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This Part contains the important judgment of the Supreme Court in the Bank Nationalisation case (R. C. Cooper v. Union of India) on p. 564 of A. I. R. 1970 S. C. The Subject Index of this case will be found on cover pages 2 and 3.

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—S. 2 (d) — Evacuee, meaning of — See Administration of Evacuee Property Act (31 of 1950), S. 40

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—S. 38 — Document falling under—Not registrable under S. 39 unless transfer confirmed by custodian — See Administration of Evacuee Property Act (31 of 1950), S. 40

SC 413 (C N 91)

—S. 39 — Registration of document falling under S. 38 — Not permissible unless transfer confirmed by Custodian — See Administration of Evacuee Property Act (31 of 1950), S. 40

SC 413 (C N 91)

Administrator General's Act (3 of 1913)

—S. 2 (2) — Property of exempted person — Letters of administration in respect of, can be granted to Administrator General — See Administrator General's Act (1913), S. 14 All 224 B (C N 35) (FB)
 —Ss. 7, 8, 9, 10, 11 — Sections deal with different situations — There is no connection between Ss. 9, 10, 11 inter se and between these sections and Ss. 7 and 8 All 224 C (C N 35) (FB)

—S. 8 — Provisions of Ss. 7 and 8 are independent of provisions of Ss. 9, 10 and 11 — See Administrator General's Act (1913), S. 7 All 224 C (C N 35) (FB)

—S. 9 — There is no connection between Ss. 9, 10 and 11 inter se and between these sections and Ss. 7 and 8 — See Administrator General's Act (1913), S. 7 All 224 C (C N 35) (FB)

—S. 10 — There is no connection between Ss. 9, 10 and 11 inter se and between these sections and Ss. 7 and 8 — See Administrator General's Act (1913), S. 7 All 224 C (C N 35) (FB)

—S. 11 — There is no connection between Ss. 9, 10 and 11 inter se and between these sections and Ss. 7 and 8 — See Administrator General's Act (1913), S. 7 All 224 C (C N 35) (FB)

—Ss. 14, 2 (2) — Power of High Court to grant letters of administration — Estate of exempted person — Administrator General can be granted letters — AIR 1956 Hyd 149, Dissented from All 224 B (C N 35) (FB)

Agra Electric Supply Co. Ltd., Standing Orders

—Order 2 (c) — The termination of Service of probationer — It can be only for misconduct — See Constitution of India, Art. 136 SC 512 B (C N 112)

—Order 14 — The termination of Service of probationer — It can be only for misconduct — See Constitution of India, Art. 136 SC 512 B (C N 112)

—O. 32 — Standing Order binds all employees presently employed as well those employed thereafter — See Industrial Employment (Standing Orders) Act (1946), S. 5 SC 512 A (C N 112)

Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947)

See under Tenancy Laws.

Andhra Pradesh Court Fees and Suits Valuation Act (7 of 1956)

See under Court Fees and Suits Valuations.

Andhra Pradesh General Sales Tax Act (6 of 1957)

See under Sales Tax.

Andhra Pradesh Public Employment (Requirement as to Residence) Rules (1959)

See under Civil Services.

Army Act (46 of 1950)

—S. 2 (1) (a) — Temporary Commissioned Officer — He is subject to provisions of Act — See Army Act (1950), S. 3 (xvii) Mad 176 (C N 44)

—Ss. 3 (xviii), 19, 2 (1) (a) — Temporary Commissioned Officer — He comes within definition of S. 3 (xviii) and is subject to provisions of Act — He can be removed only by following procedure under the Act, the Rules and the Regulations and not by following Army Instructions which are in the nature of administrative directions — Army Instructions cannot have effect of modifying rights given under the Act — (Army Rules (1954), Rule 15) — (Army Instructions, D/- 20-10-1962, Para 12) Mad 176 (C N 44)

—S. 19 — Temporary Commissioned Officer — He can be removed only by following procedure under the Act, the Rules and the Regulations and not by following Army Instructions which are in the nature of administrative directions — See Army Act (1950), S. 3 (18) Mad 176 (C N 44)

Army Instructions (D/- 20-10-1962)

—Para. 12 — They are in nature of administrative instructions — They cannot have effect of modifying rights given under Army Act, 1950 — See Army Act (1950), S. 3 (xviii) Mad 176 (C N 44)

Army Rules (1954)

—R. 15 — Temporary Commissioned Officer — He can be removed only by following procedure under the Act, regulations and R. 15 — See Army Act (1950), Section 3 (xvii) Mad 176 (C N 44)
 Assam Agricultural Income-tax Act (9 of 1939)

—S. 8 (2) 2nd Proviso and Explanation to S. 2 (a) — Provisions do not suffer from excessive delegation and are not ultra vires Assam 61 C (C N 13) (FB)

Assam Liquor Prohibition Act (1 of 1953)

See under Prohibition.

Assam Urban Areas Rent Control Act (3 of 1956)

See under Houses and Rents.

Bengal Agra and Assam Civil Courts Act (12 of 1887)

—S. 21 (1) (a) and (1A) — Enhancement of pecuniary jurisdiction of District Court upto Rs. 20000 by amendment — No violation of Art. 133 of Constitution — See U. P. Civil Laws Amendment Act (35 of 1968), S. 3 All 201 B (C N 30) (FB)

—S. 21 (1) (a) and (1A) (as amended by S. 3 of U. P. Civil Laws Amendment

Bengal, Agra and Assam Civil Courts Act (contd.)

Act 35 of 1968) — Nature of — Section is retrospective — Effect — High Court can transfer to District Court appeals filed even before commencement of Act 35 of 1968 All 201 C (C N 30) (FB)

—S. 21 (1A) — Raising of appellate jurisdiction of District Courts upto Rupees Twenty thousand — No violation of Art. 14 — See U. P. Civil Laws Amendment Act (35 of 1968), S. 3

All 201 D (C N 30) (FB)

Bengal Motor Vehicles Rules

—R. 108 — Cancellation of permit under S. 60 (1) (a) — Contravention of Chap. V or Rule framed under Chap. IV — Permit cannot be cancelled under Section 60 (1) (a) — See Motor Vehicles Act (1939), S. 60 (1) (a)

Cal 174 C (C N 28)

Bombay Hereditary Offices Act (3 of 1874)

—S. 5 (as subsequently amended insofar as applicable to State of Kolhapur) — Applicability of the Act — Alienation by sale of Patel-ki-watan inam land — Held on construction of various Wat Hukums specifically prohibiting alienation of Patel-ki-Watan and other similar inams that the alienation was void under the then prevailing law in Kolhapur State — Act did not apply to that State so as to override specific directions of Wat Hukums which had legal and binding force in the State — Decision of Bombay High Court, Reversed SC 453 A (C N 100)

Bombay Tenancy and Agricultural Lands Amendment Act (13 of 1956)

See under Tenancy Laws.

Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958)

See under Tenancy Laws.

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Bombay Revenue Tribunal Procedure Rules (1959)

See under Tenancy Laws.

Calcutta Dock Workers (Regulation of Employment) Scheme, 1956

—R. 21 — Labourer — Winchman working under Calcutta Dock Labour Board is not a domestic servant or a labourer — Training prescribed under R. 21 of Calcutta Dock Workers (Regulation of Employment) Scheme is pre-condition to employment as winchman — See Civil P. C. (1908), S. 60 (1), Proviso (h) Cal 176 A (C N 29)

—R. 38 — Calcutta Dock Labour Board is a local authority — Rules 38 and 52 of the Calcutta Dock Workers (Regulation of Employment) Scheme authorise raising and holding of fund — S. 5-C of Dock Workers (Regulation of Employment) Act, 1948 deals with accounts and audits of such fund

Calcutta Dock Workers (Regulation of Employment) Scheme (contd.)

— Board thus answers the definition of local authority under S. 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — See Civil P. C. (1908), O. 21, R. 48 (1)

Cal 176 B (C N 29)

—R. 52 — Calcutta Dock Labour Board is a local authority — Rule 38 and 52 of the Calcutta Dock Workers (Regulation of Employment) Scheme authorise raising and holding of fund — S. 5-C of Dock Workers (Regulation of Employment) Act, 1948 deals with accounts and audits of such fund — Board thus answers the definition of local authority under S. 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — See Civil P. C. (1908), O. 21, R. 48 (1) Cal 176 B (C N 29)

Calcutta High Court (Extension of Jurisdiction) Act (41 of 1953)

See under High Court Rules and Orders.

Calcutta Improvement Act (5 of 1911)

—S. 74 — Power to reduce, suspend or dismiss any member of staff — It is exercised by President as administrative officer and not as Court or tribunal though he has to act observing principles of natural justice — Power of superintendence of High Court under Art. 227 of Constitution does not extend to exercise of administrative power — (Constitution of India, Art. 227) Cal 154 C (C N 22)

Central Services (Temporary Services) Rules (1949)

See under Civil Services.

Civil Procedure Code (5 of 1908)

—Pre. — Interpretation of Statutes — Object of Act, achieved by giving reasonable interpretation — Court must do it — See Prevention of Food Adulteration Act (1954), S. 14 SC 520 (C N 113)

—Pre. — Interpretation of Statutes — Use of preamble in interpreting other provisions — See Displaced Persons (Claims) Act (1950), S. 6

SC 540 A (C N 119)

—Pre. — Interpretation of Statutes — Mandatory or directory provisions — Use of expression "may" or "shall", not conclusive — Motor Vehicles Act (1939), S. 47 (3) is mandatory — Civil Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All), Not foll. All 215 C (C N 33)

—Pre. — Interpretation of Statutes — Principle of, is that all provisions must be harmoniously construed so as to achieve object for which law was enacted

All 224 A (C N 35) (FB)

Civil P. C. (contd.)

—Pre. — Interpretation of Articles of Limitation Act — Principles — See Limitation Act (9 of 1908), Pre.

All 228 C (C N 38)

—Preamble — Interpretation of Statutes

— Deeming clauses — See Tenancy Laws

— U. P. Consolidation of Holdings Act (5 of 1954), S. 9-A All 241 C (C N 40) (FB)

—Preamble — Interpretation of Statutes

— Construction of sub-clauses — Section

has to be read as a whole — See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 95 (1) (g)

All 251 B (C N 41) (FB)

—Preamble — Interpretation of Statutes

— Deeming provision introducing legal fiction

— Scope of, cannot be extended further than that for which it is intended —

See Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S. 4 (2)

Bom 144 C (C N 26)

—Preamble — Interpretation of Statutes

— Statement of objects and reasons — Can be properly looked into for limited purpose of ascertaining the circumstances prevailing at the time of enactment of Act

Goa 59 C (C N 12)

—Preamble — Interpretation of Statutes

— Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall" — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 36

Delhi 85 A (C N 18)

—Preamble — Interpretation of Statutes

— Interpretation of rules framed under Act — Guiding principles — See Insurance Act (1938), S. 3 (4) (f)

Delhi 90 A (C N 20) (FB)

—Preamble — Interpretation of Statutes

— Illustrations — Use of

Mad 165 B (C N 43)

—Preamble — Interpretation of Statutes

— Proviso — Construction — Rule — See Land Acquisition Act (1894), S. 11

Mys 89 A (C N 23)

—Preamble — Interpretation of Statutes

— Legislative policy behind a particular enactment can be gathered from the entire provisions of the Act — See Railways Act (1890), S. 29

Pat 109 A (C N 18)

—Preamble — Interpretation of Statutes

— Harmonious construction

Punj 157 B (C N 22) (FB)

—Preamble — Precedents — Decisions

of Madras High Court prior to June 1954 are binding on Andhra Pradesh High Court

Andh Pra 119 B (C N 14)

—S. 2 (2) — Scope — Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3 (1), Proviso (ii) (as amended by Punjab Act 7 of 1934) — Question of amount due from mortgagor in subsequent suit for redemption — Question already decided in previous suit inter partes — Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under S. 3 — Expression "any decree of a Court" in Proviso (ii) to S. 3 (1) applies

Civil P. C. (contd.)

to consent decree — See Civil P. C. (1908), S. 11

Punj 152 (C N 21)

—S. 2 (7) (a) — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — See Criminal P. C. (1898), S. 492

Cal 162 (C N 24)

—S. 5 (2) — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of civil jurisdiction nor governed by C.P.C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 9 — Private trust temple — Mismanagement and misappropriation by pujari

— Right to sue — Suit on behalf of deity to protect property — Maintainable — Person making donations for temple maintenance can sue on behalf of deity — See Hindu Law — Religious Endowment

SC 532 A (C N 116)

—S. 9 — Private trust temple — Mismanagement — Suit for possession of temple and its properties on behalf of deity — Civil Court has jurisdiction to frame schemes for management — See Civil P. C. (1908), S. 92

SC 532 B (C N 116)

—S. 9 — See Administration of Evacuee Property Act (1950), S. 40

All 228 A (C N 36)

—S. 9 — Ouster of jurisdiction of Civil Court cannot be assumed — Ouster must be result of express provision in legislative enactment or one of necessary implication therefrom

All 234 C (C N 37)

—S. 9 — Tribunals and Courts — Distinction pointed out

All 241 B (C N 40) (FB)

—S. 9 — Civil Court — Consolidation authorities — Status of — Per Misra, J.: Authorities not Civil Courts even for the limited purpose of S. 9-A — Per Mukerjee, J.: The authorities have full status of Civil Courts at least for the limited purpose — Deeming provision in a statute must be given full effect to — See Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 9-A

All 241 C (C N 40) (FB)

—S. 9 — 'Expressly barred' — Section though excludes jurisdiction of Civil Court does not bar writ jurisdiction of High Court — See Daman (Abolition of Proprietorship of Villages) Regulation (1962), S. 12-F

Goa 59 F (C N 12)

—S. 9 — Scope of S. 131 (1) — Provisions deal with right of limited nature and for limited purpose, namely, private right of way of cultivator through the field of another for access to his field — Dispute

Civil P. C. (contd.)

under the section is to be decided on the basis of convenience of the parties and not on the basis of perfection of right by prescription — Decision of Revenue authorities under this section is exclusive and suit to enforce the common law right, i.e., under Easements Act, does not lie — See M. P. Land Revenue Code (1959), S. 131

Madh Pra 79 A (C N 19)

—S. 9 — Jurisdiction cannot be conferred by mere consent where it does not exist in law — See Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), S. 16, read with Rr. 3 and 4-A of Panchayat Samities (Co-option of Members) Rules, 1961

Punj 189 B (C N 25)

—S. 11 — Order of trial Court overruling objection to question put to witness of party as to legal relationship arising out of certain agreement — Question held not barred, since previous consent decree had not decided the same — Revision against order — High Court could not give finding on question of res judicata when trial Court had not decided the issue — See Civil P. C. (1908), S. 115 SC 406 (C N 89)

—S. 11 — Award of Labour Court holding that Standing Orders of a Company were not applicable to persons employed prior to certification of Standing Orders — Decision based on Supreme Court Judgment — Decision becoming final since special leave to appeal was refused — Subsequent decision of Supreme Court holding that Standing Orders were applicable after certification to employees who were employed prior to such certification — Decision of Labour Court does not act as res judicata SC 512 C (C N 112)

—S. 11— Object — Ground might and ought to have been taken, but not taken in Labour Court or earlier in High Court — Held, on applying principles of constructive res judicata, that ground could not be taken in High Court

All 210 D (C N 32)

—S. 11 — Plea of res judicata — Plea negatived by trial Court — Plea not agitated in first appellate Court — Plea not allowed to be raised in second appeal, more particularly when the suit itself is held to be incompetent — See Civil P. C. (1908), S. 100 Delhi 85 C (C N 18)

—S. 11 — Constructive res judicata — Principle of, applies to writ proceedings— See Evidence Act (1872), S. 115

Goa 59 A (C N 12)

—S. 11 — Acquisition of land—Suit relating to title to acquired land — Petition disputing apportionment of compensation— Parties and issues common in both proceedings — Both proceedings disposed of by common judgment but decrees were two — No appeal against decree in suit — Held, decree in suit had become final and principles of res judicata barred appeal from decree in petition — AIR 1943 Mad 139

Civil P. C. (contd.)

(FB) and AIR 1927 Lah 289 (FB), Dissented from Mys 81 (C N 20)

—Ss. 11, 2(2), O. 23, R. 1 — Scope— Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3(1), Proviso (ii) (as amended by Punjab Act 7 of 1934) — Question of amount due from mortgagor in subsequent suit for redemption — Question already decided in previous suit inter partes — Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under S. 3 — Expression “any decree of a Court” in Proviso (ii) to S. 3(1) applies to consent decree — (Transfer of Property Act (1882), S. 60) — (Debt Laws — Usurious Loans Act (1918), S. 3(1), Proviso (ii) (as amended by Punjab Act 7 of 1934)) Punj 152 (C N 21)

—S. 15 — Choice of forum — Two Courts having concurrent jurisdiction — Plaintiff can choose forum of his own choice and cannot be compelled to choose forum convenient to defendant — Once forum is chosen, he cannot change it — See Motor Vehicles Act (1939), S. 110-F

Andh Pra 124 (C N 15)

—S. 47 — Acknowledgment of delivery of possession by decree-holder — Judgment-debtor is entitled to raise objection as to validity of delivery of possession — See Civil P. C. (1908), O. 21, R. 35

Mys 108 (C N 27)

—S. 60(1), Proviso (h) — “Labourer” — Winchman working under Calcutta Dock Labour Board is not domestic servant or a labourer — Training prescribed under Rule 21 of Calcutta Dock Workers (Regulation of Employment) Scheme is precondition to employment as winchman — (Calcutta Dock Workers (Regulation of Employment) Scheme, 1956, R. 21)

Cal 176 A (C N 29)

—S. 60(1), Proviso (h) — Bonus should form part of wage — AIR 1957 Mad 773 not followed in view of AIR 1969 Mad 440

Mad 135 A (C N 36)

—S. 60(1), Proviso (h) and S. 115 — Question whether person is labourer or not has to be ascertained as a question of fact Mad 135 B (C N 36)

—S. 92 — Private trust temple — Mismanagement and misappropriation by pujari — Suit on behalf of deity to protect property maintainable — S. 92 not applicable and sanction of Advocate-General not necessary — See Hindu Law — Religious Endowment SC 532 A (C N 116)

—Ss. 92, 9, Order 41, Rule 33 — Private trust temple — Mismanagement — Suit for possession of temple and its properties by deity — Civil Court has jurisdiction to frame scheme for management — (Scheme directed to be framed by appellate Court in exercise of powers under Order 41, Rule 33) — (Hindu Law — Religious Endowment — Private trust temple)

SC 532 B (C N 116)

—S. 96 — Right of appeal — When can be lost — Nature of — Section is retros-

Civil P. C. (contd.)

pective — Effect — High Court can transfer to District Court appeals filed even before commencement of Act 35 of 1968 — See Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21(1)(a) and (1A) (as amended by S. 3 of U. P. Civil Laws Amendment Act 35 of 1968)

All 201 C (C N 30) (FB)

—Ss. 96(3), 151, 152, O. 47, R. 1 — Consent decree — Setting aside of, on ground that consent is obtained by coercion — Proper remedy is to file separate suit—

Appeal, application for review or application under S. 151 or S. 152 is not sustainable— AIR 1952 All 29 and AIR 1929 Oudh 385 (FB) and (1884) ILR 10 Cal 612 and AIR 1926 Cal 512 and (1903) ILR 30 Cal 613 and (1912) ILR 36 Bom 77 and AIR 1933 Bom 205, Dissented from

Punj 176 (C N 23)

—Ss. 100, 101 — Deposit by tenant not conforming to requirements of statute — Deposit, held to be irregular — Finding that benefit of S. 6(4) is not available to tenant and, therefore, he cannot be treated as defaulter under S. 6(1)(e) proviso — Finding is on question of fact and is binding on second appellate Court — See Houses and Rents — Assam Urban Areas Rent Control Act (3 of 1956), S. 6(1)(e)

Assam 59 A (C N 12) (FB)

—S. 100 — Concurrent findings — Suit for declaration filed alleging to be claimant under Displaced Persons (Compensation and Rehabilitation) Act — Both lower Courts not accepting that allegation — Conclusion of both lower Courts not shown to be tainted with any illegality — In second appeal that plea is unacceptable and must be repelled under such circumstances

Delhi 85 B (C N 18)

—Ss. 100 and 11 — Plea of res judicata — Plea negatived by trial Court — Plea not agitated in first appellate Court — Plea not allowed to be raised in second appeal, more particularly when the suit itself is held to be incompetent

Delhi 85 C (C N 18)

—Ss. 100, 101 — Question of fact — Negligence — Protection under Ss. 85, 85-A, when available stated — Negligence of drawee in cashing the draft held established — Protection under Ss. 131, 131-A, when available stated — Protection held not available to collecting bank — See Negotiable Instruments Act (1881), S. 85

Ker 74 A (C N 16)

—Ss. 100 and 101 — Second appeal — Concurrent finding of Courts below as to agreement of sale being not genuine—Finding is one of fact — No interference

Mys 84 A (C N 21)

—S. 107 — Privilege of making up deficiency in court-fee — Can be claimed as of right — See Civil P. C. (1908), S. 149

Tripura 26 A (C N 5)

—Ss. 115 and 11 — Order of trial Court overruling objection to question put to wit-

Civil P. C. (contd.)

ness of party as to legal relationship arising out of certain agreement — Question held not barred, since previous consent decree had not decided the same — Revision against order — High Court could not give finding on question of res judicata when trial Court had not decided the issue—Civil Revn. Appln. No. 328 of 1967, D/-27-4-1967 (Guj.), Reversed

SC 406 A (C N 89)

—S. 115 — Case decided — Trial Court overruling objection to a certain question put to witness — Not a case decided

SC 406 B (C N 89)

—S. 115 — Finding of fact — Nature of work done by persons in Railway workshop — Finding on, is finding of fact and binding on High Court in revision against the decision of the Court of appeal under Sec. 17, Payment of Wages Act, and also not open to re-assessment before Supreme Court on special leave — See Constitution of India, Art. 136

SC 488 B (C N 107)

—S. 115 — Relationship of landlord and tenant — Mixed question of law and fact—Revisional authority can interfere — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 111

Bom 160 E (C N 28)

—S. 115 — Irregularity being a minor one — No interference to aid judgment-debtor in his delaying tactics

Cal 176 C (C N 29)

—S. 115 — Question whether person is labourer or not has to be ascertained as a question of fact — See Civil P. C. (1908), S. 60(1), Proviso (h)

Mad 135 B (C N 36)

—S. 115 and O. 26, R. 8 — Statement of plaintiff taken on commission — Trial Court rejecting the objection of defendant regarding reading the statement as evidence without considering provisions of R. 8 of O. 26 — Held, the Court acted in exercise of its jurisdiction both illegally and with material irregularity

Tripura 24 B (C N 4)

—S. 115(c) — Amendment of plaint long after institution of suit to include cause of action not accrued on date of suit — Power of Court — Governing conditions — Eviction suits instituted on ground of personal necessity — One suit filed on 24-1-1966—Rent alleged to have been defaulted on 24-5-1966 — Application to amend plaint on ground of such default made on 3-4-1967 — In other suit, filed in 1960, default alleged to have been committed in 1962 — Such amendment application made in 1967 — Both applications allowed — Such order is material irregularity — (Houses and Rents — Rajasthan Premises) — See Civil P. C. (1908), S. 153

Raj 77 (C N 16)

—S. 139 — Oath Commissioners appointed by District Judges to verify affidavits— They are competent only where affidavits are to be filed before Courts of Civil Juris-

Civil P. C. (contd.)

diction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1 All 241 A (C N 40) (FB)

—S. 139 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify — See Constitution of India, Art. 226

All 241 D (C N 40) (FB)

—S. 141 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1 All 241 A (C N 40) (FB)

—S. 141 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify — See Constitution of India, Art. 226

All 241 D (C N 40) (FB)

—Ss. 149, 107, O. 7, R. 11(b) and (c) — Discretion under S. 149 — Exercise of — Privilege of making up deficiency in court-fee — Can be claimed as of right under O. 7, R. 11(b) and (c) read with S. 107 though not under S. 149

Tripura 26 A (C N 5)

—S. 149 — Memorandum of appeal insufficiently stamped due to wrong advice of counsel — Mistake is bona fide — Appellant can be allowed to pay deficient court-fee — (Court-fees and Suits Valuations — Court-fees Act (1870), S. 28)

Tripura 26 B (C N 5)

—S. 151, O. 45, R. 13(2)(d) — Inherent power — Absence of — Abuse of process of Court — Exercise of inherent power not necessary

Delhi 88 (C N 19)

—S. 151 — Consent decree — Setting aside of, on ground that consent is obtained by coercion — Proper remedy is to file separate suit — Appeal, application for review or application under S. 151 or S. 152 is not sustainable — See Civil P. C. (1908), S. 96(3)

Punj 176 (C N 23)

—S. 151 — Amendment of plaint long after institution of suit to include cause of action not accrued on date of suit — Power of Court — Governing conditions — Eviction suits instituted on ground of personal

Civil P. C. (contd.)

necessity — One suit filed on 24-1-1966 — Rent alleged to have been defaulted on 24-5-1966 — Application to amend plaint on ground of such default made on 3-4-1967 — In other suit, filed in 1960, default alleged to have been committed in 1962 — Such amendment application made in 1967 — Both applications allowed — Such order is material irregularity — (Houses and Rents — Rajasthan Premises) — See Civil P. C. (1908), S. 153 Raj 77 (C N 16)

—S. 152 — Consent decree — Setting aside of, on ground that consent is obtained by coercion — Proper remedy is to file separate suit — Appeal, application for review or application under S. 151 or S. 152 is not sustainable — See Civil P. C. (1908), S. 96(3)

Punj 176 (C N 23)

—Ss. 153, 151 and 115(c) and O. 6, R. 17 — Amendment of plaint long after institution of suit to include cause of action not accrued on date of suit — Power of Court — Governing conditions — Eviction suits instituted on ground of personal necessity — Default in payment of rent by tenant, thereafter — Application to amend plaint for inclusion of such ground made at belated stage — Amendment of plaint, if allowed, amounts to material irregularity — (Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) (as amended by Act 12 of 1965), S. 13(1)(a)

Raj 77 (C N 16)

—O. 1, R. 3 — Provisions of O. 1, R. 10(2), are not controlled by O. 1, R. 3 — See Civil P. C. (1908), O. 1, R. 10(2)

Andh Pra 153 (C N 21)

—O. 1, R. 10(2), O. 1, R. 3, O. 34, R. 1 — Scope — Suit on mortgage — Persons claiming adverse title paramount in some or all of mortgage properties but not through mortgagor or mortgagee — Whether should be impleaded as parties to suit — It is matter of discretion — Question is not one of jurisdiction — O. 31, R. 1, is subject to O. 1, R. 10(2), but O. 1, R. 10(2) is not controlled by O. 1, R. 3

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—O. 4, R. 1(i) — Applicability — Pending suit for recovery of money, application under S. 6 filed — Application not admitted — However, notices issued to creditors to decide question of its admission — Pending such application, Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 5(1)(i)

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—O. 6, R. 14 — Refusal by Sub-Registrar to register document — See Registration Act (1908), S. 72

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—O. 6, R. 17 — Amendment of plaint long after institution of suit to include cause

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of action not accrued on date of suit — Power of Court — Governing conditions — Eviction suits instituted on ground of personal necessity — One suit filed on 24-1-1966 — Rent alleged to have been defaulted on 24-5-1966 — Application to amend plaint on ground of such default made on 3-4-1967 — In other suit, filed in 1960, default alleged to have been committed in 1962 — Such amendment application made in 1967 — Both applications allowed — Such order is material irregularity—(Houses and Rents — Rajasthan Premises) — See Civil P. C. (1908), S. 153

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—O. 7, R. 4 — Suit in representative character — Private trust temple — Mismanagement and misappropriation by pujari — Right to sue — Suit on behalf of deity to protect property — Person making large donations has substantial interest to maintain suit — See Hindu Law — Religious Endowment SC 532 A (C N 116)

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—O. 9, R. 3 — Discretion of Tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicant's counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits—Opposite Party also absent — Propriety of order — Violation of principles of natural justice — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 111 (2)

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—O. 13, R. 9—Courts are not empowered to allow a party to take back documents filed by him normally without notice to other side and without placing on record a certified copy of that document — Document must be available throughout the lis till matter is finally decided

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—O. 17, R. 2 — Discretion of Tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicant's counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits—Opposite Party also absent — Propriety of order — Violation of principles of natural justice — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 111 (2)

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—O. 17, R. 3 — Discretion of Tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicant's counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits—Opposite Party also absent — Propriety of order — Violation of principles of natural justice — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 111 (2)

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—O. 19, Rr. 1 and 2 and Ss. 139, 141 and 5 (2) — Oath Commissioners appointed by District Judges to verify affidavits—They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — (Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), Ss. 8, 8-A, 9-A, 9-B, 19-A, 21, 38 and 41 and R. 26 of the Rules)

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—O. 19, R. 1 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify— See Constitution of India, Art. 226

All 241 D (C N 40) (FB)

—O. 19, R. 2 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C.— Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—O. 19, R. 2 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before autho-

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—O. 20, R. 18 — Suit for partition of properties including land assessed to revenue — Preliminary decree — Compromise between parties subsequent to decree — Competency and duty of Court passing preliminary decree, to pass fresh decree in accordance with compromise

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—O. 21, R. 2 (3) — Applicability — Sub-rule applies only to execution

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—O. 21, R. 35, S. 47 — Acknowledgment of delivery of possession by decree-holder — Judgment-debtor is entitled to raise objection as to validity of delivery of possession — 1968 (1) Mys LJ 311, held, not correct in view of AIR 1961 SC 272

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—Order 21, Rule 48 (1) — Calcutta Dock Labour Board is a local authority — Rules 38 and 52 of the Calcutta Dock Workers (Regulation of Employment) Scheme authorise raising and holding of fund — S. 5-C of Dock Workers (Regulation of Employment) Act, 1948, deals with accounts and audits of such fund — Board thus answers the definition of local authority under Section 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — (General Clauses Act (1897), S. 3 (31)) — (Dock Workers (Regulation of Employment) Act (1948), S. 5-C (inserted by Amendment Act 8 of 1962) — (Calcutta Dock Workers (Regulation of Employment) Scheme, 1956, Rules 38 and 52) Cal 176 B (C N 29)

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—O. 21, R. 96 — Application under S. 17 — Article 181 applies — Time begins to run from the date of sale of property — Fact that only symbolic possession and not actual physical possession of property was given in sale is immaterial — See Administration of Evacuee Property Act (1950), S. 17

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—Order 22, Rr. 2, 4 — Joint petition under Payment of Wages Act by respondents — Order in their favour by one judgment — Appeal to Supreme Court — All respondents made parties — One of them dying during pendency of appeal but his name continuing to appear in array of respondents — Legal representative not

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—O. 22, R. 4 — Joint petition under Payment of Wages Act by respondents — Order in their favour by one judgment — Appeal to Supreme Court — All respondents made parties — One of them dying during pendency of appeal but his name continuing to appear in array of respondents — Legal representative not brought on record — Appeal, held, did not abate — See Civil P. C. (1908), O. 22, R. 2

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—O. 22, R. 4 — Impleading of only some of legal representatives of defendant — Suit does not abate — It continues against those impleaded against whom an effectual decision binding them can be made

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—O. 22, Rr. 4, 5 — Hindu Succession Act (1956), S. 21 — Suit for partition and possession of his half share of property by 'B' against his widow mother P — Will by P of her property in favour of 'J' — Murder of 'P' and 'J' on same night during pendency of suit — Statutory presumption under S. 21, Hindu Succession Act, that 'J' survived 'P' — Applications by other brothers of B and also by heirs of 'J' for being brought on record as legal representatives of P — Held, J's heirs could be brought on record to continue the original suit and not the brothers of B

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—O. 22, R. 5 — Suit for partition and possession of his half share of property by 'B' against his widow mother P — Will by P of her property in favour of 'J' — Murder of 'P' and 'J' on same night during pendency of suit — Statutory presumption under S. 21, Hindu Succession Act, that 'J' survived P — Applications by other brothers of S and also by heirs of 'J' for being brought on record as legal representatives of P — Held, J's heirs could be brought on record to continue the original suit and not the brothers of B — See Civil P. C. (1908), O. 22, R. 4

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—O. 23, R. 1 — Withdrawal of suit and filing of fresh suit — Plaintiff applying for withdrawal of suit without prejudice to his lawful rights and remedies — Permission granted — Permission, held, was for withdrawal of suit only — There should be a specific prayer to file a fresh suit — Absence of specific prayer would bar fresh suit

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—O. 23, R. 1 — Scope — Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3 (1), Proviso (ii) (as amended by Punjab Act, 7 of 1934) — Question of amount due from mortgagor in subsequent suit for redemption — Question already decided in previous suit inter partes — Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under S. 3 — Expression "any decree of a

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—O. 26, R. 8—Examination of witness on commission — Statement shall form part of record of suit subject to R. 8 — See Civil P. C. (1908), O. 26, R. 7 Tripura 24 A (C N 4)

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—O. 34, R. 1 — Scope — Suit on mortgage — Persons claiming adverse title paramount in some or all of mortgage properties but not through mortgagor or mortgagee — Whether should be impleaded as parties to suit — See Civil P. C. (1908), O. 1, R. 10 (2) Andh Pra 153 (C N 21)

—O. 41, R. 33 — Private trust temple — Mismanagement— Suit for possession of temple and its properties — Scheme for management can be directed to be framed by appellate Court in exercise of powers under O. 41, R. 33 — See Civil P. C. (1908), S. 92 SC 532 B (C N 116)

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—O. 47; R. 1 — Order of Custodian-General — Review of — Successor-in-office can review — See Jammu and Kashmir Evacuees (Administration of Property) Act (6 of 2006), S. 30 (5) J and K 50 A (C N 13) (FB)

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—Arts. 13, 14 and 16 — Article 13 has no retrospective operation — Appointments to posts of Income Tax Officers Class I Grade II and preparations of Seniority Lists of such officers under Seniority Rules of 1949 and 1950 — Question as to violation of Articles 14 and 16 SC 470 A (C N 103)

—Art. 14 — Statute protected by Article 31-A — Its validity cannot be challenged on ground of violation of Arts. 14 and 19 (1) (f) — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 2 (12) SC 439 (C N 96)

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—Art. 14 — Inordinate delay — Seniority List of Income-tax Officers class I grade II — Changes effected in on 1-8-1953 as a result of change in 1952 Seniority Rules — Petition filed after fifteen years attacking changes as violative of Arts. 14 and 16 held not maintainable — See Constitution of India, Art. 32 SC 470 B (C N 103)

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—Art. 14 — Mysore Co-operative Societies Rules (1960), R. 16 (1) (c) — Validity of — Not violative of Art. 14 — Disqualification imposed on paid employee members is reasonable and has a rational connection with the object sought to be achieved

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Goa 59 H (C N 12)

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—Art. 141 — Whether a statement of law made by Supreme Court following upon concessions made by counsel would be law declared by Supreme Court and binding on all Courts (Quaere)

All 251 D (C N 41) (FB)

—Art. 226 — Misconduct — Meaning of — See Industrial Employment (Standing Orders) Act (1946), Sch. Item 9

All 210 B (C N 32)

—Art. 226 — Object — Ground might and ought to have been taken, but not taken in Labour Court or earlier in High Court — See Civil Procedure Code (5 of 1908), S. 11

All 210 D (C N 32)

—Art. 226 — Redetermination of strength of permits — Notice to existing operators not necessary as no rights are affected — Nor does provision for limitation in first proviso to S. 64-A confer on him right of hearing — See Motor Vehicles Act (1939), S. 47 (3)

All 215 A (C N 33)

—Art. 226 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify — (Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 42) — (Civil P. C. (1908), O. 19, Rr. 1, 2, Ss. 139 and 141)

All 241 D (C N 40) (FB)

—Art. 226 — Expression of opinion by enquiry officer in charge-memo that delinquent had abused his position and brought discredit to department indicates bias or at any rate fear or apprehension in mind of delinquent that he had no hope or chance of fair trial — Proceedings, held, were vitiated — See Constitution of India, Art. 311

Andh Pra 114 A (C N 13)

—Art. 226 — To obviate any allegations of bias or prejudgment, Enquiry Officer should avoid indicating punishment in charge-memo — See Constitution of India, Art. 311(2)

Andh Pra 114 B (C N 13)

—Art. 226 — Illegal assessment — Writ against — Best judgment assessment smacking of arbitrariness — Held liable to be set aside — (Income Tax Act (1961), S. 144) — (Sales Tax — Madras General

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- Sales Tax Act (9 of 1939), S. 9 (2) (b) —
Andh Pra 125 (C N 16)
- Art. 226 — Principles of natural justice stated — Andh Pra 137 B (C N 18)
- Art. 226 (as amended by Constitution (Fifteenth Amendment) Act (1963)) — Principal successor State and successor State — Liability of existing States — Petitioner retired in 1939 from service in the then State of M. P. — Reorganisation of States in 1956 and 1960 — Petitioner settled down in Nagpur and drawing pension from Nagpur Treasury even now — Place from where he retired still in State of new M.P. Both Maharashtra and M.P. Govts. granted certain increases in pensions of pensioners on different occasions — State of Bombay which is successor State to existing State of M.P. would not be liable to the increase in pension granted by present State of M.P. — Further no claim against State of M.P. can be granted even after amendment of Art. 226 — See State Reorganisation Act (1956), S. 86 — Bom 117 (C N 19)
- Art. 226 — Notice and an opportunity of being heard to party whose goods have been seized not required — See Customs Act (1962), S. 124 — Cal 134 A (C N 21)
- Art. 226 — Departmental Proceedings — Natural justice — applicability — See Constitution of India, Art. 311 — Cal 131 B (C N 20)
- Art. 226 — Natural justice — Formal cross-examination is not part of natural justice but of legal and statutory justice — Cal 154 B (C N 22)
- Art. 226 — Natural justice — Disciplinary proceedings against employee — Employee deliberately not appearing and explaining charges against him, with an eye to future legal remedy — Such conduct goes against his plea that he had no opportunity to defend and that proceedings were conducted in violation of the principles of natural justice — Cal 154 D (C N 22)
- Art. 226 — Cancellation of permit — R.T.A. acts quasi-judicially — It has also to give reasons for its decision — See Motor Vehicles Act (1939), S. 60 (1) (a) — Cal 174 A (C N 28)
- Art. 226 — Grass or pasture land of proprietor — Vesting of in Central Government — Classification of such lands has to be made under authority of law — Under S. 12-A of Regulation Mamlatdar and Collector has to make a quasi-judicial inquiry after following rules of natural justice — Classification of grass lands on basis of executive inquiry made behind back of proprietor violates Art. 31(1) of the Constitution and Principles of natural justice — Writ of Mandamus issued directing authorities to make fresh inquiry according to law — See Tenancy

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- Laws — Daman Abolition of Proprietorship of Villages Regulation (1962), S. 4(b) — Goa 59 E (C N 12)
- Art. 226 — Section though excludes jurisdiction of Civil Court does not bar writ jurisdiction of High Court — See Daman (Abolition of Proprietorship of Villages) Regulation (1962), S. 12-F — Goa 59 F (C N 12)
- Art. 226 — Grounds of Certiorari — See Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Cl. 2(a) — Guj 67 (C N 11)
- Art. 226 — Reasons for making promotion — Appointing authority is required to give subjective satisfaction of appointing authority in the matter of promotion cannot be questioned — See Civil Services — Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules 1956, R. 8 — J & K 57 B (C N 14) (FB)
- Art. 226 — Grant of promotion on merits — No infringement of Art. 16 Constitution of India — See Civil Services Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules 1956, R. 25 (2) (3) — J & K 57 D (C N 14) (FB)
- Art. 226 — Principles of natural justice — Duty of executive authorities — Opportunity to delinquent to explain action should be real and fair — Reasons for orders passed is necessary requirement — Discretionary matters — Power of High Court in writ proceedings — Suggestion to educate Officers in minimum needs of natural justice and obligations under Arts. 14 and 19 of the Constitution — Ker 65 (C N 14)
- Art. 226 — Certiorari — Who may apply for — Grant of permit to new entrant under Rice Milling (Regulation) Act for establishment of new rice mill — Licensee of existing rice mill is entitled to apply for writ of certiorari, W.P. 2298 of 1966, D/- 16-2-1967 (Mad), **Reversed**. W.P. 2332 of 1966 (Mad) and ILR (1964) 2 Mad 869, **Overruled** — (Rice Milling Industry (Regulation) Act (1958), S. 5) — Mad 136 (C N 37) (FB)
- Art. 226 — Settlement arrived at between management of press and workers' union relating to dearness allowance and conditions of service etc. — Demand for enhancement of dearness allowance and revision of grades — Government refusing to refer demand on grounds that the management was prepared to pay same dearness allowance as agreed with other union and that rate compared favourably with rates in other presses and that the existing grades and wages also compared favourably with those in similar establishments — Held, Court could not canvass order of reference closely to see if

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there was any material before Government to support its conclusion, as if it was a judicial or quasi-judicial determination — Government had the discretion to make a reference or not — Further there being failure to give notice under S. 19(2), which goes to root of the matter, order of Government can be supported on that ground also — See Industrial Disputes Act (1947), S. 10(1)

Mad 145 B (C N 38)

—Art. 226 — Quasi-judicial tribunal — Natural justice — See Stamp Act (1899), S. 56 (1) and (2)

Mad 148 A (C N 39)

—Art. 226 — Quasi-judicial power — Sub-sections (1) and (2) compared — See Stamp Act (1899), S. 56

Mad 148 B (C N 39)

—Art. 226 — Nature of power conferred by section — In a proper case, the officer is bound to make a reference — Compulsion by issue of writ possible — See Stamp Act (1899), S. 57

Mad 148 C (C N 39)

—Arts. 226, 311 — Principle of natural justice — Officer cannot be placed under suspension for indefinite period

Mad 155 (C N 41)

—Art. 226— Certiorari— Against whom certiorari lies — Departmental Communication cannot be quashed

Mys 89 C (C N 23)

—Art. 226 — Suppression of material facts by applicant

Mys 89 D (C N 23)

—Art. 226 — Challenge to constitutionality of a provision of law — Absence of counter affidavit does not establish the contention of petitioner — See Constitution of India, Art. 14

Mys 100 B (C N 25)

—Art. 226 — Enquiry by domestic Tribunal set up by educational institutions like universities — Interference by Court — In absence of rules and regulations, rules of natural justice to be followed — Allegations of bias and mala fides against invigilator — Opportunity should be given to examinee to present his case

Orissa 63 (C N 28)

—Art. 226— Speaking orders— Orders of Central Government under Railways Act — Principles to be observed — See Railways Act (1890), S. 29

Pat 109 C (C N 18)

—Art. 226 — Affidavits — New point — Principles

Pat 109 E (C N 18)

—Art. 226 — Election case — Co-optation of two members to Block Samiti found to be illegal — Petitioner praying that Court should also declare elections of Chariman and Vice-Chairman of Block Samiti as well as election of representatives of Samiti to Zilla Parishad as illegal — Petitioner was not contesting any of those elections — Held, no further relief

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as prayed for could be granted and that it would also be improper to interfere with those elections after expiry of more than four years

Punj 189 C (C N 25)

—Art. 227 — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Ss. 114 and 111 — Dismissal of revision application by Revenue Tribunal erroneously treating it to be time-barred — It amounts to failure to exercise jurisdiction vested in it — Jurisdiction of High Court is not restricted in any manner from considering validity of order of Tribunal

Bom 122 B (C N 20)

—Art. 227 — Power of superintendence — Nature of, stated

Cal 154 A (C N 22)

—Art. 227 — Administrative orders — Art. 227 cannot be invoked — Under S. 74, Calcutta Improvement Act, President acts administratively — See Calcutta Improvement Act (5 of 1911), S. 74

Cal 154 C (C N 22)

—Art. 245 — Validity — Provisions of S. 59, Income Tax Act and R. 24 of Income Tax Rules do not suffer from vice of excessive delegation — See Income-tax Act (1922), S. 59

Assam 61 A (C N 13) (FB)

—Arts. 245 and 246 — Delegation of legislative powers — Principles

Assam 61 B (C N 13) (FB)

—Art. 245 — Provisions of S. 8(2), 2nd proviso of Assam Act 9 of 1939 and Section 2(2) do not suffer from excessive delegation and are not ultra vires — See Assam Agricultural Income Tax Act (9 of 1939), S. 8(2), 2nd proviso and explanation to S. 2(a)

Assam 61 C (C N 13) (FB)

—Art. 245 — Delegation by delegatee— Power to call for statement of assets from railway employee — General Manager is competent to further delegate his power as he is a "Government" in respect of non-gazetted staff within the meaning of R. 2 (i) of Railway Service (Conduct) Rules

Cal 131 A (C N 20)

—Art. 245 — Iron and Steel (Control) Order 1956 under S. 3 Essential Commodities Act — Direction contained in notification issued under para 14(2) of Order — Direction does not relate back to the Order or form part of Order because this would involve double delegation of legislative power not authorised by Parliament — See Essential Commodities Act (1955), S. 3

Cal 167 (C N 25)

—Art. 245 — Colourable Legislation— Doctrine of — See Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (1962), S. 2(d)

Goa 59 D (C N 12)

—Art. 245 — Powers of Central Government under Ss. 29 and 42 are not absolute — Although sections do not pro-

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vide any guide lines, legislative policy can be gathered from the whole Act — No surrender of essential legislative functions to Central Government — See Railways Act (1890), S. 29

Pat 109 A (C N 18)

—Art. 246 — Madras General Sales Tax Act (1 of 1959), Ss. 59(1), 17(1) — Imposing tax on sale of "Cane jaggery" and exempting that of "palm jaggery" from liability to tax — Act held not open to challenge on plea of colourable exercise of power — See Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 59(1)

SC 508 (C N 111)

—Art. 246 and Sch. VII — Legislative entries should not be interpreted in narrow, pedantic sense — Entries comprehend ancillary and subsidiary matters

Andh Pra 126 A (C N 17)

—Art. 246 — Source of power to enact Gift Tax Act (1958) is Art. 248 read with Entry 97, List I — Tax does not entrench on powers of State Legislature — See Constitution of India Sch. VII, List I, Entry 97

Andh Pra 126 B (C N 17)

—Art. 246 — Delegation of legislative powers — Principles — See Constitution of India, Art. 245

Assam 61 B (C N 13) (FB)

—Arts. 246, 265, Sch. 7, List 2, Entries 11, 49 — Maharashtra Education (Cess) Act (27 of 1962), Pre.—Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — (Words and Phrases "Education")

Bom 154 A (C N 27)

—Art. 246 — Imposition under Act is tax on lands and buildings — Tax is authorised by entry no. 49 of List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — See Maharashtra Education (Cess) Act (27 of 1962), Pre

Bom 154 C (C N 27)

—Art. 246 — Validity of Ss. 96, 97 of Kerala Act — State legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96

Ker 88 A (C N 18)

—Art. 246 — Entries in legislative lists — Interpretation of

Ker 88 C (C N 18)

—Art. 248, Source of power to enact Gift Tax Act (1958) in Art. 248 read with Entry 97, List I — Tax does not entrench on powers of State Legislature — See Constitution of India Sch. VII, List I, Entry 97

Andh Pra 126 B (C N 17)

—Art. 258(1) — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Ben-

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gal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — See Criminal P. C. (1898), S. 492

Cal 162 (C N 24)

—Art. 265 — Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — See Constitution of India, Art. 246

Bom 154 A (C N 27)

—Art. 265 — Imposition under Act is tax on lands and buildings — Tax is authorised by Entry No. 49 of List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — See Maharashtra Education (Cess) Act (27 of 1962), Pre

Bom 154 C (C N 27)

—Art. 265 — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96

Ker 88 B (C N 18)

—Art. 276(2), Sch. 7, List 2, Entry 49 — Maharashtra Education (Cess) Act (27 of 1962), Ss. 3, 4 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned — Hence, education tax cannot be limited to Rs. 250 — Art. 276(2) has no application

Bom 154 D (C N 27)

—Art. 301 — Madras General Sales Tax Act (1 of 1959), Ss. 59(1), 17(1) — Imposing tax on sale of "Cane jaggery" and exempting that of "palm jaggery" from liability to tax — No unlawful discrimination practised — Former did not affect freedom of trade within Art. 301 of Constitution — See Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 59(1)

SC 508 (C N 111)

—Art. 309 — Suspension — When ceases — Circumstances under which it is passed decided — See Civil Services — Kerala Civil Services (Classification, Control and Appeal), Rules 1960, R. 10(1)

Ker 70 (C N 15)

—Arts. 310-311 — Double Jeopardy — Scope of 'Misconduct' is wider than that of criminal offence e.g., theft — Mere fact that case was sent to criminal Court could not bar domestic enquiry — See Constitution of India, Art. 20(2)

All 210 C (C N 32)

—Art. 311 — Temporary Government Servant — Appointment made purely on a temporary basis — Post, however, made permanent by a Government circular —

Constitution of India (contd.)

Incumbent however not made permanent — No declaration under Rule 3(2) of Central Services (Temporary Services) Rules, 1949 SC 537 (C N 118)

—Arts. 311 and 220 — Bias — Expression of opinion by enquiry officer in charge-memo that delinquent had abused his position and brought discredit to department indicates bias or at any rate fear or apprehension in mind of delinquent that he had no hope or chance of fair trial — Proceedings, held, were vitiated

Andh Pra 114 A (C N 13)

—Art. 311 — Applicability — Does not apply where appointment is by incompetent authority Assam 57 (C N 11)

—Arts. 311 and 226 — Departmental proceedings — Natural justice — Applicability Cal 131 B (C N 20)

—Art. 311 — Officer cannot be placed under suspension for indefinite period — This is against principle of natural justice — See Constitution of India, Art. 226

Mad 155 (C N 41)

—Art. 311 — Order of dismissal of forest guard passed by D. F. O. on 30-12-1967 with effect from 23-5-1966 — Order is valid and effective only from 30-12-1967 — Retrospective part can be separated from the order

Orissa 49 (C N 22)

—Art. 311 — Employee overstaying leave — Amounts to misconduct — Removal from service — Compliance with Article necessary — See Civil Services — Revised Leave Rules, 1933, R. 14(c)

Tripura 19 (C N 3)

—Arts. 311(2) and 226 — To obviate any allegations of bias or prejudgment, enquiry officer should avoid indicating punishment in charge-memo

Andh Pra 114 B (C N 13)

—Art. 311 (2) — Reasonable opportunity — What is — No date fixed calling upon delinquent to cross examine witnesses — No enquiry after denial of charges — Order of dismissal cannot stand Orissa 56 (C N 26)

—Art. 357(1) (a) — Passing of U. P. Civil Laws Amendment Act (35 of 1968) by President by virtue of power conferred upon him under Art. 357 (1) (a) — Fact that it is not assented by President as required under Art. 111 does not make it invalid — See Constitution of India, Art. 111 All 201 A (C N 30) (FB)

—Art. 357(1) (a) — Raising of appellate jurisdiction of District Courts upto Rs. Twenty thousand — No violation of Art. 14 — See U. P. Civil Laws Amendment Act (35 of 1968), S. 3

All 201 D (C N 30) (FB)

—Sch. VII — Legislative entries should not be interpreted in a narrow, pedantic sense — Entries comprehend ancillary and subsidiary matter — See Constitution

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of India, Art. 246

Andh Pra 126 A (C N 17)

—Sch. 7, List 1, Entry 52 — Validity of Ss. 96, 97 of Kerala Act — State legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96 Ker 88 A (C N 18)

—Sch. VII, List I, Entry 97 and List II, Entry 49, Arts. 246, 248 — Tax on land — Gift of land — Gift of land is taxable under Gift Tax Act (1958), S. 15 (3) — Subject matter of gift tax falls under Entry 97, List I and not under Entry 49, List II — AIR 1962 Mys 269, Dissented from Andh Pra 126 B (C N 17)

—Sch. 7, List 2, Entry 6 — Validity of Ss. 96, 97 of Kerala Act — State legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96 Ker 88 A (C N 18)

—Sch. 7, List 2, Entry 11 — Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — See Constitution of India, Art. 246 Bom 154 A (C N 27)

—Sch. 7, List II, Entry 18 — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held did not become bhumidari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14(1) All 238 (C N 39)

—Sch. 7, List II, Entry 18 — Land Reforms — See Tenancy Laws — Daman (Abolition of Proprietorship of Village) Regulation (1962), S. 2 (d)

Goa 59 D (C N 12)

—Sch. VII, Entry 49, List II — Tax on land — Gift of land — Gift of land is taxable under Entry 49, List II — See Constitution of India, Sch. VII, List I, Entry 97 Andh Pra 126 B (C N 17)

—Sch. 7, List 2, Entry 49 — Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — See Constitution of India, Art. 246 Bom 154 A (C N 27)

—Sch. 7, List 2, Entry 49 — Imposition under Act is tax on lands and buildings — Tax is authorised by Entry No. 49 of

Constitution of India (contd.)

List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — See Maharashtra Education (Cess) Act (27 of 1962) Pre Bom 154 C (C N 27)

—Sch. 7, List 2, Entry 49 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned — Hence, education tax cannot be limited to Rs. 250 — Art. 276 (2) has no application — See Constitution of India, Art. 276(2) Bom 154 D (C N 27)

—Sch. VII, List II, Entry 51 — Enhancement of consumption duty — Enhancement falls within Entry 51 of List II of Seventh Schedule of Constitution and therefore within competence of State Legislature — See Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act (5 of 1966), Art. 5 Mad 152 A (C N 40)

—Sch. 7, List III, Entry 5 — Act has no application to agricultural plots — See Hindu Succession Act (1956), S. 14(1) and (2) All 238 (C N 39)

—Sch. 7, List III, Entry 6 — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held did not become bhumidari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14 (1) All 238 (C N 39)

—Sch. VII, List III, Entry 7 — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held did not become bhumidari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14(1) All 238 (C N 39)

Contract Act (9 of 1872)

—S. 2 (d) — Suit by strangers to contract — When maintainable — Specific Relief Act (1877), Section 23 SC 504 B (C N 110)

—S. 10 — Construction of contract — Contract for supply of meat to military authorities — One of conditions of contract providing for enhanced rate subject to approval by Tribunal as described under that condition — Application by contractor for enhanced rate on ground of rise in market rate — Recommendation by C. R. I. A., Supply Corps for enhance-

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ment of rate — Reference by authorities to Controller of Military Accounts — Held, on evidence on record that condition of contract for enhanced rate was complied with — C. R. I. A. S. C. was proper sanctioning authority — Contractor could not be deprived of claim to enhanced rate merely because authorities chose to consult Controller of Military Accounts, who did not figure in relevant condition — Decision of Allahabad H. C. Reversed SC 479 B (C N 104)

—Ss. 23, 205 — Drugs Act (1940), S. 18 —Drugs and Cosmetics Rules, Rule 61 — Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void — Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — (Specific Relief Act (1877), Ss. 21 (b), 21 (a), 19) Bom 128 (C N 21)

—Ss. 31 and 55 — Conditional agreement — Agreement to transfer land — Statute prescribing prior permission of authority — Agreement must be deemed subject to implied condition SC 546 A (C N 120)

—S. 55 — Conditional agreement — Agreement to transfer land — Statute prescribing prior permission of authority — Agreement must be deemed subject to implied condition — See Contract Act (1872), S. 31 SC 546 A (C N 120)

—S. 55 — Readiness and willingness — Purchaser need not produce money or vouch a concluded scheme for financing the transaction SC 546 B (C N 120)

—S. 73 — Word "compensation" includes money due under contract for its breach — See Limitation Act (1908), Art. 115 All 206 C (C N 31) (FB)

—S. 127 — Execution of guarantee letter and promissory note by guarantor — Forbearance to sue debtor on that basis — Amounts to consideration Andh Pra 158 A (C N 22)

—S. 182 — Land Acquisition Officer and State Government — Relation between — Principal and Agent — See Land Acquisition Act (1894), S. 11 Mys 89 A (C N 23)

—S. 205 — Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void — Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — See Contract Act (1872), S. 23 Bom 128 (C N 21)

CO-OPERATIVE SOCIETIES

—Mysore Co-operative Societies Rules (1960)

—R. 16 (1) (c)— Not violative of Art. 14 of the Constitution — See Constitution of India, Art. 14

Mys 100 A (C N 25)

Court-fees Act (7 of 1870)

See under Court-fees and Suits Valuations.

COURT-FEES & SUITS VALUATIONS
—Andhra Pradesh Court-Fees and Suits Valuation Act (7 of 1956)

—S. 48 — Land Acquisition Act (1894), Ss. 54, 23, 26 — Solatium as awarded under S. 23 is not part of award within meaning of S. 26 — Appeal to High Court — No court-fee is payable on difference of solatium as a result of increase in compensation awarded by Court and that awarded by Collector — AIR 1964 Andh Pra 216, **Overruled**; AIR 1930 Mad 45, **Dissented from**

Andh Pra 139 (C N 19) (FB)

—Court-fees Act (7 of 1870) (U.P. Amendment)

—S. 7 (i) and (iv) (b) — Suit for accounts — Defendant appealing against final decree should pay court-fee on amount of decree passed against him

All 197 (C N 28) (FB)

—S. 28 — Memorandum of appeal insufficiently stamped due to lawyer's wrong advice — Mistake is bona fide — Appellant can be allowed to pay deficit court-fee — See Civil P. C. (1908) S. 149

Tripura 26 B (C N 5)

Criminal Procedure Code (5 of 1898)

—S. 4(1) (i) — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — See Criminal P. C. (1898), S. 492

Cal 162 (C N 24)

—S. 4 (1) (o) — Double jeopardy — Scope of — See Constitution of India, Art. 20(2)

All 210 C (C N 32)

—S. 32 — Principles of punishment — Duty of Court — Enhancement of sentence — See Criminal P. C. (1898), S. 439(1)

Goa 56 B (C N 11)

—S. 107 — Order drawing up proceeding under section — Substance of information received not indicated — Order is bad — See Criminal P. C. (1898), S. 112

Pat 107 A (C N 17)

—S. 107 — Order drawing up proceeding under S. 107 and calling on party to

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show cause— Specification required under law not mentioned in order — Order is revisable. Cri. Rev. No. 351 of 1954 (Pat) D/- 18-11-1954 not followed — See Criminal P. C. (1898), S. 439

Pat 107 B (C N 17)

—S. 107 — Order to show cause why party should not execute bond for peace for one year — No direction in order that the period of one year should commence from any particular date — Expiry of period — Order need not be set aside in revision. AIR 1949 All 21, **Dissented from** — See Criminal P. C. (1898), S. 439

Pat 107 C (C N 17)

—Ss. 112 and 107 — Substance of the information — Order of the Magistrate not indicating the nature of the information received which induced him to take action under Section 107 of the Code is bad

Pat 107 A (C N 17)

—S. 112 — Order drawing up proceeding under S. 107 and calling on party to show cause — Specification required under law not mentioned in order — Order is revisable. Cri. Rev. No. 351 of 1954 (Pat), D/- 18-11-1954 not followed — See Criminal P. C. (1898), S. 439

Pat 107 B (C N 17)

—S. 112 — Order to show cause why party should not execute bond for peace for one year — No direction in order that the period of one year should commence from any particular date — Expiry of period — Order need not be set aside in revision. AIR 1949 All 21, **Dissented from** — See Criminal P. C. (1898), S. 439

Pat 107 C (C N 17)

—Ss. 133 and 192 — S. 133 does not exclude provisions of transfer of cases contained in S. 192 after the party has shown cause against the conditional order. AIR 1949 Cal 637, held, **Overruled** by AIR 1956 Cal 24 & AIR 1956 Cal 220, **Not foll.**; AIR 1960 All 244 & AIR 1958 Raj 248 **Dissented from**

Cal 169 (C N 26)

—S. 144 — Prohibitory orders under — Not much distinction in the language of provisions — Party should be taken to be out of possession in either case — See Penal Code (1860), S. 379

Pat 102 A (C N 15)

—Ss. 144, 145 and 195 (1) (a) — Prohibitory order under S. 144 or 145 — Violation of — Magistrate to prefer complaint under S. 188 Penal Code — Cognizance by himself not possible— (Penal Code (1860), S. 188)

Pat 102 B (C N 15)

—S. 145 — Limitation prescribed under S. 36(1) of Bombay Tenancy & Agricultural Lands (Vidarbha Region & Kutch Area) Act (99 of 1958)—Computation of— Proceedings instituted under S. 145 Cr. P. C. cannot be taken into account for that purpose, by applying S. 14, Limitation Act— See Tenancy Laws— Bombay Tenancy and Agricultural Lands (Vidarbha

Criminal P. C. (contd.)

Region and Kutch Area) Act (99 of 1958),
S. 36 (1) Bom 138 C (C N 25)

—S. 145 — Prohibitory orders under—
Not much distinction in the language of
provisions — Party should be taken to
be out of possession in either case — See
Penal Code (1860), S. 379

Pat 102 A (C N 15)

—S. 145 — Violation of prohibitory
order under Ss. 144 or 145 Criminal P. C.
—Magistrate may prefer complaint under
S. 188 Penal Code cannot take cognizance
himself — See Criminal P. C. (1898),
S. 144 Pat 102 B (C N 15)

—S. 145 (4) — Incompetent reference
by Magistrate — Civil Court is not clothed
with any jurisdiction so that it can
neither record any finding nor give direc-
tions to Magistrate as to what course he
should adopt — Proper course for Civil
Court is to return the reference — Magis-
trate, after return of reference proceed-
ing under S. 145(4) instead of making a
proper reference — Order cannot be said
to be without jurisdiction — See Criminal
P. C. (1898), S. 146(1)

Pat 97 A (C N 13)

—S. 145(4) — Competency of witnesses
to speak about possession is no ground to
rely upon them — Magistrate refusing to
rely upon such witnesses does not commit
any error of law

Pat 97 B (C N 13)

—Ss. 146 (1) and 145 (4) — Incompe-
tent reference by Magistrate — Civil
Court is not clothed with any jurisdiction
so that it can neither record any finding
nor give directions to Magistrate as to
what course he should adopt — Proper
course for Civil Court is to return the re-
ference — Magistrate after return of
reference proceeding under S. 145 (4) in-
stead of making a proper reference —
Order cannot be said to be without juris-
diction

Pat 97 A (C N 13)

—Ss. 164 and 367 — Retracted confes-
sion of accused — Extent of corrobora-
tion required — Case of an accomplice is
different — Variation between confes-
sional statement and evidence in case —
Variation held not material — (Evidence
Act (1872), Ss. 24, 133, 114, illus. (b))

Orissa 54 B (C N 25)

—S. 192 — S. 133 Cr. P. C. does not
exclude provisions of transfer contained
in S. 192 — See Criminal P. C. (1898),
S. 133 Cal 169 (C N 26)

—S. 195 (1) (a) — Penal Code (1860),
S. 188 — Violation of prohibitory order
under S. 144 or 145 Criminal P. C. —
Magistrate may prefer complaint under
S. 188 Penal Code — Cannot take cogni-
zance himself — See Criminal P. C. (1898),
S. 144 Pat 102 B (C N 15)

—Ss. 237, 238 — Accused charged under
Section 314 read with Section 109, Penal

Criminal P. C. (contd.)

Code for abetting R to cause miscarriage
of A — At no stage he was notified that
he would be tried for offence of having
abetted A — Throughout the trial accus-
ed was asked to defend himself against
the charge on which he was tried — Con-
viction for abetting A to cause miscarri-
age, held, not proper — Accused was
likely to have been prejudiced by charge
on the basis of which he was tried —
(Penal Code (1860), Ss. 314, 109) — Cr.
App. No. 219 of 1965, D/- 15-3-1967 (Raj),
Reversed SC 436 (C N 95)

—S. 238 — Accused charged under Sec-
tion 314 read with S. 109, Penal Code for
abetting R to cause miscarriage of A —
At no stage he was notified that he would
be tried for offence of having abetted A
— Throughout the trial accused was asked
to defend himself against the charge
on which he was tried — Conviction for
abetting A to cause miscarriage, held, not
proper — Accused was likely to have
been prejudiced by charge on the basis
of which he was tried — See Criminal
P. C. (1898), S. 237

SC 436 (C N 95)

—Ss. 242, 251-A, 254, 537 and 246 —
Scope — Slight mistake in stating charge
e.g., quoting wrong section — Mistake
cannot vitiate trial — Industrial Employ-
ment (Standing Orders) Act (1946), Sch
Item 9 All 210 A (C N 32)

—S. 246 — Scope — Slight mistake in
stating charge e.g., quoting wrong sec-
tion — Mistake cannot vitiate trial — See
Criminal P. C. (1898), S. 242

All 210 A (C N 32)

—S. 251-A — Scope — Slight mistake
in stating charge e.g., quoting wrong
section — Mistake cannot vitiate trial —
See Criminal P. C. (1898), S. 242

All 210 A (C N 32)

—S. 254 — Scope — Slight mistake in
stating charge e.g., quoting wrong sec-
tion — Mistake cannot vitiate trial — See
Criminal P. C. (1898), S. 242

All 210 A (C N 32)

—S. 345 — In compromise cases ac-
quittal is recorded simply because parties
come to terms — It does not mean that no
offence was committed at all — Prosecu-
tion for offences under Ss. 323 and 147,
Penal Code — Composition of offence
under S. 323 — Held, offence under S. 147
is against public tranquillity and is of
aggravated nature and hence it is taken
out of orbit of Section 345, Criminal P. C.
— The offences under Ss. 147 and 323 are
different and composition of offence under
S. 323 did not amount to acquittal of
accused of offence under S. 147: 1964 (2)
Cri LJ 111 (Pat), Dissent.

All 235 (C N 38)

—S. 367 — Retracted confession of ac-
cused — Extent of corroboration required
— Case of an accomplice is different —

Criminal P. C. (contd.)

Variation between confessional statement and evidence in case — Variation held not material — See Criminal P. C. (1898), S. 164 Orissa 54 B (C N 25)

—S. 403 — Double jeopardy — Scope of — See Constitution of India, Art. 20(2) All 210 C (C N 32)

—S. 423 — Appeal to Supreme Court— Accused found guilty on facts by Courts below concurrently — No interference by Supreme Court ordinarily — High Court however, brushing aside entire defence version briefly and failing to consider whether it is believable — Held, Supreme Court could appreciate evidence on facts to decide guilt or otherwise of accused SC 450 A (C N 99)

—S. 423 — Judgment affirming conviction — No finding regarding necessary ingredient constituting offence — Order is vitiated Pat 104 A (C N 16)

—S. 439 — Revision against acquittal at instance of private party — Interference with finding of acquittal by Court when justifiable — Mere possibility of arriving at contrary conclusion on basis of evidence on record does not justify interference Orissa 50 A (C N 23)

—Ss. 439, 112 and 107 — Revision of orders in proceedings under Ch. 8 — Initial order drawing up proceeding under S. 107 and calling on other side to show cause — Specification required under law not mentioned in order—Revision against order is not premature and it can be entertained — Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat), Not followed Pat 107 B (C N 17)

—Ss. 439, 112 and 107 — Revision of orders in proceedings under Ch. 8 — Order asking party to show cause why he should not execute bond for keeping peace for one year — Order not directing that the period of one year should commence from any particular date — Fact that the period of one year from date of passing the order had already elapsed by the time revision is heard does not mean that the order has to be set aside. AIR 1949 All 21, Dissented from Pat 107 C (C N 17)

—Ss. 439 (1) and 32 — Principles of punishment — Duty of Court — Enhancement of sentence — Penal Code (1860), S. 53 Goa 56 B (C N 11)

—Ss. 476, 537 — Scope and principles of Section 476 stated — It is incumbent on Court before making complaint to record finding that it is expedient in interests of justice to enquire into offence — Omission to record finding is not mere irregularity curable under Sec. 537 but goes to root of matter — Where no such finding is recorded, it is not permissible to draw presumption under Sec. 114, Evidence Act that Court had formed opinion regarding expediency to enquire into

Criminal P. C. (contd.)

matter, even if Court making complaint may be Court before which offence was committed — Satisfaction is objective — Order must be a speaking order — Person sought, to be proceeded against must be heard before forming an opinion — AIR 1962 All 251, Dissent. (Evidence Act (1872), S. 114)

Andh Pra 119 A (C N 14)

—S. 488 — Hindu Adoptions and Maintenance Act (1956), Section 4 (b) — Section 4 (b) of Maintenance Act does not repeal or affect in any manner the provisions of Sec. 488, Cr. P. C.

SC 446 A (C N 98)

—S. 488 (1) — "Child", meaning of — Does not mean a minor son or daughter — Real limitation is contained in expression "unable to maintain itself". AIR 1967 Mad 77, Overruled

SC 446 B (C N 98)

—S. 488 — Maintenance grant to child — Court held rightly taken into consideration the existing situation, such as that one of the child was a student of M.Com., and the other was of M.B.B.S Course, at the time of passing order

SC 446 C (C N 98)

—S. 492 — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — Calcutta High Court (Extension of Jurisdiction) Act (41 of 1953) — (Criminal P. C. (1898), S. 4(1)(i)) — (Civil P. C. (1908), S. 2 (7) (a)) — (Constitution of India, Art. 258 (1))

Cal 162 (C N 24)

—S. 492(1) — Legal Remembrancer of West Bengal cannot, unless appointed by Central Government by virtue of provisions of Art. 258(1), read with S. 492(1) of Criminal P. C. (1898), represent Andaman and Nicobar Islands i.e., Central Government in any appeal or proceedings before Calcutta High Court — See Criminal P. C. (1898), S. 492 Cal 162 (C N 24)

—S. 537 — Scope — Slight mistake in standing charge e.g., quoting wrong section — Mistake cannot vitiate trial — See Criminal P. C. (1898), S. 242

All 210 A (C N 32)

—S. 537 — Failure of Court to record finding under S. 476 Cr. P. C. that it was expedient in interests of justice to enquire into offence — Defect goes to the root of matter and is not curable under S. 537. AIR 1962 All 251, Dissent — See Criminal P. C. (1898), S. 476

Andh Pra 119 A (C N 14)

Customs Act (52 of 1962)

—Ss. 2(25), 110 (1), 111 (d), 130 — Goods, meant for home consumption, cleared upon payment of Customs Duty on basis of forged licence — Goods so

Customs Act (contd.)

imported cannot be treated to be lawfully imported goods within S. 2 (25) — Liable to be seized under S. 110(1) — S. 130 not applicable — Cal 134 B (C N 21)

—S. 110 (1) — Goods, meant for home consumption, cleared upon payment of Customs duty on basis of forged licence — Goods so imported cannot be treated to be lawfully imported goods within Section 2(25) — Liable to be seized under Section 110 (1) — Section 130 not applicable — See Customs Act (1962), S. 2 (25) — Cal 134 B (C N 21)

—S. 110 (2), Proviso — Order of extension of period under proviso to S. 110 (2) — Notice and an opportunity of being heard to party whose goods have been seized not required — Sufficiency of cause is merely subjective satisfaction of Collector — Unless Order is in violation in statute there can be no judicial review of such order — See Customs Act (1962), S. 124 — Cal 134 A (C N 21)

—S. 110 (2), Proviso and S. 124 — Goods seized from business premises and residence of a person — Period to issue show cause notice under Section 124 extended by order of Collector of Customs in exercise of power under proviso to Section 110 (2) — Person, challenging the validity of that order, obtaining from Court Rule nisi and order of injunction restraining the customs authorities from taking any steps — After expiry of extended period, by consent of parties interim order modified so as to enable the Customs authorities to serve show cause notice — Show cause notice under Section 124 subsequently served — Validity of show cause notice challenged on ground that it was issued beyond the extended period and not within period prescribed by Statute — Held, show cause notice issued under Section 124 were valid — Time for issue of show cause notice lapsed because of the order of injunction and this injunction was obtained by petitioner and it was not open to him to plead lapse of time as the ground of invalidity of show cause notices — Cal 134 C (C N 21)

—S. 111 (d) — Goods, meant for home consumption, cleared upon payment of Customs duty on basis of forged licence — Goods so imported cannot be treated to be lawfully imported goods within Section 2 (25) — Liable to be seized under Section 110 (1) — Section 130 not applicable — See Customs Act (1962), S. 2 (25) — Cal 134 B (C N 21)

—Ss. 124, 110 (2), Proviso — Order of extension of period under proviso to Section 110 (2) — Notice and an opportunity of being heard to party whose goods have been seized not required — Sufficiency of cause is merely subjective satisfaction of Collector — Unless Order is in violation of provision in statute there can be no

Customs Act (contd.)

judicial review of such order — (Constitution of India, Art. 226)

Cal 134 A (C N 21)

—S. 124 — Goods confiscated from business premises and residence of a person — Period to issue show cause notice under Section 124 extended by order of Collector of Customs in exercise of power under proviso to Section 110 (2) — Person, challenging the validity of that order, obtaining from Court Rule nisi and order of injunction restraining the customs authorities from taking any steps — After expiry of extended period, by consent of parties interim order modified so as to enable the Customs authorities to serve show cause notice — Show cause notices under Section 124 subsequently served — Validity of show cause notice challenged on ground that it was issued beyond the extended period and not within period prescribed by Statute — Held, show cause notices issued under Section 124 were valid. Time for issue of show cause notice lapsed because of the order of injunction and this injunction was obtained by petitioner and it was not open to him to plead lapse of time as the ground of invalidity of show cause notices — See Customs Act (1962), Section 110 (2), Proviso — Cal 134 C (C N 21)

—S. 130 — Goods, meant for home consumption, cleared upon payment of Customs duty on basis of forged licence — Goods so imported cannot be treated to be lawfully imported goods within Section 2 (25) — Liable to be seized under Section 110 (1) — Section 130 not applicable — See Customs Act (1962), Section 2 (25) — Cal 134 B (C N 21)

Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act (11 of 1968)

See under Tenancy Laws.

Daman (Abolition of Proprietorship of Villages) Regulation (7 of 1962)

See under Tenancy Laws.

DEBT LAWS**—Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957)**

—Ss. 5 (1) (i), 6, 16 and 21 — Applicability — Pending suit for recovery of money, application under Section 6 filed — Application not admitted — However, notices issued to creditors to decide question of its admission — Pending such application Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — (Civil P. C. (1908), O. 4, R. 1 (i)) — Raj 67 (C N 12)

—S. 6 — Applicability — Pending suit for recovery of money, application under Section 6 filed — Application not admitted — However, notices issued to creditors to

Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (contd.)

decide question of its admission — Pending such application Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 5 (1) (i)

Raj 67 (C N 12)

—S. 16 — Applicability — Pending suit for recovery of money, application under Section 6 filed — Application not admitted — However, notices issued to creditors to decide question of its admission — Pending such application Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 5 (1) (i)

Raj 67 (C N 12)

—S. 21 — Applicability — Pending suit for recovery of money, application under Section 6 filed — Application not admitted — However, notices issued to creditors to decide question of its admission — Pending such application Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 5 (1) (i)

Raj 67 (C N 12)

—Usurious Loans Act (10 of 1918)

—S. 3 (1) Proviso (ii) (as amended by Punjab Act, 7 of 1934) — Scope — Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3 (1) Proviso (ii) (as amended by Punjab Act 7 of 1934)—Question of amount due from mortgagor in subsequent suit for redemption — Question already decided in previous suit inter partes — Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under Section 3 — Expression "any decree of a Court" in proviso (ii) to Section 3 (1) applies to consent decree — See Civil P. C. (1908), S. 11

Punj 152 (C N 21)

Defence of India Rules (1962)

—Rule 132-A (Since repealed by Defence of India (Amendment) Rules, 1965) — Prosecution for offence under Rule cannot be launched subsequent to its repeal as there is no saving provision under the Defence of India (Amendment) Rules (1965)

SC 549 A (C N 121)

—Rr. 132-A (2) and 132-A (4) — Violation of Rule 132-A (2) — Prosecution launched on 17-3-1968 after R. 132-A (2) was omitted by Defence of India Amendment Rules 1965 — Prosecution is illegal 1969 Mad LW (Cr) 98, Reversed

SC 494 C (C N 109)

Delhi Municipal Corporation Act (66 of 1957)

See under Municipalities.

Displaced Persons (Claims) Act (44 of 1950)

—S. 6 — Displaced Persons (Claims) Supplementary Act (1954), Sections 5 (1) (a) and (b) 2 (f) — Displaced Persons (Verification of Claims) Supplementary Rules (1954), Rule 18 — Power of Chief Settlement Commissioner under Section 5 (1) (b) — It includes power to review final order under the Act of 1950

SC 540 A (C N 119)

Displaced Persons (Claims) Supplementary Act (12 of 1954)

—S. 2 (f) — Verified claim — It means any claim registered under Act of 1950 in respect of which final order has been passed — See Displaced Persons (Claims) Act (1950), Section 6

SC 540 A (C N 119)

—S. 2 (f) — Power in revision — It includes valuation of claim — See Displaced Persons (Claims) Supplementary Act (1954), Section 5 (1) (b)

SC 540 B (C N 119)

—Ss. 5(1) (a) and (b)— Power of Chief Settlement Commissioner under Section 5 (1) (b) — It includes power to review final order under Act of 1950 — See Displaced Persons (Claims) Act (1950), Section 6

SC 540 A (C N 119)

—S. 5 (1) (a) — Order passed by Claims Commissioner — In review Chief Settlement Commissioner reducing amount substantially — Review order based on conclusion on pure conjectures and surmises and not on legal evidence — Order set aside in writ petition by Single Judge on ground of error apparent on face of record — Order of Single Judge set aside in Letters Patent Appeal against order — Held, that the decision of Letters Patent Bench was illegal. AIR 1965 Punj 367, Reversed

SC 540 D (C N 119)

—Ss. 5 (1) (b) and 2 (f) — Power in revision — It includes valuation of claim

SC 540 B (C N 119)

—S. 5 (1) (b) — Displaced Persons (Verification of claims) Supplementary Rules (1954), Rule 18 clause (iv) — Interpretation of clause (iv) — Rule of ejusdem generis does not apply

SC 540 C (C N 119)

Displaced Persons (Claims) Supplementary Rules (1954)

—R. 18 clause (iv) — Interpretation — Rule of ejusdem generis does not apply — See Displaced Persons (Claims) Supplementary Act (1954), S. 5 (1) (b)

SC 540 C (C N 119)

Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954)

—Concurrent findings — Suit for declaration filed alleging to be claimant under Displaced Persons (Compensation and Rehabilitation) Act — Both lower

Displaced Persons (Compensation and Rehabilitation) Act (contd.)

Courts not accepting that allegation — Conclusion of both lower Courts not shown to be tainted with any illegality — In second appeal that plea is unacceptable and must be repelled under such circumstances — See Civil P. C. (1908), Section 100 — Delhi 85 B (C N 18)

—S. 15 — See Administration of Evacuee Property Act (1950), Section 40 — All 228 A (C N 36)

—S. 36 — Scope — Distinction between Rules 41 and 42 of Displaced Persons (Compensation and Rehabilitation) Rules (1955)— "Shall" and "may"— Construction — Plaintiff alleging to be claimant, displaced person and lawful tenant of Government-built property — Suit filed for declaration — Suit is barred by Section 36 — (Interpretation of Statutes — Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall") — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall")

Delhi 85 A (C N 18)

Displaced Persons (Verification of Claims) Supplementary Rules (1952)

—R. 18 — Power of Chief Settlement Commissioner to review — It includes power to review final order — See Displaced Persons (Claims) Act (1950), S. 6

SC 540 A (C N 119)

—R. 41 — Scope — Distinction between Rr. 41 and 42 of Displaced Persons (Compensation and Rehabilitation) Rules — "Shall" and "may" — Construction — Plaintiff alleging to be claimant, displaced person and lawful tenant of Government-built property — Suit filed for declaration — Suit is barred by S. 36 — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 36

Delhi 85 A (C N 18)

—R. 42 — Scope — Distinction between Rr. 41 and 42 of Displaced Persons (Compensation and Rehabilitation) Rules — "Shall" and "may" — Construction — Plaintiff alleging to be claimant, displaced person and lawful tenant of Government-built property — Suit filed for declaration — Suit is barred by S. 36 — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 36

Delhi 85 A (C N 18)

Dock Workers (Regulation of Employment) Act (9 of 1948)

—S. 5-C (inserted by amendment Act 8 of 1962) — Calcutta Dock Labour Board is a local authority — Rules 38 and 52 of the Calcutta Dock Workers (Regulation of Employment) Scheme authorise raising and holding of fund — Section 5-C of

Dock Workers (Regulation of Employment) Act (contd.)

Dock Workers (Regulation of Employment) Act, 1948 deals with accounts and audits of such fund — Board thus answers the definition of local authority under Section 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — See Civil P. C. (1908), O. 21, R. 48 (1) — Cal 176 B (C N 29)

Drugs and Cosmetics Act (23 of 1940)

—Ss. 3 (b), 18(c) and 27 — Drugs — Definition of D. D. T. is a drug — Sale of compound containing D. D. T. without obtaining licence — Conviction under Section 18 (c) read with S. 27 is proper

Bom 134 (C N 23)

—S. 18 — Agreement of agency — Trader appointed selling agent of medicines—Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void—Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — See Contract Act (1872), S. 23

Bom 128 (C N 21)

—S. 18 (c) — Sale of compound containing D. D. T. without obtaining licence — Conviction under Section 18 (c) read with Section 27 is proper — See Drugs and Cosmetics Act (1940), S. 3 (b)

Bom 134 (C N 23)

—S. 27 — Drugs — Definition of — D. D. T. is a drug — Sale of compound containing D. D. T. without obtaining licence — Conviction under Section 18 (c) read with Section 27 is proper — See Drugs and Cosmetics Act (1940), S. 3 (b)

Bom 134 (C N 23)

Drugs and Cosmetics Rules

—R. 61 — Agreement of agency — Trader appointed selling agent of medicines—Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void— Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — See Contract Act (1872), S. 23

Bom 128 (C N 21)

Easements Act (5 of 1882)

—S. 15— Right of way— Scope of Section 131 (1) — Provisions deal with right of limited nature and for limited purpose namely private right of way of cultivator through the field of another for access to his field — Dispute under the section is to be decided on the basis of convenience of the parties and not on the basis of perfection of right by prescription — Decision of revenue authorities under this section is exclusive and suit to enforce the common law right i.e. under Easements

Easements Act (contd.)

Act, does not lie — See M. P. Land Revenue Code (1959), S. 131

Madh Pra 79 A (C N 19)

EDUCATION**—Maharashtra Education (Cess) Act (27 of 1962)**

—Pre. — Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — See Constitution of India, Art. 246

Bom 154 A (C N 27)

—Pre. — State can impose tax on citizens for meeting expenses of education — Article 45 is no bar — See Constitution of India, Art. 45

Bom 154 B (C N 27)

—Pre., Ss. 3, 4 — Imposition under Act is tax on lands and buildings — Tax is authorised by Entry No. 49 of List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — (Constitution of India, Arts. 246, 265, Sch. 7, List 2, Entry 49)

Bom 154 C (C N 27)

—S. 3 — Imposition under Act is tax on lands and buildings — Tax is authorised by Entry No. 49 of List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — See Maharashtra Education (Cess) Act (27 of 1962), Pre.

Bom 154 C (C N 27)

—S. 3 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned — Hence, education tax cannot be limited to Rs. 250 — Article 276 (2) has no application — See Constitution of India, Article 276 (2)

Bom 154 D (C N 27)

—S. 4 — Imposition under Act is tax on lands and buildings — Tax is authorised by Entry No. 49 of List 2 of Schedule 7 of Constitution — Fact that tax has no relation to services rendered is immaterial — See Maharashtra Education (Cess) Act (27 of 1962), Preamble

Bom 154 C (C N 27)

—S. 4 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned — Hence, education tax cannot be limited to Rs. 250 — Article 276 (2) has no application — See Constitution of India, Art. 276 (2).

Bom 154 D (C N 27)

Electricity Act (contd.)

under an agreement — Licence under Section 3 of Electricity Act, 1910 granted to that company — Such agreement made part of that licence — Under Electricity (Supply) Act, 1948, Government appointing Rating Committee — Committee recommending withdrawal of such concessional supply — Government accepting that recommendation — Discontinuance of such concessional supply correct — See Electricity (Supply) Act (1948), S. 57

Raj 72 A (C N 15)

—S. 51 — Scope — Demand by Municipal Corporation of fee for lands occupied by Electric Supply Company for fixing poles on corporation area — Dispute between company and corporation cannot be referred to arbitration under Section 15 of Telegraph Act — AIR 1969 Pat 355, Reversed — (Telegraph Act (1885), Sections 15, 3 (6))

SC 491 (C N 108)

Electricity (Supply) Act (54 of 1948)

—S. 23 — Object — Concessional supply made to consumer by electricity company under an agreement — Licence under Section 3 of Electricity Act, 1910 granted to that company — Such agreement made part of that licence — Under Electricity (Supply) Act 1948, Government appointing Rating Committee — Committee recommending withdrawal of such concessional supply — Government accepting that recommendation — Discontinuance of such concessional supply correct — See Electricity (Supply) Act (1948), S. 57

Raj 72 A (C N 15)

—Ss. 57, 23 and Sch. 6 — Object — Concessional supply made to consumer by electricity company under an agreement — Licence under Section 3 of Electricity Act, 1910 granted to that company — Such agreement made part of that licence — Under Electricity (Supply) Act, 1948, Government appointing Rating Committee — Committee recommending withdrawal of such concessional supply — Government accepting that recommendation — Discontinuance of such concessional supply correct — (Electricity Act (1910), Section 3)

Raj 72 A (C N 15)

—S. 57 (2) (c) — New rates fixed on recommendations of Rating Committee — Retrospective effect for such rates not permissible

Raj 72 B (C N 15)

—Sch. 6 — Object — Concessional supply made to consumer by electricity company under an agreement — Licence under Section 3 of Electricity Act, 1910 granted to that company — Such agreement made part of that licence — Under Electricity (Supply) Act 1948, Government appointing Rating Committee — Committee recommending withdrawal of such concessional supply — Government accepting that recommendation — Discontinuance of such concessional supply correct — See Electricity (Supply) Act (1948), S. 57

Raj 72 A (C N 15)

Electricity Act (9 of 1910)

—S. 3 — Object — Concessional supply made to consumer by electricity company

Essential Commodities Act (10 of 1955)

—Ss. 3, 7, 5 — Iron and Steel (Control) Order (1956), Para. 14 (2) — Order under Section 3 — Contravention of direction contained in notification issued under para 14 (2) of Order — It is not contravention of provisions of Order and so not punishable under Section 7

Cal 167 (C N 25)

—S. 3 — Petitioner authorised dealer under Cl. 2 (a) — Authorisation cancelled on ground of misconduct of petitioner — Contractual power of termination of authorisation not exercised — Cancellation order is penal and can be passed only in accordance with principles of natural justice — Writ petition filed against cancellation order — Petition clearly competent — No statutory rule or standing order available requiring elaborate inquiry by recording evidence — Petitioner not demanding copies of statements of witnesses recorded at preliminary inquiry — Gist of such statements however, given in show cause notice — No attempt made by petitioner to rebut materials sought to be relied upon against him — Petitioner heard in appeal against cancellation order — Principles of natural justice are satisfied in such a case — Writ petition hence not maintainable — See Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Cl. 2 (a)

Guj 67 (C N 11)

—S. 3 — M. P. Foodgrains Dealers Licensing Order 1965, Cls. 3 and 7 — Licence — Renewal — Principles

Madh Pra 70 A (C N 17)

—S. 3 — M. P. Foodgrains Dealers Licensing Order 1965, Cls. 3 and 7 — Renewal of license — Refusal to renew — Consideration

Madh Pra 70 B (C N 17)

—S. 3 — M. P. Foodgrains Dealers Licensing Order, 1965, Cls. 3 and 7 — Refusing to renew licence — Authority acts quasi-judicially — Principles of natural justice have to be observed

Madh Pra 70 C (C N 17)

—S. 5 — Iron and Steel (Control) Order 1956 under Section 3 — Contravention of direction contained in notification issued under para 14 (2) of Order — It is not contravention of provisions of Order and so not punishable under Section 7 — See Essential Commodities Act (1955), S. 3

Cal 167 (C N 25)

—S. 7 — Iron and Steel (Control) Order 1956 under Section 3 — Contravention of direction contained in notification issued under para 14 (2) of Order — It is not contravention of provisions of Order and so not punishable under Section 7 — See Essential Commodities Act (1955), S. 3

Cal 167 (C N 25)

Evidence Act (1 of 1872)

—S. 3 — Claim petition under S. 110-C — Judgment of Criminal Court determin-

Evidence Act (contd.)

ing guilt or innocence of driver is not binding on Claims Tribunal — Claims Tribunal is "Court" within Section 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — See Motor Vehicles Act (1939), Ss. 110 to 110-F Punj 137 A (C N 20)

—S. 3—Charge under S. 494, Penal Code — Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies — Nature of evidence required — See Penal Code (1860), S. 494

Tripura 30 (C N 6)

—S. 8, Ill. (i) — Accused absconding from village after commission of offence — Fact of absconding is an incriminating circumstance and is relevant

Orissa 54 A (C N 25)

—S. 18 — Document — Admission of execution — Admission of signature of a person on document is not tantamount to admission of execution document by that person — It is one thing to admit signature of a person on a document and quite another thing which has different legal implications to admit that that person whose signature is identified by the deponent has executed the document

Bom 160 B (C N 28)

—S. 24 — Retracted confession of accused — Extent of corroboration required — Case of an accomplice is different — Variation between confessional statement and evidence in case — Variation held not material — See Criminal P. C. (1898), Section 164

Orissa 54 B (C N 25)

—Ss. 31 and 115 — Estoppel by admission — Admission in writ petition before Supreme Court that certain lands in possession of petitioner were pasture lands and that they were used by him for grazing his cattle — It is not open to petitioner in subsequent writ petition before High Court to turn round and say that admission is not correct — He has to abide by that admission

Goa 59 G (C N 12)

—S. 43 — Claim petition under Section 110-C — Judgment of Criminal Court determining guilt or innocence of driver is not binding on Claims Tribunal — Claims Tribunal is "Court" within S. 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — See Motor Vehicles Act (1939), Ss. 110 to 110-F

Punj 137 A (C N 20)

—S. 50, Proviso — Charge under Section 494, Penal Code — Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies — Nature of evidence required — Effect of proviso — See Penal Code (1860), S. 494

Tripura 30 (C N 6)

—S. 63 — Registered Will — Certified copy of Will — Admissible in evidence — See Evidence Act (1872), S. 65

Punj 182 A (C N 24)

Evidence Act (contd.)

—Ss. 65 and 63 — Registration Act (1908), S. 60 — Registered Will — Certified copy of Will — Admissible in evidence
Punj 182 A (C N 24)

—Ss. 91, 92 — Partition deed — Document containing admission of both parties that they were joint till 1954 — Oral admission of partition in 1951 — Court should not persuade itself to hold that there was an oral partition between parties in face of admissions in written partition deed.
Bom 160 C (C N 28)

—S. 92 — Partition deed — Document containing admission of both parties that they were joint till 1954 — Oral admission of partition in 1951 — Court should not persuade itself to hold that there was an oral partition between parties in face of admissions in written partition deed — See Evidence Act (1872), Section 91
Bom 160 C (C N 28)

—Ss. 101 to 104 — Declaration under sub-section (1) — Whether procedure prescribed under sub-sections (2) to (6) were followed — Proof of — See U. P. Roadside Land Control Act (10 of 1945), Section 3
All 199 B (C N 29) (FB)

—Ss. 101 to 104 — Distinction between civil and criminal negligence — See Tort — Negligence
Punj 137 B (C N 20)

—S. 106 — 'Liquor' — Offence under Sec. 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under Section 3-A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of Section 3-A, (1956) and Section 3-A, (1963) stated — See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963), Section 4
Assam 49 (C N 10)

—S. 114 — Failure of Court to record finding under Section 476, Criminal P. C. that it is expedient in interests of justice to enquire into offence — No presumption can be drawn that Court had formed requisite opinion regarding expediency to enquire into matter, even if Court making complaint may be Court before which offence was committed : AIR 1962 All 251, Dissent — See Criminal P. C. (1898), Section 476
Andh Pra 119 A (C N 14)

—S. 114, Illustration (a) — Recovery of stolen goods in dacoity from accused three days after occurrence — Possible presumption are that (1) he took part in dacoity, or (2) received goods knowing them to be stolen in dacoity, or (3) received goods knowing them to be stolen — Choice must depend on facts of each case — See Penal Code (1860), Section 411
SC 535 (C N 117)

Evidence Act (contd.)

—S. 114, Illus. (b) — Retracted confession of accused — Extent of corroboration required — Case of an accomplice is different — Variation between confessional statement and evidence in case — Variation held not material — See Criminal P. C. (1898), Section 164
Orissa 54 B (C N 25)

—S. 114 illustration (e) — Declaration under sub-section (1) — Whether procedure prescribed under sub-sections (2) to (6) were followed — Proof of — See U. P. Roadside Land Control Act (10 of 1945), Section 3
All 199 B (C N 29) (FB)

—S. 115 — Burden of proving ingredients of Section lies on party claiming estoppel — Representation must be clear
SC 426 B (C N 94)

—S. 115 — Civil P. C. (1908), Section 11 — Doctrine of approbate and reprobate and principle of constructive res judicata — Applicable to writ proceedings
Goa 59 A (C N 12)

—S. 115 — Estoppel by admission — Admission in writ petition before Supreme Court that certain lands in possession of petitioner were pasture lands and that they were used by him for grazing his cattle — It is not open to petitioner in subsequent writ petition before High Court to turn round and say that admission is not correct — He has to abide by that admission — See Evidence Act (1872), S. 31
Goa 59 G (C N 12)

—S. 133 — Retracted confession of accused — Extent of corroboration required — Case of an accomplice is different — Variation between confessional statement and evidence in case — Variation held not material — See Criminal P. C. (1898), Section 164
Orissa 54 B (C N 25)

Factories Act (63 of 1948)

—Preamble — Factories Act is a social enactment to achieve social reform and must receive liberal construction to achieve legislative purpose without doing violence to language
SC 488 D (C N 107)

—S. 2 (1) — 'Worker' — Persons doing clerical duties but otherwise falling within definition of "worker" — They are workers
SC 488 C (C N 107)

Finance Act (25 of 1950)

—S. 2 (11) (a) Proviso — Assessee submitting return for assessment year 1950-51 — Income from 1-7-1949 to 31-3-1950 shown — Permission under Section 2 (11) (a) proviso of the Act to change the period of 'previous year' to nine months granted — Income cannot be assessed at the rate applicable for twelve months' income
Mys 110 (C N 28)

Finance Act (23 of 1951)

—Sch. I, Part B, Proviso (1) — Words "no order has been made under Section 23-A (1) Income-tax Act" — Words do not merely mean physical fact of there

Finance Act (1951) (contd.)

being no order under that provision in existence — Rebate may be allowed only after considering applicability of Section 23-A, Income-tax Act (1922) and of propriety of making order under that section — Rebate granted without applying mind to the question — Assessment can be reopened on ground that it had been made at too low a rate — (Income-tax Act (1922), Ss. 23-A, 34

Mad 133 (C N 35)

Finance Act (5 of 1957)

—S. 2 (3) (a) and (1) (a) — "Income-tax" — Meaning — Income-tax on dividend income for 1957-58 assessment year calculated under Section 2 (3) (a) — Special surcharge under Section 2 (1) (a) levied on that income-tax — Levy correct

Raj 70 (C N 14)

Foreigners Act (31 of 1946)

—S. 3 (2) (c) — Sentence — Accused though born and brought up in Goa choosing to retain his Portuguese nationality after Goa became part of India — Accused deliberately disobeying order under Section 3 (2) (c) for second time — Accused contending that in spite of de facto occupation of Government of India, Goa continued de jure as Portuguese territory and by exercising option to continue as Portuguese national he did not become foreigner — Held sentence of simple imprisonment for three months and fine of Rs. 100 or, in default further imprisonment for 20 days was unduly lenient and manifestly inadequate when accused had been wilfully disregarding law and challenging territorial integrity of India; sufficiently deterrent sentence was called for in the ends of justice — Sentence enhanced in exercise of powers under S. 439 (2) of Criminal P. C. (1898), to 12 months simple imprisonment and fine of Rs. 1,000 and in default, further imprisonment for six months — See Foreigners Act (1946), Section 14

Goa 56 A (C N 11)

—Ss. 14 and 3 (2) (c) — Sentence — Accused though born and brought up in Goa choosing to retain his Portuguese nationality after Goa became part of India — Accused deliberately disobeying order under Section 3 (2) (c) for second time — Accused contending that in spite of de facto occupation of Government of India, Goa continued de jure as Portuguese territory and exercising option to continue as Portuguese national he did not become foreigner — Held sentence of simple imprisonment for three months and fine of Rs. 100 or, in default further imprisonment for 20 days was unduly lenient and manifestly inadequate when accused had been wilfully disregarding law and challenging territorial integrity of India; sufficiently deterrent sentence was called for in the ends of justice — Sentence enhanced in exercise of powers under Section 439 (2) of

Foreigners Act (contd.)

Criminal P. C. (1898) to 12 months simple imprisonment and fine of Rs. 1,000 and in default, further imprisonment for six months

Goa 56 A (C N 11)

Foreign Exchange Regulation Act (7 of 1947)

—Ss. 4 (1), 5 (1), 9, 23-D (1) and proviso, and 23 (3) — Contravention of Ss. 4 (1), 5 (1) and 9 — Enquiry under Section 23-D (1) instituted by issue of show cause notice — Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in position to impose adequate penalty — Complaint, held was filed without complying with the proviso and was invalid. 1969 Mad LW (Cr) 98, Reversed

SC 494 B (C N 109)

—S. 5 (1) — See Foreign Exchange Regulation Act (1947), S. 4 (1)

SC 494 B (C N 109)

—S. 9 — See Foreign Exchange Regulation Act (1947), S. 4 (1)

SC 494 B (C N 9)

—S. 21 (1) — Penal Code (1860), Sections 120-A, 120-B — Contract contemplated under Section 21 (1) — Nature — Section 21 (1) does not cover criminal conspiracy similar to Sec. 120-B — Complaint in respect of illegal acquisition of Foreign Exchange — Allegation therein that two accused agreed to obtain foreign exchange illegally — Framing of charge under S. 120-B — Maintainability — See Penal Code (1860), S. 120-B

SC 549 B (C N 121)

—S. 23 (1) and Proviso — Contravention of Ss. 4 (1), 5 (1) and 9 — Enquiry under Section 23-D (1) instituted by issue of show cause notice — Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty — Complaint; held was filed without complying with the proviso and was invalid — See Foreign Exchange Regulation Act (1947), Section 4 (1)

SC 494 B (C N 109)

—Ss. 23 (1) (b), 23 (1) (a) and 23-D — Vires — Provision of Section 23 (1) (b) does not violate Art. 14 of the Constitution

SC 494 A (C N 109)

—S. 23 (3) — Contravention of Ss. 4 (1), 5 (1) and 9 — Enquiry under Section 23-D (1) instituted by issue of show cause notice — Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty — Complaint, held was filed without complying with the proviso and was invalid — See Foreign Exchange Regulation Act (1947), S. 4 (1)

SC 494 B (C N 109)

—S. 23-D — Vires — Provision of Section 23 (1) (b) does not violate Art. 14

Foreign Exchange Regulation Act (contd.)
of the Constitution — See Foreign Exchange Regulation Act (1947), S. 23 (1) (b)
SC 494 A (C N 109)

General Clauses Act (10 of 1897)

—S. 3 (31) — Calcutta Dock Labour Board is a local authority — Rules 38 and 52 of Calcutta Dock Workers (Regulation of Employment) Scheme authorise raising and holding of fund — Section 5-C of Dock Workers (Regulation of Employment) Act, 1948 deals with accounts and audits of such fund — Board thus answers the definition of local authority under Section 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — See Civil P. C. (1908), O. 21, R. 48 (1)
Cal 176 B (C N 29)

Gift Tax Act (18 of 1958)

—S. 2 (iii) — "Assessee" — Definition is wide enough to include every person who is deemed to be a donee

Andh Pra 126 J (C N 17)

—Ss. 2 (xviii), 2 (xii), 2 (xxiv) and 4 (d) — "Person" — Definition is inclusive one — Coparceners taking share in self-acquired property of another coparcener which was merged in joint family property — Transfer in this case is to 'person' within definition of Gifts Tax Act

Andh Pra 126 F (C N 17)

—Ss. 2 (xxiv) (d), 4 (d) — Hindu father merging his self-acquired property into joint family property — His rights being diminished the transaction is gift

Andh Pra 126 D (C N 17)

—S. 2 (xxiv) (d) — "Transaction" — Conversion of self-acquired property into joint family property — Conversion is "transaction" — Andh Pra 126 G (C N 17)

—S. 3 — Gift tax not recovered from donor — Recovering from donees — Notice of demand — Essentials — See Gift Tax Act (1958), S. 29

Andh Pra 126 H (C N 17)

—S. 4 (d) — Hindu father merging self-acquired property in joint family property — His right being diminished transaction is gift — See Gift Tax Act (1958), S. 2 (xxiv)

Andh Pra 126 D (C N 17)

—S. 4 (d) — "Person" coparcener taking share in self-acquired property merged in joint family property — Transfer is to "person" — See Gift Tax Act (1958), S. 2 (xviii)

Andh Pra 126 F (C N 17)

—S. 15 (3) — Subject-matter of Gift Tax falls under Entry 97, List II of Constitution of India — See Constitution of India, Sch. VII, List I, Entry 97

Andh Pra 126 B (C N 17)

—S. 22 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal does not

Gift Tax Act (contd.)

make proceedings invalid — Section 29 does not contravene Art. 19 (1) (f) — See Constitution of India, Art. 19 (1) (f)

Andh Pra 126 K (C N 17)

—S. 23 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal does not make proceedings invalid — Section 29 does not contravene Art. 19 (1) (f) — See Constitution of India, Art. 19 (1) (f)

Andh Pra 126 K (C N 17)

—S. 24 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal does not make proceedings invalid — Section 29 does not contravene Art. 19 (1) (f) — See Constitution of India, Art. 19 (1) (f)

Andh Pra 126 K (C N 17)

—S. 26 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal does not make proceedings invalid — Section 29 does not contravene Art. 19 (1) (f) — See Constitution of India, Art. 19 (1) (f)

Andh Pra 126 K (C N 17)

—Ss. 29, 31 and 3 — Gift tax not recovered from donor — Recovery from donees — Notice of demand — Essentials

Andh Pra 126 H (C N 17)

—S. 29 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal does not make proceedings invalid — Section 29 does not contravene Article 19 (1) (f) — See Constitution of India, Article 19 (1) (f)

Andh Pra 126 K (C N 17)

—S. 30 — Priority of Government in respect of arrears of tax — Government can proceed against immoveable properties gifted.

Andh Pra 126 I (C N 17)

—S. 31 — Gift tax not recovered from donor — Recovering from donees — Notice of demand — Essentials — See Gift Tax Act (1958), Section 29

Andh Pra 126 H (C N 17)

Government of Union Territories Act (20 of 1963)

—S. 18 — Legislative competency of State legislature — See Tenancy Laws — Daman (Abolition of Proprietorship of Village Regulation (1962), S. 2(d)

Goa 59 D (C N 12)

HIGH COURT RULES AND ORDERS

—Calcutta High Court (Extension of Jurisdiction) Act (41 of 1953)

—Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — See Criminal P. C. (1898), S. 492
Cal 162 (C N 24)

Hindu Adoptions and Maintenance Act (78 of 1956)

—S. 4(b) — S. 4 (b) does not repeal or affect in any manner the provisions of S. 488, Cr. P. C. — See Criminal P. C. (1898), S. 488 SC 446 A (C N 98)

Hindu law

—Debt by father — Son's liability — Father standing as surety for debt incurred by stranger — Surety is not personal — His sons are bound to make good that surety Andh Pra 158 B (C N 22)

—Religious endowments — Idol — Legal status — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Section 2 (12), Explanation I SC 439 A (C N 96)

—Joint family — Father merging his self-acquired property into joint family property — Such conversion amounts to transfer and diminution of rights of father and enlargement of rights of coparceners — AIR 1962 Mad 26 and 1967-66 ITR 169 (Mad) and 1967-65 ITR 19 (Mys), Dissented

Andh Pra 126 C (C N 17)

—Religious endowments — Manager or shebait of idol and trustee — Distinction between SC 439 B (C N 96)

—Religious endowment — Private temple — Mismanagement — Civil Court has jurisdiction to frame scheme for management — See Civil P. C. (1908), S. 92

SC 532 B (C N 116)

—Religious endowment — Private trust temple — Mismanagement and misappropriation by pujari — Right to sue — Suit on behalf of deity to protect property maintainable — Person making donations for temple maintenance can sue on behalf of deity — Civil P. C., Section 92, has no application — (Civil P. C. (1908), Sections 9 and 92, Order 7, Rule 4)

SC 532 A (C N 116)

—Trust — Religious or charitable purpose — Dedication — Essentials — Dedication for purpose of promoting games not as part of education of those participating but for promotion of games simpliciter — Purpose is not charitable — Trust created for maintaining Akhara though idols and Tasweer installed, held, was not a religious Trust. Decision of High Court (All) D/- 5-8-65, Reversed

SC 458 (C N 101)

Hindu Marriage Act (25 of 1955)

—S. 7 — Charge under S. 494 — Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies — Nature of evidence required — See Penal Code (1860), S. 494

Tripura 30 (C N 6)

—S. 17 — Charge under S. 494 — Marriage alleged to have been celebrated according to Hindu rites — Proof of cere-

Hindu Marriage Act (contd.)

monies — Nature of evidence required — See Ptnal Code (1860), S. 494

Tripura 30 (C N 6)

Hindu Succession Act (30 of 1956)

—S. 4(2) — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held did not become bhumidari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14(1)

All 238 (C N 39)

—Ss. 14(1) and (2), and 4 (2) — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held, did not become bhumidari right by reason of Section 14 of the Hindu Succession Act. AIR 1964 All 165 & AIR 1968 All 419, Overruled — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), Ss. 10 and 11) — (Constitution of India, Sch. 7, List III, Entries 5, 6 and 7; List II, Entry 18)

All 238 (C N 39)

—S. 21—Murder of mother and daughter on the same night — Difficult to ascertain who died first — Presumption under the section is that younger (daughter) survived the elder

Mys 87 A (C N 22)

—S. 21 — Suit for partition and possession of his half share of property by 'B' against his widow mother P — Will by P of her property in favour of 'J' — Murder of 'P' and 'J' on same night during pendency of suit — Statutory presumption under S. 21 Hindu Succession Act that 'J' survived P — Applications by other brothers of S and also by heirs of 'J' for being brought on record as legal representatives of P — Held 'J's heirs could be brought on record to continue the original suit and not the brothers of S — See Civil P. C. (1908), O. 22, R. 4

Mys 87 B (C N 22)

HOUSES AND RENTS**—Assam Urban Areas Rent Control Act (3 of 1956)**

—S. 6 (1)(e) and (4)— Deposit by tenant not conforming to requirements of statute — Deposit, held to be irregular — Finding that benefit of S. 6(4) is not available to tenant and therefore he cannot be treated as defaulter under S. 6(1)(e) proviso — Finding is on question of fact and is binding on second appellate court —

Houses & Rents — Assam Urban Areas Rent Control Act (contd.)

(Civil P. C. (1908), Ss. 100-101)

Assam 59 A (C N 12) (FB)

—S. 6 — Scope of S. 9 — Deposit of rent made under S. 6(4)—Notice by Court to landlord to withdraw the same — There is no right of appeal under S. 9— Hence, there is no question of any legal consequence from non-filing of appeal by landlord — See Houses and Rents — Assam Urban Areas Rent Control Act (3 of 1956), S. 9

Assam 59 B (C N 12) (FB)

—Ss. 9, 6 — Scope of S. 9 — Deposit of rent made under S. 6 (4) — Notice by Court to landlord to withdraw the same — There is no right of appeal under S. 9 — Because of non-filing of appeal, landlord in subsequent proceeding is not debarred from taking the plea of non-compliance with S. 6(4) — S. A. No. 165 of 1962, D/- 15-2-1966 (Assam), Overruled

Assam 59 B (C N 12) (FB)

—**Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) (as amended by Act 12 of 1965)**

—S. 13 (1) (a) — Amendment of plaint long after institution of suit to include cause of action not accrued on date of suit — Power of Court — Governing conditions — Eviction suits instituted on ground of personal necessity — One suit filed on 24-1-1966 — Rent alleged to have been defaulted on 24-5-1966 — Application to amend plaint on ground of such default made on 3-4-1967. In other suit, filed in 1960, default alleged to have been committed in 1962 — Such amendment application made in 1967 — Both applications allowed — Such order is material irregularity. (Houses and Rents — Rajasthan premises) — See Civil P. C. (1908), S. 153 Raj 77 (C N 16)

Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958)

—Cls. 2(a) and 3 — Petitioner authorised dealer under Cl. 2(a) — Authorisation cancelled on ground of misconduct of petitioner — Contractual power of termination of authorisation not exercised — Cancellation order is penal and can be passed only in accordance with principles of natural justice — Writ petition filed against cancellation order — Petition clearly competent — No statutory rule or standing order available requiring elaborate inquiry by recording evidence — Petitioner not demanding copies of statements of witnesses recorded at preliminary inquiry — Gist of such statements however given in show cause notice — No attempt made by petitioner to rebut

Imported Foodgrains (Prohibition of Unauthorised Sale) Order (contd.)

materials sought to be relied upon against him — Petitioner heard in appeal against cancellation order — Principles of natural justice are satisfied in such a case— Writ petition hence not maintainable— (Essential Commodities Act (1955), S. 3)— (Constitution of India, Art. 226 — Grounds of Certiorari) Guj 67 (C N 11)

—Cl. 3 — Petitioner authorised dealer under Cl. 2(a) — Authorisation cancelled on ground of misconduct of petitioner — Contractual power of termination of authorisation not exercised — Cancellation order is penal and can be passed only in accordance with principles of natural justice — Writ petition filed against cancellation order — Petition clearly competent — No statutory rule or standing order available requiring elaborate inquiry by recording evidence — Petitioner not demanding copies of statements of witnesses recorded at preliminary inquiry — Gist of such Statements however given in show cause notice — No attempt made by petitioner to rebut materials sought to be relied upon against him — Petitioner heard in appeal against cancellation order — Principles of natural justice are satisfied in such a case— Writ Petition hence not maintainable — See Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Cl. 2(a)

Guj 67 (C N 11)

Income Tax Act (11 of 1922)

—S. 3 — Adventure in nature of trade — Assessee firm purchasing large block of shares with borrowed money at ruling rates and soon thereafter selling at a profit in small lots — Transaction, held was a commercial one entered into with profit motive and was not in the nature of capital investment — See Income Tax Act (1922), S. 10 SC 529 (C N 115)

—Ss. 10, 12 — Assessee, a private limited Company whose business inter alia is to deal with shares and securities — Assessee purchasing shares of a Company from a share broker — Shares sold with arrear dividends declared long ago but not claimed by previous owners—Amount of arrear dividends received by the assessee — Amount cannot be treated as income liable to tax either under Sec. 10 or under Section 12 SC 410 (C N 90)

—Ss. 10, 3 and 12-A — Adventure in nature of trade — Assessee firm purchasing large block of shares with borrowed money at ruling rates and son thereafter selling at a profit in small lots — Transaction, held, was a commercial one entered into with profit motive and was not in the nature of capital investment

SC 529 (C N 115)

—S. 12 — Assessee, a private limited Company, whose business inter alia is to

Income-tax Act (1922) (contd.)

deal with shares and securities — Assessee purchasing shares of a Company from a share broker — Shares sold with arrear dividends declared long ago but not claimed by previous owners — Amount of arrear dividends received by the assessee — Amount cannot be treated as income liable to tax either under S. 10 or under S. 12 — See Income-tax Act (1922), S. 10 SC 410 (C N 90)

—S. 12-A — Adventure in nature of trade — Assessee firm purchasing large block of shares with borrowed money at ruling rates and soon thereafter selling at a profit in small lots — Transaction, held was a commercial one entered into with profit motive and was not in the nature of capital investment — See Income Tax Act (1922), S. 10 SC 529 (C N 115)

—Ss. 22 (2), (3) and 34—Assessee filing returns in his individual capacity in response to notice under Section 22 (2) and (3) — Income-tax Officer issuing notice under Section 34 without disposing of returns — Notice under Section 34 and consequent assessments are invalid SC 486 (C N 106)

—S.23-A— Rebate may be allowed only after considering applicability of Section 23-A, Income Tax Act (1922) and of propriety of making order under that section — Rebate allowed without applying mind to the question — It can be reopened on ground that it has been made at too low a rate— See Finance Act (1951), Sch. I, Part B, Proviso (1) Mad 133 (C N 35)

—S. 34 — Assessee filing returns in his individual capacity in response to notice under S. 22(2) and (3) — Income Tax Officer issuing notice under S. 34 without disposing of returns — Notice under S. 34 and consequent assessments are invalid — See Income Tax Act (1922), S. 22(2) (3) SC 486 (C N 106)

—S. 34 — Rebate may be allowed only after considering applicability of S. 23-A, Income Tax Act (1922) and of propriety of making order under that section — Rebate allowed without applying mind to the question — Assessment can be reopened on ground that it has been made at too low a rate— See Finance Act (1951), Sch. I, Part B, Proviso (1) Mad 133 (C N 35)

—S. 59 — Validity — Provisions do not suffer from vice of excessive delegation — Rule 24 framed in pursuance of that power is also not ultra vires Assam 61 A (C N 13) (FB)

Income Tax Act (43 of 1961)

—S. 144 — Illegal assessment — Writ against—Best judgment assessment smacking arbitrariness — Held liable to be set

Income-tax Act (1961) (contd.)

aside — See Constitution of India, Art. 226 Andh Pra 125 (C N 16)

—Ss. 147 and 148 — Duty of assessee questioning jurisdiction of I. T. Officer — Conditions precedent — Duty to disclose primary facts, extent of — Consequences of failure — Reasons to issue notice need not be disclosed

Orissa 58 (C N 27)

—S. 148 — Duty of assessee questioning jurisdiction of I. T. Officer — Conditions precedent — Duty to disclose primary facts, extent of — Consequences of failure — Reasons to issue notice need not be disclosed — See Income Tax Act (1961), S. 147 Orissa 58 (C N 27)

Income Tax Rules (1922)

—R. 24 — Validity — Provisions do not suffer from vice of excessive delegation— See Income-tax Act (1922), S. 59 Assam 61 A (C N 13) (FB)

Industrial Disputes Act (14 of 1947)

—S. 2 (i) — 'Industry' — Meaning — Institution carrying on different activities — Dominant purpose will determine its character as "industry" or otherwise — Society catering for intellectual needs of men — Improvement of general knowledge of men through research and publication of journals — Society having no press of its own — Society is not an "industry" — Neither it is an "undertaking." Cal 170 (C N 27)

—S. 2 (rr) — Term 'wages' not defined in former Act — Definition of that term in S. 2 (rr) applied — Car allowance and benefit of free telephone and newspapers given to employee — Held, that both the items were relevant in fixation of fair wages as they were allowed to him to directly reduce the expenditure which would otherwise have gone into his family budget — See Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), S. 2(g)

SC 426 C (C N 94)

—S. 10(1) — Payment of Bonus Act (1965), Section 34(1) — Settlement arrived at between management of Press and Workers' union on 27-3-1962 relating to dearness allowance, bonus and gratuity— Regarding claims made by union failure report made on 20-1-1966 — Bonus issue — Order of Government declining to make a reference on ground that bonus issue is covered by settlement dated 27-3-1962 held an obvious error — Question as to whether Payment of Bonus Act was applicable or not had to be considered with regard to demand made

Mad 145 A (C N 38)

—Ss. 10(1), 12(5) and 19(2) — Settlement arrived at between management of press and workers' union relating to dearness allowance and conditions of service etc. — Demand for enhancement of dear-

Industrial Disputes Act (contd.)

ness allowance and revision of grades — Government refusing to refer demand on grounds that the management was prepared to pay same dearness allowance as agreed with other union and that rate compared favourably with rates in other presses and that the existing grades and wages also compared favourably with those in similar establishments — Held, Court could not canvass order of reference closely to see if there was any material before Government to support its conclusion, as if it was a judicial or quasi-judicial determination— Government had the discretion to make a reference or not — Further, there being failure to give notice under Section 19 (2), which goes to root of the matter, order of Government can be supported on that ground also. Case law discussed.

Mad 145 B (C N 38)

—S. 12(5) — Settlement arrived at between management of press and workers' union relating to dearness allowance and conditions of service etc. — Demand for enhancement of dearness allowance and revision of grades — Government refusing to refer demand on grounds that the management was prepared to pay same dearness allowance as agreed with other union and that rate compared favourably with rates in other presses and that the existing grades and wages also compared favourably with those in similar establishments — Held, Court could not canvass order of reference closely to see if there was any material before Government to support its conclusion, as if it was a judicial or quasi-judicial determination — Government had the discretion to make a reference or not — Further there being failure to give notice under S. 19(2), which goes to root of the matter, order of Government can be supported on that ground also — See Industrial Disputes Act (1947), S. 10(1)

Mad 145 B (C N 38)

—S. 15 — Powers of Labour Court — It is only when Labour Court comes to conclusion that fair enquiry was not held, that it can enter into merits of case

All 210 E (C N 32)

—S. 19(2) — Settlement arrived at between management of press and workers' union relating to dearness allowance and conditions of service etc. — Demand for enhancement of dearness allowance and revision of grades — Government refusing to refer demand on ground that the management was prepared to pay same dearness allowance as agreed with other union and that rate compared favourably with rates in other presses and that the existing grades and wages also compared favourably with those in similar establishments — Held, Court could not canvass order of reference closely to see if there was any material before Govern-

Industrial Disputes Act (contd.)

ment to support its conclusion, as if it was a judicial or quasi-judicial determination — Government had the discretion to make a reference or not — Further there being failure to give notice under S. 19(2), which goes to root of the matter, order of Government can be supported on that ground also — See Industrial Disputes Act (1947), S. 10(1)

Mad 145 B (C N 38)

Industrial Employment (Standing Orders) Act (20 of 1946)

—S. 3 — Object of Act is to have uniform standing orders — Standing Orders after certification bind all employees presently employed as well those employed thereafter — See Industrial Employment (Standing Orders) Act (1946), S. 5

SC 512 A (C N 112)

—Ss. 5 and 3 — Agra Electric Supply Co. Ltd., Standing Orders, Order 32 — Object of Act is to have uniform standing orders — Standing Orders after certification bind all employees presently employed as well those employed thereafter

SC 512 A (C N 112)

—Sch., Item 9 — Scope — Slight mistake in stating charge e.g., quoting wrong section — Mistake cannot vitiate trial — See Criminal P. C. (1898), S. 242

All 210 A (C N 32)

—Sch., Item 9 — Misconduct — Meaning of — It is enough if alleged misconduct affects competence of employee for particular kind of work given to him— Misconduct by theft of property — Mere absence of evidence as to ownership of property could not make decision of domestic tribunal perverse.

All 210 B (C N 32)

—Sch. Item 9 — Double jeopardy — Scope of— See Constitution of India, Articles 20 (2) and 310, 311

All 210 C (C N 32)

Insurance Act (4 of 1938)

—Ss. 3(4)(f), 64-M(3), 110 and 114 — Insurance Rules (1939), R. 17-H—R. 17-H does not confer power of cancellation of registration of insurer independently of S. 3(4)(f) — Right of appeal against cancellation not taken away — (Insurance Rules (1939), R. 17-H)— (Civil P.C. (1908), Preamble — Interpretation of Statutes)

Delhi 90 A (C N 20) (FB)

—S. 3 (5-c) — Insurance Rules (1939), R. 17-H — Registration cancelled in pursuance of S. 64-M(3) of Act and R. 17-H may be revised in suitable case — See Insurance Act (1938), S. 64-M (3)

Delhi 90 B (C N 20) (FB)

—S. 64-M (3) — Insurance Rules (1939), R. 17-H — R. 17-H does not confer power of cancellation of registration of insurer independently of S. 3(4)(f) — See Insurance Act (1938), S. 3(4)(f)

Delhi 90 A (C N 20) (FB)

Insurance Act (contd.)

—Ss. 64-M(3) and 3 (5-c) — Insurance Rules (1939). R. 17-H — Registration cancelled in pursuance of S. 64-M (3) may be revived in suitable case — (Insurance Rules (1939), R. 17-H)

Delhi 90 B (C N 20) (FB)

—S. 64-M (3) — Insurance Rules (1939), R. 17-H — Constitution of India, Art. 14 — S. 64-M (3) and R. 17-H are not violative of Art. 14 — (Insurance Rules (1939), R. 17-H) — (Constitution of India, Art. 14)

Delhi 90 C (C N 20) (FB)

—S. 110 — Insurance Rules (1939), R. 17-H — Cancellation of registration of insurer under S. 64-M (3) of Act and R. 17-H — Right of appeal against cancellation not taken away — See Insurance Act (1938), S. 3 (4) (f)

Delhi 90 A (C N 20) (FB)

—S. 114 — Scope — See Insurance Act (1938), S. 3 (4) (f)

Delhi 90 A (C N 20) (FB)

Insurance Rules (1939)

—R. 17-H — R. 17-H does not confer power of cancellation of registration of insurer independently of S. 3 (4) (f) — See Insurance Act (1938), S. 3 (4) (f)

Delhi 90 A (C N 20) (FB)

—R. 17-H — Registration cancelled in pursuance of S. 64-M(3) of Insurance Act and R. 17-H may be revived in suitable case — See Insurance Act (1938), Section 64-M (3)

Delhi 90 B (C N 20) (FB)

—R. 17-H — Constitution of India, Art. 14 — R. 17-H is not violative of Art. 14 — See Insurance Act (1938), Section 64-M (3)

Delhi 90 C (C N 20) (FB)

Iron and Steel (Control) Order (1956)

—Para 14(2) — Order under S. 3 Essential Commodities Act — Contravention of direction contained in notification issued under Para. 14(2) of Order — It is not contravention of provisions of Order and so not punishable under S. 7 of the Act — See Essential Commodities Act (1955), S. 3

Cal 167 (C N 25)

Interpretation of Statutes

—Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall" — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 36

Delhi 85 A (C N 18)

Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)

See under Civil Services.

J. & K. State Evacuees' (Administration of Property) Act (6 of 2006)

—S. 30 and R. 27(6) of the Rules under the Act — Review application — Limita-

J. & K. State Evacuees' (Administration of Property) Act (contd.)

tion — Application has to be filed within 30 days

J & K 50 B (C N 13) (FB)

—S. 30 — Civil P. C. (1908), O. 47, R. 1 — Power of review — It is analogous with O. 47, R. 1

J & K 50 C (C N 13) (FB)

—S. 30 (5) — Order of Custodian General — Review of — Successor in office can review — (Civil P. C. (1908), O. 47, R. 1)

J & K 50 A (C N 13) (FB)

—Rules under R. 27 (6) — Review application — Limitation — Application has to be filed within 30 days — See J. & K. State Evacuees' (Administration of Property) Act (6 of 2006), S. 30

J & K 50 B (C N 13) (FB)

Kerala Civil Services (Classification, Control and Appeal) Rules (1960)

See under Civil Services.

Kerala Panchayats Act (32 of 1960)

See under Panchayats.

Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (1963)

See under Panchayats.

Land Acquisition Act (1 of 1894)

—S. 11 Proviso (As inserted by Mysore Act 17 of 1961) — Land Acquisition Officer and State Government — Relation between — Principal and Agent — Proviso to S. 11 is not ultra vires main section

Mysore 89 A (C N 23)

—S. 11 Proviso (As inserted by Mysore Act 17 of 1961) — Determination of compensation by Land Acquisition Officer — Government's approval — Nature — Confidential communication to Land Acquisition Officer asking to fix certain compensation amount — Effect

Mys 89 B (C N 23)

—S. 18 — District Court acting under S. 18 is a Court — Claim petition under S. 110-C — Judgment of Criminal Court determining guilt or a innocence of driver is not binding on Claims Tribunal — Claims Tribunal is "Court" within S. 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — See Motor Vehicles Act (1939), Ss. 110 to 110-F

Punj 137 A (C N 20)

—S. 23 — Solatium as awarded under S. 23 is not part of award within meaning of S. 26 — Appeal to High Court — No Court-fee is payable on difference of solatium as a result of increase in compensation awarded by Court and that awarded by Collector — See Court-fees and Suits Valuations— Andhra Pradesh Court Fees and Suits Valuation Act (7 of 1956), S. 48

Andh Pra 139 (C N 19) (FB)

—S. 26 — Solatium as awarded under S. 23 is not part of award within meaning of S. 26 — Appeal to High Court — No

Land Acquisition Act (contd.)

Court-fee is payable on difference of solatium as a result of increase in compensation awarded by Court and that awarded by Collector — See Court-fees and Suits Valuations — Andhra Pradesh Court Fees and Suits Valuation Act (7 of 1956), S. 48

Andh Pra 139 (C N 19) (FB)

—S. 30 — Acquisition of Land — Suit relating to title to acquired land — See Civil P. C. (1908), S. 11

Mys 81 (C N 20)

—S. 54 — Solatium as awarded under S. 23 is not part of award within meaning of S. 26 — Appeal to High Court — No Court fee is payable on difference of solatium as a result of increase in compensation awarded by Court and that awarded by Collector — See Court-fees and Suits Valuations— Andhra Pradesh Court Fees and Suits Valuation Act (7 of 1956), S. 48

Andh Pra 139 (C N 19) (FB)

Limitation Act (9 of 1908)

—Pre — Interpretation of Articles of Limitation Act — Principles

All 228 C (C N 36)

—S. 9 — Once period of limitation starts running, it cannot be arrested

All 228 D (C N 36)

—S. 14 — Prescription of period of limitation under Bombay Tenancy and Agricultural Lands (Vidarbha Region & Kutch Area) Act (99 of 1958) — It is different from period prescribed by 1st Sch. of Limitation Act — S. 14 of Limitation Act applies to proceedings under S. 36(1) — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 36(1)

Bom 138 B (C N 25)

—S. 14 — Limitation prescribed under S. 36(1) of Bombay Tenancy and Agricultural Lands (Vidarbha Region & Kutch Area) Act (99 of 1958) — Computation of — Proceedings instituted under S. 145 Cr. P. C. cannot be taken into account for that purpose, by applying S. 14. Lim. Act — See Tenancy Laws— Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 36(1)

Bom 138 C (C N 25)

—S. 28 — Puisse mortgagee not in possession of mortgaged property— His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91(a) T. P. Act — Suit for redemption of prior mortgages even though not barred under Art. 148 is not maintainable — See Limitation Act (1908), Art. 132

Ker 81 B (C N 17)

—S. 29(2) — Prescription of period of limitation under Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958) — Must be taken to be different from period prescribed by 1st Sch. of Limitation Act for the

Limitation Act (1908) (contd.)

purpose of S. 29(2) — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1959), S. 36(1)

Bom 138 B (C N 25)

—Art. 97 — Dismissal of application under S. 40 — Revision also dismissed — Subsequent application for registration of claim also dismissed — Applicant directed to go to civil suit — Limitation for suit — See Administration of Evacuee Property Act (1950), S. 40

All 228 E (C N 36)

—Art. 113 — Plaintiff obtaining theka of Fishery rights in certain tank — Defendants agreeing to pay half of theka money to plaintiff in return of half of fishery rights — Suit by plaintiff for recovery of amount after defendants' working out their theka in respect of their share — Held, suit was governed by Article 115 and not Art. 113 — See Limitation Act (1908), Art. 115

All 206 B (C N 31) (FB)

—Arts. 115, 113 — Plaintiff obtaining theka of Fishery rights in certain tank for complete year — Defendants agreeing to pay half of theka money to plaintiff in return of half of fishery rights in tank — Suit by plaintiff for recovery of amount after defendants working out their theka in respect of their share — Held, suit was for recovery of amount and not for specific performance of contract — Suit was governed by Art. 115 and not Art. 113

All 206 B (C N 31) (FB)

—Arts. 115, 120 — Word "compensation" in Art. 115 — Includes money due under contract — Suit to recover such amount is governed by Art. 115 and not Art. 120. AIR 1962 All 438. **Overruled**— (Contract Act (1872), S. 73) — (Words and Phrases — Word "Compensation")

All 206 C (C N 31) (FB)

—Art. 116 — Dismissal of application under S. 40 — Revision also dismissed — Subsequent application for registration of claim also dismissed — Applicant directed to go to civil court— Limitation for suit — See Administration of Evacuee Property Act (1950), S. 40

All 228 E (C N 36)

—Art. 120 — Applicability — Article is residuary in nature — Applies when no other Article is applicable

All 206 A (C N 31) (FB)

—Art. 120 — Money due under contract — Suit to recover such amount — Governed by Art. 115 and not Art. 120— AIR 1962 All 438, **Overruled** — See Limitation Act (1908), Art. 115

All 206 C (C N 31) (FB)

—Art. 120 — Dismissal of application under S. 40 — Revision also dismissed — Subsequent application for registration of claim also dismissed — Applicant directed to go to civil court—Limitation for suit — See Administration of Evacuee Pro-

Limitation Act (1908) (contd.)

erty Act (1950), S. 40
All 228 E (C N 36)
—Arts. 132 and 148 and S. 28 — Transfer of Property Act (1882), S. 91(a) — Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91(a), T. P. Act — Suit for redemption of prior mortgages even though not barred under Art. 148 is not maintainable. AIR 1925 Mad 76 & (1909) 5 Ind Cas 877 (Cal) & AIR 1933 Bom 25, Diss. from — (Travancore Limitation Act, S. 29, Arts. 119 and 136)

Ker 81 B (C N 17)
—Art. 139 — Applicability — Suit for arrears of rent and eviction — Suit more than 12 years after expiry of lease — Tenant holding over and asserting hostile title — No rent ever paid by tenant — Mere demand of rent by landlord is no renewal of lease within the meaning of Section 116 Transfer of Property Act — Suit is barred under Art. 139 — (Transfer of Property Act (1882), Section 116)
Raj 68 (C N 13)

—Art. 142 — Suit for recovery of possession against the person not entitled to possession — Suit not based on ground that plaintiff has been dispossessed by him — Article 142, held not applicable

SC 453 B (C N 100)
—Arts. 142, 144 — Sale of suit land in favour of plaintiff — After redeeming mortgage possession of suit land given to plaintiff — Under a misapprehension Collector forfeiting property and taking possession in year 1928 — But subsequently realising the mistake releasing property and handing over possession to wrong person namely defendant, in 1951 — Suit for ejectment and for recovery of possession on ground of title filed in 1953, held not barred — Right to file suit accrued to plaintiff only after the possession was handed over to defendant — It could not be said that plaintiff was out of possession from 1928 till the date of suit

SC 453 C (C N 100)
—Arts. 142 and 144 — Possession and dispossession — Possession when follows title — Proof of possession and enjoyment by plaintiff though not satisfactory, not valueless — Title of plaintiff to land admitted by defendant — Plea of title by adverse possession taken by the defendant disbelieved — Plaintiff's possession, held, could be presumed from title

Pat 100 (C N 14)
—Art. 144 — Sale of suit land in favour of plaintiff — After redeeming mortgage possession of suit land given to plaintiff — Under a misapprehension Collector forfeiting property and taking possession in year 1928 — But subsequently realising

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ing the mistake releasing property and handing over possession to wrong person namely defendant in 1951 — Suit for ejectment and for recovery of possession on ground of title filed in 1953, held not barred — Right to file suit accrued to plaintiff only after the possession was handed over to defendant — It could not be said that plaintiff was out of possession from 1928 till the date of suit — See Limitation Act (1908), Art. 142

SC 453 C (C N 100)
—Art. 114 — Possession and dispossession — Possession when follows title — Proof of possession and enjoyment by plaintiff though not satisfactory, not valueless — Title of plaintiff to land admitted by defendant — Plea of title by adverse possession taken by the defendant disbelieved — Plaintiff's possession, held, could be presumed from title — See Limitation Act (1908), Art. 142

Pat 100 (C N 14)
—Art. 148 — Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91(a) T. P. Act — Suit for redemption of prior mortgages even though not barred under Art. 148 is not maintainable — See Limitation Act (1908), Art. 132

Ker 81 B (C N 17)
—Art. 181 — Application under S. 17 — Article 181 applies — Time begins to run from the date of sale of property — Fact that only symbolic possession and not actual physical possession of property was given in sale is immaterial — See Administration of Evacuee Property Act (1950), S. 17
Delhi 82 A (C N 17)

Limitation Act (36 of 1963)

—S. 5 — Sufficient cause — Appellant businessman returning from another place on last day of limitation — Lawyer out of town — Copies already given to the lawyer — Copies found out 5 days after search — Delay of 5 days for filing appeal — Held there was sufficient cause and delay could be condoned. AIR 1919 Pat 503, Diss.
Orissa 53 (C N 24)

Madhya Bharat Land Revenue and Tenancy Act (66 of 1950)
See under Tenancy Laws.

Madhya Bharat Ryotwari Sub-Lessee Protection Act (29 of 1955)
See under Tenancy Laws.

Madhya Pradesh Foodgrains Dealers Licensing Order 1965

—Cl. 3 — Licence — Renewal — Principles — See Essential Commodities Act (1955), S. 3
Madh Pra 70 A (C N 17)
—Cl. 3 — Renewal of license — Refusal to renew — Consideration — See Essential

Madhya Pradesh Foodgrains Dealers Licensing Order (contd.)

Commodities Act (1955), Section 3

Madh Pra 70 B (C N 17)

—Cl. 3 — Refusing to renew licence — Authority acts quasi-judicially — Principles of natural justice have to be observed — See Essential Commodities Act (1955), S. 3

Madh Pra 70 C (C N 17)

—Cl. 7 — Licence — Renewal — Principles — See Essential Commodities Act (1955), S. 3

Madh Pra 70 A (C N 17)

—Cl. 7 — Renewal of license — Refusal to renew — Consideration — See Essential Commodities Act (1955), Section 3

Madh Pra 70 B (C N 17)

—Cl. 7 — Refusing to renew licence — Authority acts quasi-judicially — Principles of natural justice have to be observed — See Essential Commodities Act (1955), S. 3

Madh Pra 70 C (C N 17)

Madhya Pradesh Land Revenue Code (20 of 1959)

—Ss. 131 and 257 — Scope of S. 131 (1) — Provisions deal with a right of limited nature and for limited purpose namely private right of way of cultivator through the field of another for access to his field — Dispute under the section is to be decided on the basis of convenience of the parties and not on the basis of perfection of right by prescription — Decision of revenue authorities under this section is exclusive and suit to enforce the common law right i. e., under Easements Act, does not lie.

Madh Pra 79 A (C N 17)

—S. 131 (1) and (2) — Words “any person” in sub-section (2) are wide enough to include plaintiffs as well as defendants in proceedings under sub-section (1) — It is not necessary that only such person who has moved the tahsildar under sub-section (1) can institute a civil suit for establishing his right to easement — Sub-section (2), however, does not enable a person to bring civil suit to establish his right provided for in sub-section (1) — Civil Second Appeal No. 146 of 1964, dated 30-10-1964 (M. P.), Partly Reversed

Madh Pra 79 B (C N 19)

—S. 185 (1) (ii) (b) — Madhya Bharat Ryotwari Sub-lessee Protection Act (29 of 1955), Sections 3 and 2 (b) — “Ryotwari sub-lessee”, meaning of — Person inducted as a sub-lessee contrary to provisions of M. B. Act 66 of 1950 — His possession not protected by Act 29 of 1955 — Such a person is not a “Ryotwari sub-lessee” as defined in Act 29 of 1955 and hence cannot acquire status of occupancy tenant under Section 185 (1) (ii) (b) of M. P. Land Revenue Code — (Madhya Bharat Land Revenue and Tenancy Act Smt. 2007 (66 of 1950) Sections 73, 78) — Second Appeal No. 254 of 1962, D/- 9-7-1965 (M. P.), Reversed;

Madhya Pradesh Land Revenue Code (contd). 1963 MPLJ 314, Overruled.

SC 483 (C N 105)

—S. 257 — Scope of Section 131 (1) — Provisions deal with right of limited nature and for limited purpose namely private right of way of cultivator through the field of another for access to his field — Dispute under the section is to be decided on the basis of convenience of the parties and not on the basis of perfection of right by prescription — Decision of revenue authorities under this section is exclusive and suit to enforce the common law right i. e., under Easements Act, does not lie — See M. P. Land Revenue Code (1959), Section 131

Madh Pra 79 A (C N 19)

Madras District Municipalities Act (5 of 1920)

See under Municipalities.

Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)

See under Tenancy Laws.

Madras General Sales Tax Act (9 of 1939)

See under Sales Tax.

Madras General Sales Tax Act (1 of 1959)

See under Sales Tax.

Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961)

See under Tenancy Laws.

Maharashtra Education (Cess) Act (27 of 1962)

See under Education.

Medicinal and Toilet Preparations (Excise Duties) Act (6 of 1955)

—S. 3 and Schedule, Item I and Cl. 2 (iii) — Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, Rules 60 and 67 — Presumption under Rule 67 possible only if the preparation is an Ayurvedic one — Higher rate under Item I cannot also be charged

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—Schedule, Item I and Clause 2 (iii) — Presumption under Rule 67 possible only if the preparation is an Ayurvedic one — Higher rate under Item I cannot also be charged — See Medicinal and Toilet Preparations (Excise Duties) Act (1955), Section 3

Cal 161 (C N 23)

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956

—R. 60 — Presumption under Rule 67 possible only if the preparation is an Ayurvedic one — Higher rate under item 1 cannot also be charged — See Medicinal and Toilet Preparations (Excise Duties) Act (1955), S. 3

Cal 161 (C N 23)

—R. 67 — Presumption under Rule 67 possible only if the preparation is an Ayurvedic one — Higher rate under Item 1 cannot also be charged — See Medicinal and Toilet Preparations (Excise Duties) Act (1955), S. 3

Cal 161 (C N 23)

Motor Vehicles Act (4 of 1939)

—S. 43 (1) — Re-determination of strength of permits — Relevant considerations indicated — Authority acting mechanically rather by applying its mind — Resolution held bad — See Motor Vehicles Act (1939), S. 47 (3)

All 215 B (C N 33)

—Ss. 47 (3) and 64-A First Proviso — Re-determination of strength of permits — Notice to existing operators not necessary as no rights are affected — Nor does provision for limitation in First Proviso to S. 64-A confer on him right of hearing — (Constitution of India, Art. 226)

All 215 A (C N 33)

—Ss. 47 (3) and 43 (1) — Re-determination of strength of permits — Relevant considerations indicated — Authority acting mechanically rather by applying its mind — Resolution held bad

All 215 B (C N 33)

—S. 47 (3) — Interpretation of Statutes — Mandatory or directory provisions — See Civil P. C. (1908), Preamble

All 215 C (C N 33)

—Ss. 48 and 57 — Scope — Application for variation of conditions of permit for including new route or area — Provisions of Section 57 (3), (4) and (5) cannot be ignored

SC 466 A (C N 102)

—S. 57 — Application for variation of conditions of permit for including new route or area — Provisions of Section 57 (3), (4) and (5) cannot be ignored — See Motor Vehicles Act (1939), Section 48

SC 466 A (C N 102)

—S. 57—Ss. 288 & 289 of Delhi Municipal Corporation Act (66 of 1957) do not dispense with compliance with provisions of Motor Vehicles Act — See Municipalities — Delhi Municipal Corporation Act (66 of 1957) S. 288

SC 466 B (C N 102)

—S. 59 (3) (a) — Cancellation of permit under S. 60 (1) (a)—Contravention of Chap. V or Rule framed under Chap. IV — Permit cannot be cancelled under S. 60 (1) (a) — See Motor Vehicles Act (1939), S. 60 (1) (a)

Cal 174 C (C N 28)

—S. 60 (1) (a) and (c) — Cancellation of permit — R. T. A. acts quasi-judicially — It has also to give reasons for its decision — Permit cannot be cancelled under Section 60 (1) (a)

Cal 174 A (C N 28)

—Ss. 60 (1) (a) and 59 (3) (a) — Bengal Motor Vehicles Rules, Rule 108 — Cancellation of permit under Section 60 (1) (a) — Contravention of Chapter V or Rule framed thereunder necessary — Rule 108 contravened, framed under Chapter IV — Permit cannot be cancelled under S. 60 (1) (a)

Cal 174 C (C N 28)

—S. 60 (3) — Duty of R. T. A. under sub-section (3) — Matter not considered at all by Authority — Infirmary is introduced in the resolution to cancel the permit.

Cal 174 D (C N 28)

—S. 64 (b) — Appeal against cancellation of permit — Additional evidence admitted

Motor Vehicles Act (contd.)

— Appellate Authority should give opportunity to rebut it

Cal 174 B (C N 28)

—S. 64A — First provision—Re-determination of strength of permits — Notice to existing operators not necessary as no rights are affected — Nor does provision for limitation in first proviso to Section 64A confer on him right of hearing — See Motor Vehicles Act (1939), S. 47 (3)

All 215 A (C N 33)

—Ss. 110 to 110-F — Claim petition under Section 110-C — Judgment of Criminal Court determining guilt or innocence of driver is not binding on Claims Tribunal — Claims Tribunal is "Court" within Section 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — AIR 1968 Punj 466, Overruled — (Evidence Act (1872), Sections 3, 43) — (Punjab Motor Accidents Claims Tribunal Rules (1964), Rule 3) — (Land Acquisition Act (1894), Section 18 — District Court acting under Section 18 is a Court)

Punj 137 A (C N 20)

—S. 110F — Jurisdiction of Tribunal under Workmen's Compensation Act, 1923, is not barred — What is barred is jurisdiction of Civil Court — Tribunals under two Acts have concurrent jurisdiction — Option lies with claimant to choose one or the other tribunal and he cannot be compelled to choose a forum which would be convenient to defendant — Once a particular forum is chosen, claimant cannot choose another forum — Though application for compensation is not filed under Motor Vehicles Act, employer's remedy against insurer under contract of insurance is always available under general law — (Workmen's Compensation Act (1923), Section 19)

Andh Pra 124 (C N 15)

MUNICIPALITIES

—Delhi Municipal Corporation Act (66 of 1957)

—Ss. 288, 289 — Scope — Flying vehicles by Corporation over entire area of Union Territory of Delhi — Sections do not dispense with compliance with provisions of Motor Vehicles Act — (Motor Vehicles Act (1939), S. 57)

SC 466 B (C N 102)

—S. 289 — Section 288 of Delhi Municipal Corporation Act (66 of 1957) do not dispense with compliance with provisions of Motor Vehicles Act — See Municipalities — Delhi Municipal Corporation Act (66 of 1957), S. 288

SC 466 B (C N 102)

—Madras District Municipalities Act (5 of 1920)

—S. 82 (2) — Municipality which originally formed part of Madras State and on reorganisation became part of Mysore State, issued demand notice for property tax for assessment year 1965-66 determining rateable annual value under Section 101 (2) but assessed tax at rates under Madras Act of 1920 — Tax paid as per demand notice —

Municipalities — Madras District Municipalities Act (contd.)

Demand notice for year 1966-67 under Madras Act held not justified in view of second and third proviso to S. 382 (1) of Mysore Act — See Municipalities — Mysore Municipalities Act (12 of 1964), S. 382 (1), Proviso 2 SC 417 (C N 92)

—Mysore Municipalities Act (22 of 1964)

—S. 101 (2) — Municipality which originally formed part of Madras State and on reorganisation became part of Mysore State, issued demand notice for property tax for assessment year 1965-66 determining rateable annual value under Section 101 (2) but assessed tax at rates under Madras Act of 1920 — Tax paid as per demand notice — Demand notice for year 1966-67 under Madras Act held not justified in view of second and third proviso to Section 382 (1) of Mysore Act — See Municipalities — Mysore Municipalities Act (22 of 1964), Section 382 (1) Proviso 2 SC 417 (C N 92)

—Ss. 382 (1) Provisos 2 and 3, 101 (2) — Madras District Municipalities Act (5 of 1920), Section 82 (2) — Municipality which originally formed part of Madras State and on reorganisation became part of Mysore State, issued demand notice for property tax for assessment year 1965-66 determining rateable annual value under Section 101 (2) of Mysore Act but assessed tax at rates under Madras Act of 1920 — Tax paid as per demand notice — Demand notice for year 1966-67 under Madras Act held not justified in view of second and third provisos to Sections 382 (1) of Mysore Act SC 417 (C N 92)

Mysore Co-operative Societies Rules (1960)

See under Co-operative Societies.

Mysore Municipalities Act (22 of 1964)

See under Municipalities.

Negotiable Instruments Act (26 of 1881)

—Ss. 85, 85A, 131, 131A — Protection under Sections 85, 85A, when available stated — Negligence of drawee in cashing the draft held established — Protection under Ss. 131, 131A, when available stated — Protection held not available to collecting bank — (Civil P. C. (1908), Sections 100-101 — Question of fact — Negligence)

Ker 74 A (C N 16)

—S. 85A — Protection under Ss. 85, 85A when available stated — Negligence of drawee in cashing the draft held established — Protection under Sections 131, 131A, when available stated — Protection held not available to collecting bank — See Negotiable Instruments Act (1881), S. 85

Ker 74A (C N 16)

—S. 131 — Protection under Sections 85, 85-A, when available stated — Negligence of drawee in cashing the draft held establish-

Negotiable Instruments Act (contd.)

ed — Protection under Sections 131, 131-A, when available stated — Protection held not available to collecting Bank — See Negotiable Instruments Act (1881), Section 85 Ker 74A (C N 16)

—S. 131 — "Customer" who is, stated — (Words and Phrases — "Customer of Bank")

Ker 74 B (C N 16)

—S. 131-A — Protection under Sections 85, 85-A, when available stated — Negligence of drawee in cashing the draft held established — Protection under Sections 131, 131-A, when available stated — Protection held not available to collecting Bank — See Negotiable Instruments Act (1881), Section 85

Ker 74 A (C N 16)

PANCHAYATS**—Kerala Panchayats Act (32 of 1960)**

—S. 76 — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — See Panchayats — Kerala Panchayats Act (32 of 1960), Section 96

Ker 88B (C N 18)

—Ss. 96, 97 — Constitution of India, Article 246, Schedule 7, List 1, Entry 52 and List 2, Entry 6 — Rice Milling Industry (Regulation) Act (1958), Sections 5, 6 and 2 — Validity of Sections 96, 97 of Kerala Act — State Legislature held competent to enact law contained in these sections

Ker 88A (C N 18)

—Ss. 96, 97, 76 — Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (1963) — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — (Constitution of India, Article 265)

Ker 88B (C N 18)

—S. 97 — Validity of Sections 96, 97 of Kerala Act — State Legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96

Ker 88 A (C N 18)

—S. 97 — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 96

Ker 88 B (C N 18)

—Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (1963)

—Validity of — Provisions relating to levy of fees are invalid — Issue of licenses

Panchayats — Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (contd.)

and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — See Panchayats — Kerala Panchayats Act (32 of 1960), Section 96
Ker 88 B (C N 18)

—Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961)

—S. 5 (2) (cc) — Co-option under — Not automatic — It has to be done in meeting convened under Rule 3 (1) read with Rule 4-A of Panchayat Samitis (Co-option of Members) Rules, 1961 — (Point conceded)
Punj 189 A (C N 25) (FB)

—S. 16 read with Rules 3 and 4-A of Panchayat Samitis (Co-option of Members) Rules, 1961 — Convening meeting for purpose of co-option — Requirement of five days notice is mandatory — Lots drawn by Returning Officer in a meeting convened without giving five days notice — Deputy Commissioner after noticing defect reconvened a meeting but instead of drawing lots as required under Rule 4-A approving lots already drawn by Returning Officer, with consent of candidates — Held, co-option in this manner was patently illegal and had to be set aside — Jurisdiction could not be conferred by mere consent where it does not exist in law
Punj 189 B (C N 25) (FB)

—Punjab Panchayat Samitis (Co-option of Members) Rules, 1961

—R. 3 — Convening meeting for purpose of Co-option — Requirement of five days notice is mandatory — See Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), S. 16

Punj 189 B (C N 25) (FB)

— R. 3. (1) — Co-option under — Not automatic — See Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), Section 5 (2) (cc)

Punj 189A (C N 25) (FB)

—R. 4-A — Co-option under — Not automatic — See Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), Section 5 (2) (cc)

Punj 189A (C N 25) (FB)

—R. 4A — Convening meeting for purpose of Co-option — Requirement of five days notice is mandatory — See Panchayat — Punjab Panchayat Samities and Zilla Parishads Act (3 of 1961), Section 16

Punj 189 B (C N 25) (FB)

— U. P. Panchayat Raj Act (26 of 1947)

—Ss. 95 (1) (g), 96-A — Suspension of Pradhan of Gaon Sabha — Power is delegated to Sub-Divisional Officer only and not to Collector — Suspension order passed by Sub-Divisional Officer under the Collector's order — Suspension is invalid.

All 251A (C N 41) (FB)

Panchayats — U. P. Panchayat Raj Act (contd.)

—S. 95 (1) (g) — Power under to suspend Pradhan of Gaon-Sabha — Cannot be exercised during pendency of enquiry — Status of Pradhan vis-a-vis State Government — Sub-clauses of Section 95 (1) (g) — Construction of — 1966 All L J 740 and C W W No. 1140 of 1969, D/- 23-4-1969 (All) and C.M. W. No. 2399 of 1968 D/- 25-4-1969 (All), Overruled All 251B (C N 41) (FB)

—S. 95 (1) (g) (ii) and (iii) — Suspension of Pradhan — Validity of Order — Determination of — Duty of Court — Pradhan charged for giving leases illegally to some persons — Charge referable to Clause (iii) and not Clause (ii) of Section 95 (1) (g)
All 251C (C N 41) (FB)

—S. 96A — Suspension of Pradhan of Gaon Sabha — Power is delegated to Sub-Divisional Officer only and not to Collector — Suspension order passed by Sub-Divisional Officer under Collector's order — Suspension is invalid — See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 95 (1) (g)
All 251 A (C N 41) (FB)

Payment of Bonus Act (21 of 1965)

—S. 34 (1) Settlement arrived at between management of Press and workers union on 27-3-1962 relating to dearness allowance, bonus and gratuity — Regarding claims made by Union failure report made on 20-1-1966 — Bonus issue — Order of Government declining to make a reference on ground that bonus issue is covered by settlement dated 27-3-1962 held an obvious error — Question as to whether payment of Bonus Act was applicable or not had to be considered with regard to demand made — See Industrial Disputes Act (1947), S. 10 (1)
Mad 145 A (C N 38)

Penal Code (45 of 1860)

—S. 21 — Pradhan of Gaon Sabha is public servant — No relation, however, of master and servant with Government — See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 95 (1) (g)

All 251 B (C N 41) (FB)

—S. 53 — Principles of punishment — Duty of Court — Enhancement of sentence — See Criminal P. C. (1898), S. 439 (1)

Goa 56 B (C N 11)

—S. 102 — Right of private defence — How long continues — Attempt to assault accused with weapon by the injured — Weapon snatched away by accused — No evidence to show any attempt by injured to snatch back the weapon or to secure any other weapon — Inflicting of injuries by accused on the injured by the weapon held could not be in private defence

Orissa 50B (C N 23)

—S. 109 — Accused charged under Section 314 read with Section 109, Penal Code

Penal Code (contd.)

for abetting Rule to cause miscarriage of A — At no stage he was notified that he would be tried for offence of having abetted A — Throughout the trial accused was asked to defend himself against the charge on which he was tried — Conviction for abetting A to cause miscarriage, held, not proper — Accused was likely to have been prejudiced by charge on the basis of which he was tried — See Criminal P. C. (1898), Section 237

SC 436 (C N 95)

—S. 120A — Foreign Exchange Regulation Act (1947), Section 21 (1) — Contract contemplated under Section 21 (1) — Nature — Section 21 (1) does not cover Criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of Foreign Exchange — Allegation therein that two accused agreed to obtain Foreign Exchange illegally — Framing of charge under Section 120B — Maintainability — See Penal Code (1860), Section 120B

SC 549B (C N 121)

—Ss. 120A, 120B — Agreement to do illegal act — Acts not amounting to offence done by one conspirator in furtherance of that agreement — He is still liable to be convicted under Section 120B

SC 549C (C N 121)

—S. 120A — Essentials of offence — Agreement between two or more persons — When constitutes conspiracy — Continuance of agreement — Effect

SC 549D (C N 121)

—Ss. 120B, 120A — Foreign Exchange Regulations Act (1947), Section 21 (1) — Contract contemplated under Section 21 (1) — Nature — Section 21 (1) does not cover criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of Foreign Exchange — Allegation therein that two accused agreed to obtain Foreign Exchange illegally — Framing of charge under Section 120B — Maintainability

SC 549B (C N 121)

—S. 120B — Agreement to do illegal act — Acts not amounting to offence done by conspirator in furtherance of that agreement — Not material in convicting him under Section 120B — See Penal Code (1860), Section 120A

SC 549C (C N 121)

—S. 147 — In compromise cases acquittal is recorded simply because parties come to terms — See Criminal Procedure Code (5 of 1898), Section 345

All 235 (C N 38)

—S. 161 — Accused charged for taking bribe — His conviction on uncorroborated statement of complainant — Circumstantial and documentary evidence, however, supported defence version—Conviction set aside — See Prevention of Corruption Act (1947), Section 5 (1) (d) read with Section 5 (2)

SC 450B (C N 99)

Penal Code (contd.)

—S. 161 — Offence under Section 5 (2) read with Section 5 (1) (d), Prevention of Corruption Act and Section 161 Penal Code — Held on facts that presumption under Section 4 (1), Prevention of Corruption Act applied to the case and guilt of the accused had been established beyond reasonable doubt — See Prevention of Corruption Act (1947), Section 4 (1)

Delhi 95 (C N 21)

—S. 188 — Violation of Prohibitory order under Section 144 or 145 Criminal P. C. — Magistrate may prefer complaint under Section 188, Penal Code — Cannot take cognizance himself — See Criminal P. C. (1898), Section 144

Pat 102B (C N 15)

—S. 314 — Accused charged under Section 314 read with Section 109, Penal Code for abetting R to cause miscarriage of A — At no stage he was notified that he would be tried for offence of having abetted A — Throughout the trial accused was asked to defend himself against the charge on which he was tried — Conviction for abetting A to cause miscarriage, held, not proper — Accused was likely to have been prejudiced by charge on the basis of which he was tried — See Criminal P. C. (1898), Section 237

SC 436 (C N 95)

—S. 323 — In compromise cases acquittal is recorded simply because parties come to terms — See Criminal Procedure Code (5 of 1898), S. 345

All 235 (C N 38)

—S. 337 — Distinction between civil and criminal negligence — See Tort — Negligence

Punjab 137 B (C N 20)

—Ss. 339, 390 — Wrongful restraint — Obstruction to truck from proceeding in direction in which it wanted to proceed — No obstruction to its occupants from proceeding anywhere — No wrongful restraint

Goa 49 A (C N 9)

—S. 379 — Magistrate making a prohibitory order in a proceeding under Sec. 144 Criminal P. C. — One party violating the order and harvesting the crop — Opposite party complaining to the Magistrate about theft — Held, charge of theft would not lie — (Criminal P. C. (1898), Ss. 144 and 145)

Pat 102A (C N 15)

—S. 390 — Wrongful restraint — Obstruction to truck from proceeding in direction in which it wanted to proceed — No obstruction to its occupants from proceeding anywhere — No wrongful restraint — See Penal Code (1860), S. 339

Goa 49 A (C N 9)

—S. 396 — Recovery of goods stolen in dacoity from accused three days after occurrence — Only presumption deducible from facts being that accused knew articles as stolen but not as stolen in dacoity — His conviction is proper under Section 411 and not under Section 396 — See Penal Code

Penal Code (contd.)
(1860), Section 411

SC 535 (C N 117)

—Ss. 411, 396 — Recovery of cloth, stolen in dacoity, from accused, a cloth merchant, three days after occurrence — Other stolen articles not recovered from him — His name not mentioned as one of the participants in dacoity, either by any eye-witnesses or in dying declaration of person killed in dacoity — No evidence to show that in village in which accused lived, it was known that dacoity took place and goods stolen — Held, only presumption that could be drawn was that accused knew that goods were stolen but he did not know that they were stolen in dacoity — He could be convicted only under Section 411 and not under Section 396 — Decision of Allahabad High Court, Reversed — Evidence Act (1872), S. 114, Illustration (a)

SC 535 (C N 117)

—S. 494 — Hindu Marriage Act (1955), Ss. 7 and 17 — Charge under Section 494 — Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies — Nature of evidence required

Tripura 30 (C N 6)

Pensions Act (23 of 1871)

—S. 4 — Suit relating to amount of gratuity — Held, gratuity must be taken to be commuted pension and as such capital sum — Suit in Civil Court maintainable

All 234A (C N 37)

—S. 4 — Expression 'grant of money' does not include gratuity or a capital sum converted out of a part of pension

All 234 B (C N 37)

Police Act (5 of 1861)

—S. 34 — Scope and applicability — Notification of State Government extending provisions of Section 34 to whole of territory is not in conformity with requirements of Section 34 — Expression 'whole of territory' would not take within its sweep a town for purpose of Section 34 — "Town", meaning of — In absence of notification specially extending scheme of Section 34 to a town, prosecution for offences under Section 34 committed in that town is not maintainable

Goa 54 (C N 10)

Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act (5 of 1966)

—Art. 5 — Enhancement of Consumption Duty Act falls within Entry 51 and therefore within competence of State Legislature — Constitution of India, Sch. VII, List II, Entry No. 51 Mad 152 A (C N 40)

—Art. 5 — Transport of liquor mentioned in permit effected within time granted without violation of permit — Further duty is not to be paid at time of actual movement of goods in carrier across State's frontier

Mad 152B (C N 40)

Prevention of Corruption Act (2 of 1947)

—Ss. 4 (1), 5 (2) and 5 (1) (d) — Offence under Section 5 (2) read with Sec. 5 (1) (d) and Section 161 Penal Code — Presumption under Section 4 (1) when can be drawn indicated — Held on facts that presumption under Section 4 (1) applied to the case and guilt of the accused had been established beyond reasonable doubt — (Penal Code (1860), Section 161)

Delhi 95 (C N 21)

—S. 5 (1) (d) — S. 5 (1) (d) read with S. 5 (2) — Penal Code (1860), S. 161 — Accused charged for taking bribe — His conviction on uncorroborated statement of complainant — Circumstantial and documentary evidence, however, supporting defence version — Conviction set aside — Decision of Punjab High Court, Reversed

SC 450 B (C N 99)

—Ss. 5 (2) and 5 (1) (d) — Offence under Section 5 (2) read with Section 5 (1) (d) and Section 161, Penal Code — Presumption under Section 4 (1), when can be drawn indicated — Held on facts that presumption under Section 4 (1) applied to the case and guilt of the accused had been established beyond reasonable doubt — See Prevention of Corruption Act (1947), Section 4 (1)

Delhi 95 (C N 21)

Prevention of Food Adulteration Act (37 of 1954)

—S. 10 — Section 10 cannot be so construed as to deprive seller of his defence under Section 19 (2) — See Prevention of Food Adulteration Act (1954), S. 16 (1) (b)

Bom 135 (C N 24)

—S. 10 — Section does not create obligation on person mentioned therein to actively co-operate with Food Inspector in taking sample by handing it over to him — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Pat 104 B (C N 16)

—S. 11 — Section does not cast any positive obligation on Food Inspector to purchase 450 grams of sample alone and not a gram more — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Bom 135 (C N 24)

—Ss. 14, 19 (2) — Prevention of Food Adulteration Rules (1955), Rule 12A proviso — Object underlying Act achieved by giving reasonable interpretation — Court must do so — Warranty as required by proviso to Rule 12A — Use of popular language therein — Object of Act is not defeated — ILR (1967) 2 Ker 676, Reversed — (Civil P. C. (1908), Pre. — Interpretation of Statutes)

SC 520 (C N 113)

—Ss. 16 (1) (b), 19 (2), 11 and 10 — Accused a dealer in "Anik Ghee" supplied by manufacturers in sealed tins — Accused refusing to sell to Food Inspector 450 Grams out of packing of 2 Kg. and insisting to purchase the sealed tin — Inspector refusing to purchase sealed tin as offered — Dealer, held not guilty under Section 16 (1) (b) —

Prevention of Food Adulteration Act (contd.)
Provisions of Sections 10, 11 and 19 to be read harmoniously — Section 10 cannot be so construed as to deprive seller of his defence under Section 19 (2) — Neither Section 11 of the Act nor Rules 22 and 22A of the Rules, prohibits Food Inspector to purchase more than 450 grams of sample — (Prevention of Food Adulteration Rules (1955), Rules 22 and 22A)

Bom 135 (C N 24)

—Ss. 16 (1) (b) and 10 — Expression “to prevent” — Mere refusal to sell article does not amount to prevention

Pat 104 B (C N 16)

—S. 19 (2) — Warranty as required by proviso to Rule 12A — Use of popular language therein — Object of Act is not defeated — See Prevention of Food Adulteration Act (1954), S. 14 SC 520 (C N 113)

—S. 19 (2) — Accused a dealer in “Anik Ghee” supplied by manufacturers in sealed tin under a warranty — Accused refusing to sell to Food Inspector 450 Grams out of packing of 2 Kg. and insisting to purchase the sealed tin — Inspector refusing to purchase sealed tin as offered — Dealer, held, not guilty under Section 16 (1) (b) — Section 10 cannot be so construed as to deprive seller of his defence under S. 19 (2) — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Bom 135 (C N 24)

Prevention of Food Adulteration Rules (1955)

—R. 12A Proviso — Warrantry as required by proviso to Rule 12A — Use of popular language therein — Object of Act is not defeated — See Prevention of Food Adulteration Act (1954), Section 14

SC 520 (C N 113)

—R. 22 — There is nothing in the rule which prevents Food Inspector in a given case from sending a quantity larger than 450 grams — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Bom 135 (C N 24)

—R. 22A — Rule does not prohibit Food Inspector to purchase more than 450 grams of sample — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Bom 135 (C N 24)

Probation of Offenders Act (20 of 1958)

—S. 4 (1) and (2) — Release of accused on probation of good conduct — Consideration of report in terms of Section 4 (2) is condition precedent — Word “shall” in Section 4 (2) is mandatory

Goa 49 B (C N 9)

PROHIBITION

—Assam Liquor Prohibition Act (1 of 1953)

—S. 2 (3) (as amended in 1956 and 1963)

—‘Liquor’ — Offence under Section 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under Section 3A (1963) can be invoked — Presumption re-

Prohibition — Assam Liquor Prohibition Act (contd.)

buttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of Section 3A (1956) and Section 3A (1963) stated — See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963) S. 4 Assam 49 (C N 10)

—S. 3A (1956) (as amended in 1956 and 1963)—‘Liquor’ — Offence under Section 4 for consuming liquor—Burden of proof — State of drunkenness established by prosecution — Presumption under S. 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of Section 3A (1956) and Section 3A (1963) stated — See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963) S. 4 Assam 49 (C N 10)

—S. 3A (1963) (as amended in 1956 and 1963) — ‘Liquor’ — Offence under Sec. 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under Section 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of Section 3A (1956) and Section 3A (1963) stated — See Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963), Section 4

Assam 49 (C N 10)

—Ss. 4, 3A (1963), 3A (1956) and 2 (3) (as amended in 1956 and 1963) — ‘Liquor’ — Offence under Section 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under Section 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of Section 3A (1956) and Section 3A (1963) stated — (Evidence Act (1872), Section 106)

Assam 49 (C N 10)

Public Employment (Requirement as to Residence) Act (44 of 1957)

See under Civil Services.

Punjab Motor Accidents (Claims Tribunal) Rules (1964)

—R. 3 — Claim petition under S. 110-C — Judgment of Criminal Court determining guilt or innocence of driver is not binding on Claims Tribunal — Claims Tribunal is “Court” within Section 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — See Motor Vehicles Act (1939), Ss. 110 to 110F Punj 137 A (C N 20)

Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961)
See under Panchayats.

Punjab Panchayat Samitis (Co-option of Members) Rules (1961)
See under Panchayats.

Punjab Security of Land Tenures Act (10 of 1953)
See under Tenancy Laws.

Railway Establishment Code
See under Civil Services

Railway Services (Conduct) Rules (1956)
See under Civil Services.

Railways Act (9 of 1890), Sections 28 and 29 — Constitution of India, Article 14 — Government Railway and non-Government Railway — Government can be put in a separate class — Discrimination between non-Government Railways alleged — Burden of proof is on petitioner
Pat 109D (C N 18)

—Ss. 29 and 42 — Constitution of India, Art. 245 — Powers of Central Government under Sections 29 and 42 are not absolute — Although sections do not provide any guide-lines — Legislative policy can be gathered from the whole Act
Pat 109A (C N 18)

—Ss. 29 and 42 — Orders under — Quasi-judicial nature — Record of evidence
Pat 109 B (C N 18)

—Ss. 29 and 42 — Constitution of India Article 226 — Speaking orders — Orders of Central Government — Principles to be observed
Pat 109 C (C N 18)

—S. 29 — Government railway and non-Government railway — Government can be put in a separate class — Discrimination between non-Government railways alleged — Burden of proof is on petitioner — See Railways Act (1890), Section 28
Pat 109 D (C N 18)

—S. 42 — Powers of Central Government under Sections 29 and 42 are not absolute — Although sections do not provide any guide-lines legislative policy can be gathered from the whole Act — See Railways Act (1890), Section 29
Pat 109A (C N 18)

—S. 42 — Orders under — Quasi-judicial nature — Record of evidence — See Railways Act (1890), Section 29
Pat 109B (C N 18)

—S. 42 — Speaking orders — Orders of Central Government — Principles to be observed — See Railways Act (1890), S. 29
Pat 109 C (C N 18)

Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950)
See under Houses and Rents.

Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957)
See under Debt Laws.

Registration Act (16 of 1908)

—S. 17 — Merging of self acquired property in joint family property — Registered instrument not necessary — See T. P. Act (1882), S. 123 Andh Pra 126 E (C N 17)

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—Ss. 72, 73 and 77 — Refusal by Sub-Registrar to register document — Refusal not on ground of denial of execution — Appeal under Section 72 — Maintainability — Order of District Registrar whether passed under Section 72 or Section 73 and amounting to refusal to order registration — Suit against, is maintainable under Section 77
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—S. 73 — Refusal by Sub-Registrar to register document — See Registration Act (1908) Section 72
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—S. 14 — Will — Public trust created by Will — Manager appointed — Manager not competent to alienate the property of the trust — Manager, held could not make a gift of the property in favour of his Chela
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—S. 14 — Public trust — H creating by a Will a trust for religious purposes — T made manager of Dera along with its properties for carrying out objects of the Dera and effect improvements — T selected for his ability and learning — Panchayat given right to remove him in case he became bad character — Property not to be alienated except for the purposes of the Dera itself — Held that a public trust for religious purposes was created by the Will
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—Ss. 100 (1) (b) and 123 (4) — Publication of false statements of facts by election agent before his appointment as such — Consent of returned candidate not establish-

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—S. 123 (4) — Publications of false statements of facts by election agent before his appointment as such — Consent of returned candidates not established — Publication held did not invalidate election — See Representation of the People Act (1951), Section 100 (1) (b)
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—S. 123 (4) and (3A) — Statement in newspaper that differences between communities are spread by supporters of rival candidates and that candidate favoured by the newspaper will not preach communal hatred — Statement is not hit either by clause (4) or clause (3A)
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—S. 2 — Validity of Sections 96, 97 of Kerala Act — State Legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), Section 96
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—S. 5 — Validity of Sections 96, 97 of Kerala Act — State Legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (32 of 1960), Section 96
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—S. 5 — Grant of permit to new entrant for establishment of new rice-mill—Licensee of existing rice-mill whether entitled to apply for writ of certiorari — W. P. No. 2298 of 1966 etc. D/-16-2-1967 (Mad), Reversed — W. P. No. 2332 of 1966 (Mad) and ILR 1964-2 Mad 869, Overruled — See Constitution of India, Article 226
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—S. 6 — Validity of Sections 96, 97 of Kerala Act — State Legislature held competent to enact law contained in these sections — See Panchayats — Kerala Panchayats Act (April) 1970 Indexes/4

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—S. 14 (as amended in 1963) — Powers of revisional authority under S. 20 — Extent of — Assessment of additional turnover can be made — See Sales Tax — Andhra Pradesh General Sales Act (6 of 1957), Section 20 (as amended in 1963)
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—S. 9 (2) (b) — Illegal assessment — Writ against — Best judgment assessment smacking arbitrariness — Held liable to be set aside — See Constitution of India, Article 226
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—S. 17 (1) — Imposing tax on sale of "Cane jaggery" and exempting that of "palm jaggery" from liability to tax — No unlawful discrimination practised — Former did not affect freedom of trade within Art. 301 of Constitution — Act held not open to challenge on plea of colourable exercise of power — See Sales Tax — Madras General Sales Tax Act (1 of 1959), Section 59 (1)
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—Ss. 59 (1), 17 (1) — Notifications under — Imposing tax on sale of "Cane jaggery" and exempting that of "palm jaggery" from liability to tax — No unlawful discrimination practised — Imposition of tax on sale of cane jaggery did not affect freedom of trade within Article 301 of Constitution — Act held not open to challenge on plea of colourable exercise of power — Constitution of India, Articles 14, 301, 246
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—S. 12 — Plaintiff obtaining theka of Fishery rights in certain tank — Defendants agreeing to pay half of theka money to plaintiff in return of half of fishery rights in tank — Suit by plaintiff for recovery of amount after defendants' working out their theka — Held suit was not for specific performance of contract — See Limitation Act (1908), Article 115

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—S. 19 — Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void — Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — See Contract Act (1872), Section 23 Bom 128 (C N 21)

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—S. 23 — Suit by strangers to contract — When maintainable — See Contract Act (1872), S. 2 (d) SC 504 B (C N 110)

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STAMP DUTY**—Stamp Act (2 of 1899)**

—S. 2 (15) — Partition deed — Construction of Madh Pra 74 C (C N 18) (FB)

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—S. 61 — Admission of document in evidence — Validity thereof cannot subsequently be challenged in the same suit on ground of its not being duly stamped — Only remedy open is under Section 61 — See Stamp Act (1899), Section 38 (2)

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—S. 2 (m), (o) — Principal successor State and Successor State — Liability of existing States — Petitioner retired in 1939 from service in the then State of M. P. — Reorganisation of States in 1956 and 1960 — Petitioner settled down in Nagpur and drawing pension from Nagpur Treasury even now — Place from where he retired still in State of new M. P. — Both Maharashtra and M. P. State Governments granted certain increases in pensions of pensioners on different occasions — State of Bombay which is successor State to existing State of M. P. would not be liable to the increase in pension granted by present State of M. P. — Further no claim against State of M. P. can be granted even after amendment of Article 226 — See States Reorganisation Act (1956), Section 86

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—Ss. 86, 2 (m), (o), Sch. 5 — "Principal successor State" and "Successor State" — Liability of existing States — Petitioner retired in 1939 from service in the then State of M. P. — Reorganisation of States in 1956 and 1960 — Petitioner settled down in Nagpur and drawing pension from Nagpur Treasury even now — Place from where he retired still in State of new M. P. — Both Maharashtra and M. P. State Governments granted certain increases in pensions of pensioners on different occasions — State of Bombay which is successor State to existing State of M. P. would not be liable to the increase in pension granted by present State of M. P. — Further, no claim against State of M. P. can be granted even after amend-

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—Andhra Pradesh (Andhra Area) Estates
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 (Prohibition of Alienation) Act (14 of
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—S. 2 (b) — "Forest Land" — Inclusion
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—S. 4 (4) — Question as to whether
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—Bombay Tenancy and Agricultural Lands
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—Pre. — Act is protected by Art. 31A
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—Ss. 6, 7 — Tenancy, proof — Mere
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—S. 7 — Tenancy, proof — See Tenancy
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—S. 36 (1) — Application for restoration of possession — Prescription of period of limitation under Act — It is different from period prescribed by 1st Schedule of Limitation Act — Section 14 of Limitation Act applies to proceedings under Sec. 36 (1)

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—S. 111 — Revision filed in time returned on ground that documents were not enclosed — Application refiled with necessary enclosures — Application cannot be rejected as being filed beyond time prescribed by S. 114 — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 114

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—S. 111 — Civil P. C. (1908), S. 115 — Relationship of landlord and tenant — Mixed question of law and fact — Revisional authority can interfere

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—S. 111 (2) — Rules under — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules (1959), R. 19 — Discretion of Tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicant's counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits — Opposite party also absent — Propriety of order — Violation of principles of natural justice — (Civil P. C. (1908), O. 9, Rr. 3, 8; O. 17, Rules 2, 3) — (Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules (1959), R. 19)

Bom 132 (C N 22)

—Ss. 114 and 111 — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Bombay Revenue Tribunal Procedure Rules, 1959, Rr. 9 and 11 — Revision filed in time returned on ground that documents were not enclosed — Application refiled with necessary enclosures — Application cannot be rejected as being filed beyond time prescribed by S. 114

Bom 122 A (C N 20)

Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (contd.)

—S. 114 — Dismissal of revision application by Revenue Tribunal erroneously treating it to be time barred — It amounts to failure to exercise jurisdiction vested in it — Jurisdiction of High Court is not restricted in any manner from considering validity of order of tribunal — See Constitution of India, Art. 227

Bom 122 B (C N 20)

—S. 129 — Application under S. 36 (1) — Not prohibited by S. 129 in case of lands enumerated therein — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 36 (1)

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—R. 9 — Revision filed in time returned on ground that documents were not enclosed — Application refiled with necessary enclosures — Application cannot be rejected as being filed beyond time prescribed by S. 114 — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 114

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—R. 11 — Revision filed in time returned on ground that documents were not enclosed — Application refiled with necessary enclosures — Application cannot be rejected as being filed beyond time prescribed by S. 114 — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 114

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—R. 19 — Discretion of tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicant's counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits — Opposite party also absent — Propriety of order — Violation of principles of natural justice — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 111 (2)

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—Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act (11 of 1968)

—Act is intra vires and valid — See Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (1962), S. 2 (d)

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—Daman (Abolition of Proprietorship of Villages) Regulation (7 of 1962)

—Pre., Ss. 2 (h), 3, 10 (2) proviso and 12 — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in S. 2 (h)

Goa 59 B (C N 12)

Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (contd.)

—S. 2 (d) — Definition of village as inserted by Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act (1968) — S. 2 (d) is not ultra vires the State Legislature and is constitutionally valid — Its validity cannot be challenged under Arts. 14, 19 (1) (f) and 31 as it is protected by Art. 31-A of the Constitution — (Constitution of India, Arts. 31-A, 245, Sch. 7, List II Entry 18) — (Government of Union Territories Act (1963), S. 18)

Goa 59 D (C N 12)

—S. 2 (h) — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in Section 2 (h) — See Tenancy Laws — Daman (Abolition of Proprietorship of Village) Regulation (1962), Preamble

Goa 59 B (C N 12)

—S. 3 — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in Section 2 (h) — See Tenancy Laws — Daman (Abolition of Proprietorship of Village) Regulation (1962), Preamble

Goa 59 B (C N 12)

—Ss. 4 (b) and 12-A — Grass or pasture land of proprietor — Vesting of, in Central Government — Classification of such lands has to be made under authority of law — Under Sec. 12-A Mamlatdar and Collector have to make a quasi-judicial inquiry after following rules of natural justice — Classification of grass lands on basis of executive inquiry made behind back of proprietor violates Art. 31 (1) of the Constitution and principles of natural justice — Writ of Mandamus issued directing authorities to make fresh inquiry according to law — (Constitution of India, Arts. 31 (1) and 226) — (Words and Phrases — Grass or pasture lands)

Goa 59 E (C N 12)

—S. 10 (2) proviso — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in S. 2 (h) — See Tenancy Laws — Daman (Abolition of Proprietorship of Village) Regulation (1962), Preamble

Goa 59 B (C N 12)

—S. 12 — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in Section 2 (h) — See Tenancy Laws — Daman (Abolition of Proprietorship of Village) Regulation (1962), Preamble

Goa 59 B (C N 12)

—S. 12-A — Grass or pasture land of proprietor — Vesting of, in Central Government — See Tenancy Laws — Daman Abolition of Proprietorship of Villages Regulation (1962), S. 4 (b)

Goa 59 E (C N 12)

—S. 12-F — Section though excludes jurisdiction of Civil Court does not bar writ jurisdiction of High Court

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—Madhya Bharat Land Revenue and Tenancy Act (66 of 1950)

—S. 70 (8) — Defence of part performance — Conditions essential — Sale of land — Necessity of permission — S. 70 (8) of M. B. Land Revenue and Tenancy Act creates no bar — See Transfer of Property Act (1882), S. 53A

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—Madhya Bharat Land Revenue and Tenancy Act Smt. 2007 (66 of 1950)

—S. 73 — Person inducted as a sub-lessee contrary to provisions of Section 73 — His possession not protected by Act 29 of 1955 and hence cannot acquire status of occupancy tenant under S. 185 (1) (ii) (b) of M. P. Land Revenue Code — See Madhya Pradesh Land Revenue Code (Act 20 of 1959), S. 185 (1) (ii) (b)

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—S. 78 — Person inducted as a sub-lessee contrary to provisions of S. 73 — Such a person is not a "Ryotwari sub-lessee" as defined in Act 29 of 1955 and hence cannot acquire status of occupancy tenant under S. 185 (1) (ii) (b) of M. P. Land Revenue Code — See Madhya Pradesh Land Revenue Code (Act 20 of 1959), Section 185 (1) (ii) (b)

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—Madhya Bharat Ryotwari Sub-Lessee Protection Act (29 of 1955)

—S. 2 (b) — "Ryotwari sub-lessee" — Person inducted as a sub-lessee contrary to provisions of M. B. Act 66 of 1950 — Not a "Ryotwari sub-lessee" — See Madhya Pradesh Land Revenue Code (Act 20 of 1959), S. 185 (1) (ii) (b)

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—S. 3 — Person inducted as a sub-lessee contrary to provisions of M. B. Act 66 of 1950 — His possession not protected under S. 3 — See Madhya Pradesh Land Revenue Code (Act 20 of 1959), S. 185 (1) (ii) (b)

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—Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)

—S. 20 (1) (as substituted by amending Act 44 of 1956) — Question as to whether land is "forest land" within Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947) — District Judge and not Settlement Officer is competent to adjudicate

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—S. 63 — Provision is prospective in operation — See Tenancy Laws — Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947), Preamble

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—Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961)

—Pre. — Object of Act

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Tenancy Laws — Maharashtra Agricultural Lands (Ceilings on Holdings) Act (contd.)

—S. 4 (2) — Deeming provision in S. 4 (2) introduces a legal fiction and can be applied only for purpose intended and cannot be stretched further— It cannot be construed to mean that determination of surplus land is to be made as on 26-1-1962 irrespective of whether holder was alive or dead after 26-1-1962

Bom 144 C (C N 26)

—S. 6 — Ceiling area which a family can hold under — Determination of — Number of members in the family as existing on the appointed day and not on the date of enquiry has to be taken into account — Neither births nor deaths in family subsequent to appointed day will affect the determination Bom 115 (C N 18)

—Ss. 12 to 21 (Chap. IV) — Scheme of Act — Ceiling area and surplus land — Determination of — Holder of land dying after 26-1-1962 but before declaration under S. 21 — His heirs by succession or under will have to file separate returns with respect to land held by them if it is in excess of ceiling area — Determination of surplus land has to be with respect to such returns and not with respect to land held by deceased holder on 26-1-1962

Bom 144 A (C N 26)

—Punjab Security of Land Tenures Act (10 of 1953)

—S. 19-B (as amended by Punjab Security of Land Tenures (Amendment and Validation) Act (14 of 1962))— Section has retrospective effect and operates from the date it was enacted — 1967 Lah LT 155 and 1969 Pun LJ 1, Overruled

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—U. P. Consolidation of Holdings Act (5 of 1954)

—S. 8 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 8-A — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not

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also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 9-A — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 9-A — Consolidation authorities — Status of — Per Misra J.: Authorities not Civil Courts even for the limited purpose of S. 9-A — Per Mukherjee, J.: The authorities have full status of Civil Courts at least for the limited purpose — Deeming provision in a statute must be given full effect to — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Deeming clauses) — (Civil P. C. (1908), S. 9 — Civil Court)

All 241 C (C N 40) (FB)

—S. 9-B — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 19A — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 21 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C.

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(1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 38 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—S. 41 — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—Section 42 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify — See Constitution of India, Article 226

All 241 D (C N 40) (FB)

—U. P. Consolidation of Holdings Rules (1954)

—Rule 26—Oath Commissioners appointed by District Judges to verify affidavits— They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also Revenue Courts — See Civil P. C. (1908), O. 19, R. 1

All 241 A (C N 40) (FB)

—U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951)

—S. 10 — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act— Asami right, held, did not become bhumi-

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dari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14 (1)

All 238 (C N 39)

—S. 11 — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act— Asami right, held, did not become bhumi-dari right by reason of Section 14 of the Hindu Succession Act — See Hindu Succession Act (1956), S. 14 (1)

All 238 (C N 39)

Trade and Merchandise Marks Act (43 of 1958)

—S. 12 (3) — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 18 — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 39 — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 40 — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

Trade and Merchandise Marks Act (contd.)
 —S. 48 — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 49 — Permission to use trade mark is not assignment of the mark—Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2).

Mad 156 (C N 42)

Trade Marks Act (5 of 1940)

—Ss. 10 (2), 14 (1), 31, 32, 39 — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2), the claimant should be the proprietor — Under special circumstances of the case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — (Trade and Merchandise Marks Act (1958), Ss. 12 (3), 18, 39, 40, 48 and 49)

Mad 156 (C N 42)

—S. 14 (1) — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2), the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 31 — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2), the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 32 — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2), the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See

Trade Marks Act (contd.)

Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

—S. 39 — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2), the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — See Trade Marks Act (1940), S. 10 (2)

Mad 156 (C N 42)

Transfer of Property Act (4 of 1882)

—S. 8 — Partition deed — Construction of — See Stamp Act (1899), S. 2 (15)

Madh Pra 74 C (C N 18) (FB)

—S. 53-A — Defence of part performance — Conditions essential — Sale of land — Necessity of permission — Section 70 (8) of Madhya Bharat Revenue and Tenancy Act creates no bar

SC 546 C (C N 120)

—Ss. 58 (c) and 60 — Act was not in force in erstwhile State of Travancore — Still principles under Act including S. 58 (c) were applied — Document styled as stridhanam Eedadharam — Condition that in case of non-payment of mortgage amount within stipulated time transaction would be treated as sale — Condition, held, was a clog and transaction was not a mortgage by conditional sale — AIR 1926 All 493, Diss. from

Ker 81 A (C N 17)

—S. 60 — Act was not in force in erstwhile State of Travancore — Still principles under Act including S. 68 (c) were applied — Document styled as stridhanam Eedadharam — Condition that in case of non-payment of mortgage amount within stipulated time transaction would be treated as sale — Condition, held, was a clog and transaction was not a mortgage by conditional sale — See Transfer of Property Act (1882), S. 58 (c)

Ker 81 A (C N 17)

—S. 60 — Scope — Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3 (1), Proviso (ii) (as amended by Punjab Act, 7 of 1934) — Question of amount due from mortgagor in subsequent suit for redemption — Question already decided in previous suit inter partes — Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under S. 3 — Expression "any decree of a Court" in Proviso (ii) to S. 3 (1) applies to consent decree — See Civil P. C. (1908), S. 11

Punj 152 (C N 21)

—S. 62 — Self-redeeming mortgage — Suit for possession — Mortgage debt already discharged — No suit for redemption of mortgage is necessary

Mys 84 C (C N 21)

—S. 91 (a) — Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming

T. P. Act (contd.)

barred by limitation under Article 132 — He has no subsisting right to redeem prior mortgage within S. 91 (a), Transfer of Property Act — Suit for redemption of prior mortgages, even though not barred under Art. 148, is not maintainable — See Limitation Act (1908), Art. 132 Ker 81 B (C N 17)

—S. 92 — Person seeking to get benefit of para (1) of S. 92 must show that he had pre-existing interest or charge on property, that he redeemed same in full and that he paid amount from his own pocket and his own money for protection of his interest—P having charge on mortgaged property getting transfer from mortgagor and out of consideration money paying off mortgagee towards discharge of mortgage debt—Held, as money paid belonged to mortgagor, case did not fall under para (1) of S. 92 — Case would fall under para (3) of S. 92 and P would get right of subrogation, in place of mortgagee, only if he had obtained writing registered from mortgagor as contemplated by para (3)

Guj 73 A (C N 12)

—S. 100 — Creation of charge on immovable property — No particular form of words needed — Document must disclose intention to create charge—Family arrangement providing for discharge of personal debt of donor out of share of another did not create a charge on property in favour of the creditor — A. S. No. 502 of 1961, D/-23-11-1964 (Ker.), Reversed.

SC 504 A (C N 100)

—S. 105 — Waiver of forfeiture by accepting rent — Use of word 'rent' in receipts is not decisive on question whether there is waiver — See Transfer of Property Act (1882), S. 111 (g)

Mad 165 A (C N 43)

—Ss. 111 (g) and (h), 112, 113, 116 and 105 — Waiver of forfeiture and waiver of notice to quit — Law is same in England and in India — Receipt of rent subsequent to notice determining lease and pending ejectment suit — Whether receipt of rent by itself amounts to waiver — AIR 1957 Cal 627 and AIR 1926 Cal 763, Dissent. from

Mad 165 A (C N 43)

—S. 112 — Waiver of forfeiture and waiver of notice to quit — Law is same in England and in India — Receipt of rent subsequent to notice determining lease and pending ejectment suit — Whether receipt of rent by itself amounts to waiver — AIR 1957 Cal 627 and AIR 1926 Cal 763, Dissent. from — See Transfer of Property Act (1882), S. 111 (g)

Mad 165 A (C N 43)

—S. 113 — Waiver of forfeiture and waiver of notice to quit — Law is same in England and in India — Receipt of rent subsequent to notice determining lease and pending ejectment suit — Whether receipt of rent by itself amounts to waiver — AIR

T. P. Act (contd.)

1957 Cal 627 and AIR 1926 Cal 763, Dissent. from — See Transfer of Property Act (1882), S. 111 (g)

Mad 165 A (C N 43)

—S. 116 — Waiver of forfeiture and waiver of notice to quit — Law is same in England and in India — Receipt of rent subsequent to notice determining lease and pending ejectment suit — Whether receipt of rent by itself amounts to waiver — AIR 1957 Cal 627 and AIR 1926 Cal 763, Dissent. from — See Transfer of Property Act (1882), S. 111 (g)

Mad 165 A (C N 43)

—S. 116 — Applicability — Suit for arrears of rent and eviction — Suit more than 12 years after expiry of lease—Tenant holding over and asserting hostile title — No rent ever paid by tenant — Mere demand of rent by landlord is no renewal of lease within the meaning of S 116, Transfer of Property Act — Suit is barred under Art. 139 — See Limitation Act (1908), Art. 139

Raj 68 (C N 13)

—S. 123 — Registration Act (1908), S. 17 — Hindu father merging self-acquired property into joint family property — No formal registered instrument necessary — (Hindu Law — Self-acquired property — Merger of, into joint family property—No registered instrument necessary)

Andh Pra 126 E (C N 17)

Travancore Limitation Act (6 of 1100 M.E.)

—S. 29 — Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91 (a), Transfer of Property Act — Suit for redemption of prior mortgages, even though not barred under Art. 148, is not maintainable — See Limitation Act (1908), Art. 132

Ker 81 B (C N 17)

—Art. 119—Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91 (a), Transfer of Property Act — Suit for redemption of prior mortgages, even though not barred under Art. 148, is not maintainable — See Limitation Act (1908), Art. 132

Ker 81 B (C N 17)

—Art. 136—Puisse mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91 (a), Transfer of Property Act — Suit for redemption of prior mortgages, even though not barred under Art. 148, is not maintainable — See Limitation Act (1908), Art. 132

Ker 81 B (C N 17)

Torts

—Negligence — Distinction between civil and criminal negligence — Penal Code

Torts (contd.)

(1860), Ss. 304-A, 337 — Evidence Act
(1872), Ss. 101 to 104
Punj 137 B (C N 20)

Usurious Loans Act (10 of 1918)

See under Debt Laws.

U. P. Administration of Evacuee Property Ordinance (1 of 1949)

—Applicability — See Administration of Evacuee Property Act (31 of 1950), S. 40
SC 413 (C N 91)

U. P. Civil Laws Amendment Act (35 of 1968)

—S. 3 — Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 (1) (a) and (1-A) — Enhancement of pecuniary jurisdiction of District Court up to Rs. 20,000 by amendment — No violation of Art. 133 of Constitution — (Constitution of India, Art. 133) All 201 B (C N 30) (FB)

—S. 3 — Raising of appellate jurisdiction of District Courts up to rupees twenty thousand — No violation of Art. 14—Constitution of India, Articles 14, 357 (1) (a) and Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 (1-A)
All 201 D (C N 30) (FB)

U. P. Consolidation of Holdings Act (5 of 1954)

See under Tenancy Laws.

U. P. Consolidation of Holdings Rules (1954)

See under Tenancy Laws.

U. P. Panchayat Raj Act (26 of 1947)

See under Panchayats.

U. P. Roadside Land Control Act (10 of 1945)

—S. 3 — That area to which declaration under S. 3(1) relates is a controlled area — Validity of, on ground of non-compliance with procedure prescribed by S. 3(2) to (6) can be challenged by accused — See U. P. Roadside Land Control Act (10 of 1945), S. 13 (1).

All 198 A (C N 29) (FB)

—S. 3 — Declaration under sub-section (1) — Whether procedure prescribed under sub-sections (2) to (6) was followed—Proof of

All 198 B (C N 29) (FB)

—Ss. 13(1), 3 — That area to which declaration under S. 3(1) relates is a controlled area — Validity of, on ground of non-compliance with procedure prescribed by S. 3(2) to (6) can be challenged by accused

All 198 A (C N 29) (FB)

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951)

See under Tenancy Laws.

Words and Phrases

—Word “case” — Meaning of — Civil P. C. (5 of 1908), S. 115

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Words and Phrases (contd.)

—“Child” — Meaning of — See Criminal P. C. (1898), S. 488 (1)

SC 446 B (C N 98)

—Word “compensation” in Art. 115, Limitation Act, means money payable on account of loss or damage — See Limitation Act (1908), Art. 115

All 206 C (C N 31) (FB)

—“Customer of bank” — “Customer”, who is, stated — See Negotiable Instruments Act (1881), S. 131

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—Word “education” — See Constitution of India, Art. 246 Bom 154 A (C N 27)

—“First appointment” — Meaning of— See Civil Services — Jammu and Kashmir Civil Services (Classification, Control and Appeals) Rules (1956), R. 24

J and K 57 E (C N 14) (FB)

—‘Grass or pasture lands’ — See Tenancy Laws — Daman Abolition of Proprietorship of Villages Regulation (1962), S. 4 (b)

Goa 59 E (C N 12)

—‘Local authority’ — Calcutta Dock Labour Board is local authority — See Civil P. C. (1908), O. 21, R. 48 (1)

Cal 176 B (C N 29)

—“Notices” — Principles of natural justice stated — See Constitution of India, Art. 226 Andh Pra 137 B (C N 18)

—‘Town’ — Meaning of — See Police Act (1961), S. 34

Goa 54 (C N 10)

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (45 of 1955)

—Ss. 2(c), (f), (g), 5, 17 — Expression “who is employed” in definition of “working journalist” in Section 2(f) — It includes employee whose service has come to an end by resignation — Claim for gratuity from such employee is maintainable

SC 426 A (C N 94)

—Ss. 2(g) and 5 — Industrial Disputes Act (1947), Section 2(rr) — Term “wages” not defined in former Act — Definition of that term in Section 2(rr) can be applied — Car allowance and benefit of free telephone and newspapers given to employee not only for his personal use but for use connected with his employment — Held, that both the items were relevant in fixation of fair wages as they were allowed to him to directly reduce the expenditure which would otherwise have gone into his family budget — These items could properly be regarded as part of the wages and had to be taken into account into calculation of gratuity payable to him

SC 426 C (C N 94)

—S. 5—Expression “who is employed”— It includes employee whose service has come to end by resignation — Claim for gratuity from such employee is maintainable — See Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), S. 2(c), (f), (g)

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Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (contd.)

—S. 5—Expression “who is employed”—It includes employee whose service has come to end by resignation — Claim for gratuity from such employee is maintainable — See Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), S. 2 (g) SC 426 C (C N 94)

—S. 17—Expression “who is employed”—It includes employee whose service has come to end by resignation — Claim for gratuity from such employee is maintainable

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (contd.)

— See Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), S. 2 (c), (f), (g) SC 426 A (C N 94)

Workmen's Compensation Act (8 of 1923)

—S. 19 — Jurisdiction of Tribunal is not barred by S. 110-F of Motor Vehicles Act — Option lies with claimant to choose one or the other tribunal — See Motor Vehicles Act (1939), S. 110-F Andh Pra 124 (C N 15)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 APRIL

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

Administrator General's Act (3 of 1913)

—S. 2 (2) — AIR 1956 Hyd 149 — Diss. AIR 1970 All 224 B (C N 35)

—S. 14 — AIR 1956 Hyd 149 — Diss. AIR 1970 All 224 B (C N 35)

Bombay Hereditary Offices Act (3 of 1874)

—S. 5 — Decision of Bombay High Court —Revers. AIR 1970 SC 453 A (C N 100)

Civil Procedure Code (5 of 1908)

—Pre — ('68) Civ. Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All) — Not F. AIR 1970 All 315 C (C N 33).

—S. 11 — ('67) Civil Revn. Appln. No. 328 of 1967, D/- 27-4-1967 (Guj) — Revers. AIR 1970 SC 406 A (C N 89).

—S. 11 — AIR 1943 Mad 139 (FB) — Diss. AIR 1970 Mys 81 (C N 20).

—S. 11 — AIR 1927 Lah 289 (FB) — Diss. AIR 1970 Mys 81 (C N 20).

—S. 47 — (1968) 1 Mys LJ 311 — Held not correct in view of AIR 1961 SC 272 as interpreted. AIR 1970 Mys 108 (C N 27).

—S. 60 (1) Proviso (h) — AIR 1957 Mad 773 — Not Followed in view of AIR 1969 Mad 440 as interpreted. AIR 1970 Mad 135 A (C N 36).

—S. 96 (3) — AIR 1929 Oudh 385 (FB) — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — AIR 1952 All 29 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — (1912) ILR 36 Bom 77 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — AIR 1933 Bom 205 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — (1884) ILR 10 Cal 612 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — (1903) ILR 30 Cal 613 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 96 (3) — AIR 1926 Cal 512 — Diss. AIR 1970 Punj 176 (C N 23).

Civil P. C. (contd.)

—S. 115 — ('67) Civil Revn. Appln. No. 328 of 1967, D/- 27-4-1967 (Guj) — Revers. AIR 1970 SC 406 A (C N 89).

—S. 151 — AIR 1929 Oudh 385 (FB) — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — AIR 1952 All 29 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — (1912) ILR 36 Bom 77 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — AIR 1933 Bom 205 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — (1884) ILR 10 Cal 612 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — (1903) ILR 30 Cal 613 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 151 — AIR 1926 Cal 512 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — AIR 1929 Oudh 385 (FB) — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — AIR 1952 All 29 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — (1912) ILR 36 Bom 77 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — AIR 1933 Bom 205 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — (1884) ILR 10 Cal 612 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — (1903) ILR 30 Cal 613 — Diss. AIR 1970 Punj 176 (C N 23).

—S. 152 — AIR 1926 Cal 512 — Diss. AIR 1970 Punj 176 (C N 23).

—O. 21, R. 35 — (1968) 1 Mys LJ 311 — Held not correct in view of AIR 1961 SC 272 as interpreted. AIR 1970 Mys 108 (C N 27).

—O. 21, R. 90 — AIR 1925 All 459 — Diss. AIR 1970 Ker 94 (C N 19).

—O. 21, R. 90 — AIR 1920 Mad 145 — Diss. AIR 1970 Ker 94 (C N 19).

—O. 21, R. 90 — AIR 1939 Nag 179 — Diss. AIR 1970 Ker 94 (C N 19).

Civil P. C. (contd.)

- O. 47, R. 1 — AIR 1929 Oudh 385 (FB)
- Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — AIR 1952 All 29 — Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — (1912) ILR 36 Bom 77 — Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — AIR 1933 Bom 205 — Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — (1884) ILR 10 Cal 612 — Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — (1903) ILR 30 Cal 613 — Diss. AIR 1970 Punj 176 (C N 23).
- O. 47, R. 1 — AIR 1926 Cal 512 — Diss. AIR 1970 Punj 176 (C N 23).

CIVIL SERVICES**—Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)**

- R. 8 — AIR 1957 J & K 8 (FB) — Partly Diss. AIR 1970 J & K. 57 B (C N 14) (FB).
- R. 8 — AIR 1957 J & K 31 — Partly Diss. AIR 1970 J & K 57 B (C N 14) (FB).
- R. 25 (2) (3) — AIR 1957 J & K 8 (FB) — Partly Diss. AIR 1970 J & K 57 B (C N 14) (FB).
- R. 25 (2) (3) — AIR 1957 J & K 31 — Partly Diss. AIR 1970 J & K 57 B (C N 14) (FB).
- R. 30 (3) — AIR 1957 J & K 8 (FB) — Partly Diss. AIR 1970 J & K 57 B (C N 14) (FB).
- R. 30 (3) — AIR 1957 J & K 31 — Partly Diss. AIR 1970 J & K 57 B (C N 14) (FB).

Constitution of India

- Art. 19 (1) (f) — AIR 1963 Cal 127 — Diss. AIR 1970 Andh Pra 126 K (C N 17).
- Art. 226 — ILR (1964) 2 Mad 869 — Over. AIR 1970 Mad 136 (C N 37) (FB).
- Art. 226 — ('66) W. P. No. 2332 of 1966 (Mad) — Over. AIR 1970 Mad 136 (C N 37).
- Art. 226 — ('67) W. P. No. 2298 of 1966, D/- 16-2-1967 (Mad) — Revers. AIR 1970 Mad 136 (C N 37) (FB).
- Art. 246 — AIR 1962 Mys 269 — Diss. AIR 1970 Andh Pra 126 B (C N 17).
- Art. 248 — AIR 1962 Mys 269 — Diss. AIR 1970 Andh Pra 126 B (C N 17).
- Art. 311 — AIR 1969 Assam 3 — Revers. AIR 1970 SC 537 (C N 118).
- Sch. VII, List I, Entry 97 — AIR 1962 Mys 269 — Diss. AIR 1970 Andh Pra 126 B (C N 17).
- Sch. VII, List II, Entry 49 — AIR 1962 Mys 269 — Diss. AIR 1970 Andh Pra 126 B (C N 17).

Contract Act (9 of 1872)

- S. 10 — Decision of Allahabad High Court — Revers. AIR 1970 SC 479 B (C N 104).

COURT-FEES AND SUITS VALUATIONS**—Andhra Pradesh Court-fees and Suits Valuation Act (7 of 1956)**

- S. 48 — AIR 1964 Andh Pra 216 — Over. AIR 1970 Andh Pra 139 (C N 19) (FB).
- S. 48 — AIR 1930 Mad 45 — Diss. AIR 1970 Andh Pra 139 (C N 19) (FB).
- S. 48 — AIR 1955 Trav-Co 110 — Not F. AIR 1970 Andh Pra 139 (C N 19) (FB).

Criminal Procedure Code (5 of 1898)

- S. 107 — AIR 1949 All 21 — Diss. AIR 1970 Pat 107 C (C N 17).
- S. 107 — ('54) Cri. Revn. No. 351 of 1954, D/- 18-11-1954 (Mad) — Not F. AIR 1970 Pat 107 B (C N 17).
- S. 112 — AIR 1949 All 21 — Diss. AIR 1970 Pat 107 C (C N 17).
- S. 112 — ('54) Cri. Revn. No. 351 of 1954 D/- 18-11-1954 (Mad) — Not F. AIR 1970 Pat 107 B (C N 17).
- S. 133 — AIR 1960 All 244 — Diss. AIR 1970 Cal 169 (C N 26).
- S. 133 — AIR 1949 Cal 637 — Held Overruled by AIR 1956 Cal 24 as interpreted AIR 1970 Cal 169 (C N 26).
- S. 133 — AIR 1956 Cal 220 — Not F. AIR 1970 Cal 169 (C N 26).
- S. 133 — AIR 1958 Raj 248 — Diss. AIR 1970 Cal 169 (C N 26).
- S. 192 — AIR 1960 All 244 — Diss. AIR 1970 Cal 169 (C N 26).
- S. 192 — AIR 1949 Cal 637 — Held overruled by AIR 1956 Cal 24 as interpreted AIR 1970 Cal 169 (C N 26).
- S. 192 — AIR 1956 Cal 220 — Not F. AIR 1970 Cal 169 (C N 26).
- S. 192 — AIR 1958 Raj 248 — Diss. AIR 1970 Cal 169 (C N 26).
- S. 237 — ('67) Cri. Appeal No. 219 of 1965, D/- 15-3-1967 (Raj) — Revers. AIR 1970 SC 436 (C N 95).
- S. 238 — ('67) Cri. Appeal No. 219 of 1965, D/- 15-3-1967 (Raj) — Revers. AIR 1970 SC 436 (C N 95).
- S. 345 — (1964) 2 Cri LJ 111 (Pat) — Diss. AIR 1970 All 235 (C N 38).
- S. 439 — AIR 1949 All 21 — Diss. AIR 1970 Pat 107 C (C N 17).
- S. 439 — ('54) Cri. Revn. No. 351 of 1954, D/- 18-11-1954 (Mad) — Not F. AIR 1970 Pat 107 B (C N 17).
- S. 476 — AIR 1962 All 251 — Diss. AIR 1970 Andh Pra 119 A (C N 14).
- S. 488 (1) — AIR 1967 Mad 77 — Over. AIR 1970 SC 446 B (C N 98).
- S. 537 — AIR 1962 All 251 — Diss. AIR 1970 Andh Pra 119 A (C N 14).

Defence of India Rules (1962)

- Rr. 132-A (2) and 132-A (4) — 1969 Mad LW (Cri) 98 — Revers. AIR 1970 SC 494 C (C N 109).

Displaced Persons (Claims) Supplementary Act (12 of 1954)

—S. 5 (1) (a) — AIR 1965 Punj 307 — Revers. AIR 1970 SC 540 D (C N 119).

Electricity Act (9 of 1910)

—S. 51 — AIR 1969 Pat 355 — Revers. AIR 1970 SC 491 (C N 108).

Foreign Exchange Regulation Act (7 of 1947)

—S. 5 (1) — 1969 Mad LW (Cri) 98 — Revers. AIR 1970 SC 494 B (C N 109).

—S. 9 — 1969 Mad LW (Cri) 98 — Revers. AIR 1970 SC 494 B (C N 109).

—S. 23 (3) — 1969 Mad LW (Cri) 98 — Revers. AIR 1970 SC 494 B (C N 109).

—S. 23-D (1), Proviso — 1969 Mad LW (Cri) 98 — Revers. AIR 1970 SC 494 B (C N 109).

Hindu Law

—Joint Family—AIR 1962 Mad 26—Diss. AIR 1970 Andh Pra 126 C (C N 17).

—Joint Family — (1967) 66 ITR 169 (Mad) — Diss. AIR 1970 Andh Pra 126 C (C N 17).

—Joint Family — (1967) 65 ITR 19 (Mys) — Diss. AIR 1970 Andh Pra 126 C (C N 17).

—Trust — ('65) Decision of High Court, D/- 5-8-1965 (All) — Revers. AIR 1970 SC 458 (C N 101).

Hindu Succession Act (30 of 1956)

—S. 4 (2) — AIR 1964 All 165 — Over. AIR 1970 All 238 (C N 39).

—S. 4 (2) — AIR 1968 All 419 — Over. AIR 1970 All 238 (C N 39).

—S. 14 (1) (2) — AIR 1964 All 165 — Over. AIR 1970 All 238 (C N 39).

—S. 14 (1) (2) — AIR 1968 All 419 — Over. AIR 1970 All 238 (C N 39).

HOUSES AND RENTS

—Assam Urban Areas Rent Control Act (3 of 1956)

—S. 6 — ('66) S. A. No. 165 of 1962, D/- 15-2-1966 (Assam) — Over. AIR 1970 Assam 59 B (C N 12) (FB).

—S. 9 — ('66) S. A. No. 165 of 1962, D/- 15-2-1966 (Assam) — Over. AIR 1970 Assam 59 B (C N 12) (FB).

Limitation Act (9 of 1908)

—S. 28 — AIR 1933 Bom 25 — Diss. AIR 1970 Ker 81 B (C N 17).

—S. 28 — (1909) 5 Ind Cas 877 (Cal) — Diss. AIR 1970 Ker 81 B (C N 17).

—S. 28 — AIR 1925 Mad 76 — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 115 — AIR 1962 All 438 — Over. AIR 1970 All 206 C (C N 31) (FB).

—Art. 120 — AIR 1962 All 438 — Over. AIR 1970 All 206 C (C N 31) (FB).

Limitation Act (1908) (contd.)

—Art. 132 — AIR 1933 Bom 25 — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 132 — (1909) 5 Ind Cas 877 (Cal) — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 132 — AIR 1925 Mad 76 — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 148 — AIR 1933 Bom 25 — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 148 — (1909) 5 Ind Cas 877 (Cal) — Diss. AIR 1970 Ker 81 B (C N 17).

—Art. 148 — AIR 1925 Mad 76 — Diss. AIR 1970 Ker 81 B (C N 17).

Madhya Pradesh Land Revenue Code (20 of 1959)

—S. 131 (1) (2) — ('64) Civil Second Appeal No. 146 of 1964, D/- 30-10-1964 (M. P.)

— Partly Revers. AIR 1970 Madh Pra 79 B (C N 19).

—S. 185 (1) (ii) (b) — 1963 MPLJ 314 — Over. AIR 1970 SC 483 (C N 105).

—S. 185 (1) (ii) (b)—('65) S. A. No. 254 of 1962, D/- 9-7-1965 (M. P.) — Revers. AIR 1970 SC 483 (C N 105).

Motor Vehicles Act (4 of 1939)

—Ss. 110 to 110-F — AIR 1968 Punj 466 — Over. AIR 1970 Punj 137 A (C N 20).

PANCHAYATS

—U. P. Panchayat Raj Act (26 of 1947)

—S. 95 (1) (g) — 1966 All LJ 740 — Over. AIR 1970 All 251 B (C N 41) (FB).

—S. 95 (1) (g) — ('69) C. M. W. No. 2399 of 1968, D/- 25-4-1969 (All) — Over. AIR 1970 All 251 B (C N 41) (FB).

—S. 95 (1) (g) — ('69) C. M. W. No. 1140 of 1969, D/- 23-4-1969 (All) — Over. AIR 1970 All 251 B (C N 41) (FB).

Penal Code (45 of 1860)

—S. 396 — Decision of All. H. C. — Revers. AIR 1970 SC 535 (C N 117).

—S. 411 — Decision of All. H. C. — Revers. AIR 1970 SC 535 (C N 117).

Prevention of Corruption Act (2 of 1947)

—S. 5 (1) (d) read with S. 5 (2) — Decision of Punjab High Court — Revers. AIR 1970 SC 450 B (C N 99).

Prevention of Food Adulteration Act (37 of 1954)

—S. 14 — (1967) ILR (1967) 2 Ker 676 — Revers. AIR 1970 SC 520 (C N 113).

—S. 19 (2) — (1967) ILR (1967) 2 Ker 676 — Revers. AIR 1970 SC 520 (C N 113).

Registration Act (16 of 1908)

—S. 34, Proviso — AIR 1918 Cal 225 — Not F. AIR 1970 All 221 A (C N 34).

—S. 35 (3) — AIR 1918 Cal 225 — Not F. AIR 1970 All 221 A (C N 34).

—S. 72 — AIR 1918 Cal 225 — Diss. AIR 1970 All 221 A (C N 34).

—S. 73 — AIR 1918 Cal 225 — Diss. AIR 1970 All 221 A (C N 34).

62 SUBJECTWISE LIST OF CASES OVERRULED, ETC., IN A. I. R. 1970 APRIL

Revenue Recovery Act (1 of 1890)

—S. 57-A (1) — ('67) W. P. No. 1229 of 1966, D/- 23-11-1967 (A. P.) — Revers. AIR 1970 Andh Pra 137 A (C N 18).

SALES TAX

—Andhra Pradesh General Sales Tax Act (6 of 1957)

—S. 14 — (1963) 2 Andh LT 201 — Over. AIR 1970 Andh Pra 146 (C N 20) (FB).

—S.20 — (1963) 2 Andh LT 201 — Over. AIR 1970 Andh Pra 146 (C N 20) (FB).

TENANCY LAWS

—Punjab Security of Land Tenures Act (10 of 1953)

—S. 19-B — 1967 Lah LT 155—Over. AIR 1970 Punj 157 A (C N 22) (FB).

—S. 19-B — 1969 Pun LJ 1 — Over. AIR 1970 Punj 157 A (C N 22) (FB)

Transfer of Property Act (4 of 1882)

—S. 58 (c) — AIR 1926 All 493 — Diss. AIR 1970 Ker 81 A (C N 17).

Transfer of Property Act (contd.)

—S. 60 — AIR 1926 All 493 — Diss. AIR 1970 Ker 81 A (C N 17).

—S. 100 — (1964) A. S. No. 502 of 1961, D/- 23-11-1964 (Ker) — Revers. AIR 1970 SC 504 A (C N 110).

—S. 105 — AIR 1926 Cal 763 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 105 — AIR 1957 Cal 627 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 111 (g) and (h) — AIR 1926 Cal 763 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 111 (g) and (h) — AIR 1957 Cal 627 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 112 — AIR 1926 Cal 763 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 112 — AIR 1957 Cal 627 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 113 — AIR 1926 Cal 763 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 113 — AIR 1957 Cal 627 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 116 — AIR 1926 Cal 763 — Diss. AIR 1970 Mad 165 A (C N 43).

—S. 116 — AIR 1957 Cal 627 — Diss. AIR 1970 Mad 165 A (C N 43).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN A. I. R. 1970 APRIL

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in

ALLAHABAD

AIR 1929 Oudh 385 = ILR 4 Luck 562 (FB), Mohammad Raza v. Ram Saroop — Diss. AIR 1970 Punj 176 (C N 23).

AIR 1925 All 459 = ILR 47 All 479, Ravinandan Prasad v. Jagarnath Sahu — Diss. AIR 1970 Ker 94 (C N 19).

AIR 1926 All 493 = ILR 48 All 302, Sheoram Singh v. Babu Singh — Diss. AIR 1970 Ker 81 A (C N 17).

AIR 1949 All 21 = 50 Cri LJ 78, Babu Ram v. Rex — Diss. AIR 1970 Pat 107 C (C N 17).

AIR 1952 All 29 = ILR (1953) 2 All 544, Jagdish Narain v. Rasul Ahmad — —Diss. AIR 1970 Punj 176 (C N 23).

AIR 1960 All 244 = 1960 Cri LJ 450, Kishorilal v. State — Diss. AIR 1970 Cal 169 (C N 26).

AIR 1962 All 251 = (1962) 1 Cri LJ 555, Lal Behari v. State — Diss. AIR 1970 Andh Pra 119 A (C N 14).

AIR 1962 All 438 = 1962 All LJ 55, Town Area Committee Rava v. Budh Sen Over. AIR 1970 All 206 C (C N 31) (FB).

AIR 1964 All 165, Shakuntala Devi v. Beni Madhav — Over. AIR 1970 All 238 (C N 39).

Allahabad (contd.)

(1965) Decision of High Court, D/- 5-8-1965 (All) — Revers. AIR 1970 SC 458 (C N 101).

(1966) All LJ 740 = ILR (1966) 2 All 675, Baburam Tripathi v. Sub-Divisional Officer — Over. AIR 1970 All 251 B (C N 41) (FB).

AIR 1968 All 419, Ram Jag Mistri v. Dy. Director of Consolidation — Over. 1970 All 238 (C N 39).

(1968) Civ. Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All), Balkrishna Khattri v. Regional Transport Authority Lucknow — Not F. AIR 1970 All 215 C (C N 33).

(1969) Civil Misc. Writ. No. 2399 of 1968, D/- 25-4-1969 (All), Nathu v. Sub-Divisional Officer — Over. AIR 1970 All 251 B (C N 41) (FB)

(1969) Civil Misc. Writ. No. 1140 of 1969, D/- 23-4-1969 (All), Bhagwat Prasad v. Sub-Divisional Officer — Over. AIR 1970 All 251 B (C N 41) (FB).

ANDHRA PRADESH

AIR 1956 Hyd 149 = ILR (1956) Hyd 184, Administrator General Hyderabad v. T. Laxmamma — Diss. AIR 1970 All 224 B (C N 35).

(1963) 2 Andh LT 201 = 15 STC 222, State of U. P. v. Varre Pathuraju —

Andhra Pradesh (contd.)

- Over.** AIR 1970 Andh Pra 146 (C N 20) (FB).
 AIR 1964 Andh Pra 216 = (1964) 1 Andh WR 185, *Dodla Malliah v. State* — **Over.** AIR 1970 Andh Pra 139 (C N 19) (FB).
 (1967) W. P. No. 1229 of 1966, D/- 23-11-1967 (Andh Pra) — **Revers.** AIR 1970 Andh Pra 137 A (C N 18).

ASSAM

- (1966) S. A. No. 165 of 1962, D/- 15-2-1966 (Assam) — **Over.** AIR 1970 Assam 59 B (C N 12) (FB).
 AIR 1969 Assam 3, *Smt. G. Vasantha v. State of Nagaland* — **Revers.** AIR 1970 SC 537 (C N 118).

BOMBAY

- (1912) ILR 36 Bom 77 = 13 Bom LR 573, *Fatmabai v. Sonabai* — **Diss.** AIR 1970 Punj 176 (C N 23).
 AIR 1933 Bom 25 = 34 Bom LR 1519, *Nathmal v. Nilkanth* — **Diss.** AIR 1970 Ker 81 B (C N 17).
 AIR 1933 Bom 205 = ILR 57 Bom 206, *Onkar Bhagwan v. Gamna Lakhaji and Co.* — **Diss.** AIR 1970 Punj 176 (C N 23).
 AIR 1939 Nag 179 = ILR (1939) Nag 357, *A. I. Railwaymen's Benefit Fund Ltd. v. Ramchand* — **Diss.** AIR 1970 Ker 94 (C N 19).

CALCUTTA

- (1884) ILR 10 Cal 612, *Aushootosh Chandra v. Tara Prasanna* — **Diss.** AIR 1970 Punj 176 (C N 23).
 (1903) ILR 30 Cal 613 = 7 Cal WN 419, *Rakhal Moni Dassi v. Adwyta Prasad Roy* — **Diss.** AIR 1970 Punj 176 (C N 23).
 (1909) 5 Ind Cas 877 = 14 Cal WN 439, *Nidhiram Bandopadhyaya v. Sarbessur Biswas* — **Diss.** AIR 1970 Ker 81 B (C N 17).
 AIR 1918 Cal 225 = 41 Ind Cas 57, *Anila Debi v. Moni Mohan Mukerjee* — **Diss.** AIR 1970 All 221 A (C N 34).
 AIR 1926 Cal 512 = 91 Ind Cas 620, *Madhusudan Chakravarti v. Satish Chandra Nag* — **Diss.** AIR 1970 Punj 176 (C N 23).
 AIR 1926 Cal 763 = 43 Cal LJ 272, *Manicklal v. Kadambini* — **Diss.** AIR 1970 Mad 165 A (C N 43).
 AIR 1949 Cal 637 = 51 Cri LJ 205, *Pran Krishna v. Shyam Sundar* — **Held Overruled** by AIR 1956 Cal 24 as interpreted AIR 1970 Cal 169 (C N 26).
 AIR 1956 Cal 220, *Jhatu Charan Das v. Bhanu Chandra Das* — **Not F.** AIR 1970 Cal 169 (C N 26).

Calcutta (contd.)

- AIR 1957 Cal 627 = ILR (1958) 2 Cal 426, *Pulin Behary v. Miss Lila Dey* — **Diss.** AIR 1970 Mad 165 A (C N 43).
 AIR 1963 Cal 127 = (1962) 45 ITR 528, *Rahaman Tea & Lands Co. (P) Ltd. v. Gift Tax Officer* — **Diss.** AIR 1970 Andh Pra 126 K (C N 17).

GUJARAT

- (1967) Civil Revn. Appln. No. 328 of 1967, D/- 27-4-1967 (Guj) — **Revers.** AIR 1970 SC 406 A (C N 89).

JAMMU AND KASHMIR

- AIR 1957 J & K 8 (FB), *Modh. Aslam v. V. L. Vishin* — **Partly Diss.** AIR 1970 J & K 57 B (C N 14) (FB).
 AIR 1957 J & K 31, *Gopi Nath v. State* — **Partly Diss.** AIR 1970 J & K 57 B (C N 14) (FB).

KERALA

- AIR 1955 Trav-Co 110 = ILR (1954) Trav-Co 1275, *M. K. Abdulrahiman v. State* — **Not F.** AIR 1970 Andh Pra 139 (C N 19) (FB).
 (1964) A. S. No. 502 of 1961, D/- 23-11-1964 (Ker) — **Revers.** AIR 1970 SC 504 A (C N 110).
 (1967) ILR (1967) 2 Ker 676, *State of Kerala v. Renganatha Reddiar* — **Revers.** AIR 1970 SC 520 (C N 113).

MADHYA PRADESH

- (1963) M. P. LJ 314 = 1963 Jab LJ 318, *Rao Nihalkaran v. Ramchandra* — **Over.** AIR 1970 SC 483 (C N 105).
 (1964) Civil Second. Appeal No. 146 of 1964, D/- 30-10-1964 (M. P.) — **Partly Revers.** AIR 1970 Madh Pra 79 B (C N 19).
 (1965) Second Appeal No. 254 of 1962, D/- 9-7-1965 (M. P.) — **Revers.** AIR 1970 SC 483 (C N 105).

MADRAS

- AIR 1920 Mad 145 = 38 Mad LJ 228, *Gopala Krishnayya v. Sanjeeva Reddi* — **Diss.** AIR 1970 Ker 94 (C N 19).
 AIR 1925 Mad 76 = 47 Mad LJ 602, *Lakshmanan v. Sella Muthu* — **Diss.** AIR 1970 Ker 81 B (C N 17).
 AIR 1930 Mad 45 = ILR 53 Mad 48 = 57 Mad LJ 357, *Brahmanandam v. Secy. of State* — **Diss.** AIR 1970 Andh Pra 139 (C N 19) (FB).
 AIR 1943 Mad 139 = ILR (1943) Mad 235 (FB), *Pappammal v. Meenammal* — **Diss.** AIR 1970 Mys 81 (C N 20).
 AIR 1957 Mad 773 = (1957) 2 Mad LJ 400, *Manuswamy v. Viswanath Nair* — **Not Followed** in view of AIR 1969

Madras (contd.)

- Mad 440 as interpreted AIR 1970 Mad 135 A (C N 36).
 AIR 1962 Mad 26 = (1961) 41 ITR 297, M. K. Stremann v. Commr. of Income-tax — Diss. AIR 1970 Andh Pra 126 C (C N 17).
 ILR (1964) 2 Mad 869, Lakshmiamma v. Commr. Land Revenue — Over. AIR 1970 Mad 136 (C N 37) (FB).
 (1966) W. P. No. 2332 of 1966 (Mad), Kuppusami Pillai v. State — Over. AIR 1970 136 (C N 37) (FB).
 AIR 1967 Mad 77 = 1967 Cri LJ 205, Aminithammal v. Manimuthu — Over. AIR 1970 SC 446 B (C N 98).
 (1967) 66 ITR 169 = (1967) 2 Mad LJ 352, Kandaswami v. Commr. of Agri. I. T. Diss. AIR 1970 Andh Pra 126 C (C N 17).
 (1967) W. P. No. 2298 of 1966, D/- 16-2-1967 (Mad) — Revers. AIR 1970 Mad 136 (C N 37) (FB).
 (1969) Mad LW (Cri) 98, Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi — Revers. AIR 1970 SC 494 B, C (C N 109).

MYSORE

- AIR 1962 Mys 269 = (1962) 45 ITR 194, D. H. Nazarath v. 2nd. Gift. Tax Officer — Diss. AIR 1970 Andh Pra 126 B (C N 17).
 (1967) 65 ITR 19 = 10 Law Rep 397 (Mys) Smt. Laxmibai Narayana Rao v. Commr. of Gift Tax — Diss. AIR 1970 Andh Pra 126 C (C N 17).
 (1968) 1 Mys LJ 311, Tavanappa Hambanna v. Veerabhadrappe Tippanna — Held not correct in view of AIR 1961 SC 272 as interpreted AIR 1970 Mys 108 (C N 27).

PATNA

- (1954) Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat), Zahuruddin v. State — Not F. AIR 1970 Pat 107 B (C N 17).
 (1964) 2 Cri LJ 111 (Pat), Ramphal v. State of Bihar — Diss. AIR 1970 All 235 (C N 38).
 AIR 1969 Pat 355, Patna Electric Supply Co. Ltd. v. Patna Municipal Corporation — Revers. AIR 1970 SC 491 (C N 108).

PUNJAB

- AIR 1927 Lah 289 = ILR 8 Lah 384 (FB), Mt. Lachhmi v. Mt. Bhulli — Diss. AIR 1970 Mys 81 (C N 20).
 AIR 1965 Punj 307, Union of India v. Tribhuwan Prakash Nayyar — Revers. AIR 1970 SC 540 D (C N 119).
 1967 Lah LT 155 = 1967 Pun LJ 193, Gurucharan Singh v. State of Punjab — Over. AIR 1970 Punj 157 A (C N 22) (FB).
 AIR 1968 Punj 466 = 70 Pun LR 9, Fazilka Dabwali Transport Co. (P) Ltd. v. Madan Lal — Over. AIR 1970 Punj 137 A (C N 20).
 1969 Pun LJ 1, Atma Devi v. State of Punjab — Over. AIR 1970 Punj 157 A (C N 22) (FB).

RAJASTHAN

- AIR 1958 Raj 248 = 1958 Cri LJ 1243, Ramcharan v. Residents of Shahabad — Diss. AIR 1970 Cal 169 (C N 26).
 (1967) Cri. Appeal No. 219 of 1965, D/- 15-3-1967 (Raj) — Revers. AIR 1970 SC 436 (C N 95).

COMPARATIVE TABLE

(10-3-1970)

A. I. R. 1970 April = Other Journals

AIR 1970 Supreme Court		AIR 1970 S C		AIR 1970 Andhra Pradesh		AIR 1970 Gujarat	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
403	(1969) 2 S C O 96	522	(1969) 2 S C O 634	139con	(1969) 1 Andh W R	67	---
408	(1969) 2 S C O 201	529	(1969) 2 S C C 376	(FB)	381	73	ILR (1969) Guj 323
	1969 S C D 824		(1970) 1 I T J 61		ILR (1969)		AIR 1970 J. & K.
410	(1969) 2 S C W R		75 I T R 186		Andh Pra 968		AIR Other Journals
	294		(1970) 1 S C J 221	146(FB)	24 S T C 390		50(FB)1969 Kash LJ 276
	(1969) 2 S C O 514	532	(1969) 2 S C O 313	153	(1970) 1 Andh W R		57(FB)1969 Serv LR 781
	75 I T R 191		(1969) 2 S C W R		45		AIR 1970 Kerala
413	(1969) 2 S C O 524		802	158(FB)	---		AIR Other Journals
417	---	535	(1970) 1 S C J 174		AIR 1970 Assam	65	1969 Ker L T 230
422	(1969) 1 S C O 839		(1969) 2 S C W R		AIR Other Journals		1969 Ker L R 373
	(1970) 1 S C W R		793	49	Assam L R (1969)	70	1969 Ker L J 481
	52	537	---		Assam 119		1969 Ker L T 965
428	(1969) 2 S C O 1	540	(1970) 1 S C W R	57	---	74	1970 Ser L R 146
	19 Fac L R 32		151	59	Assam L R (1969)		ILR (1969) 1 Ker
	(1969) 2 Lab L J	546	(1970) 1 S C W R	(FB)	Assam 163		167
	554	549	(1970) 1 S C O 152	61	Assam L R (1969)		1969 Ker L J 267
436	(1969) 2 S C O 386		AIR 1970 Allahabad	(FB)	Assam 10		1969 Mad L J
	(1970) 1 S C J 180		AIR Other Journals		AIR 1970 Bombay		(Cri) 413
	1970 Mad L J	197	1969 All W R		AIR Other Journals	81	1969 Ker L R 726
	(Cri) 98	(FB)	(HC) 439	115	1969 Maha L J		1969 Ker L T 338
439	(1969) 2 S C O 661		1969 All L J 733		634		ILR (1969) 1 Ker
	1970 Maha L J 1	198	1969 All W R		ILR (1970) Bom 144	88	1969 Ker L T 587
442	---	(FB)	(HC) 234	117	1969 Maha L J 464		ILR (1969) 1 Ker
446	(1969) 1 S C W R		1969 All (Cri) R	122	1969 Serv L R 462		642
	1176	201	1969 All L J 348	128	1969 Maha L J 347		1969 Ker L R 639
	1969 Cur L J 791	(FB)	1969 All W R	132	71 Bom L R 545		1969 Mad L J
	1969 All W R (HC)		(HC) 324	134	---		(Cri) 606
	711	206	1969 All L J 637	135	1969 Maha L J 344	94	1969 Ker L J 713
	1969 All Cri R 435	(FB)	1969 All W R	138	71 Bom L R 587		1969 Ker L T 397
	(1970) 1 S C J 176		(HC) 364	144	1969 Maha L J 873		1969 Ker L R 518
	1970 Mad L J (Cri)	210	1969 All L J 718	154	1969 Maha L J 723		ILR (1969) 2 Ker
	94	215	17 Fac L R 250	160	1969 Maha L J 813		184
450	1970 S C D 85	221	1969 All L J 495		1969 Maha L J 540		1969 Ker L J 591
453	---	224(FB)	1969 All L J 714		1969 Maha L J 838		AIR 1970 Madhya Pradesh
458	---	228	---		72 Bom L R 32		AIR Other Journals
466	---	234	---		AIR 1970 Calcutta	70	1969 M P W R 568
470	(1969) 2 S C A 390	235	---		AIR Other Journals		1969 M P L J 574
	(1970) 1 S C O 84	238	1969 All W R (HC)	131	---		1969 Jab L J 853
479	---		80	134	---	74	1969 M P L J 817
483	1970 M P L J 210		1969 All L J 253	154	---	(FB)	1969 M P W R 858
	1970 Jab L J 91	241	1969 All W R	161	---		1969 Jab L J 841
486	---	(FB)	(HC) 482	162	---	79	1969 Jab L J 115
488	---		1969 All L J 862	167	---		1969 M P W R 229
491	---	251	1969 All Cri R	169	---		1969 M P L J 349
	---	(FB)	285	170	20 Fac L R 54		AIR 1970 Madras
494	(1969) 2 S C O 412		1969 All W R	174	---		AIR Other Journals
504	(1969) 2 S C W R 241		(HC) 441	176	73 Cal W N 943	133	73 I T R 571
	(1969) 2 S C O 343		1969 All L J 743		AIR 1970 Delhi		(1969) 2 I T J 311
508	(1969) 2 S C W R		AIR 1970 Andhra Pradesh		AIR Other Journals	135	(1969) 2 Mad LJ 241
	216		AIR Other Journals	81	---		82 Mad L W 541
	(1969) 2 S C O 299	114	---	82	---	136	82 Mad L W 307
	(1970) 1 S C J 163	119	---	85	---	(FB)	(1969) 2 Mad LJ 79
	(1970) 1 Mad L J	124	---	88	---	145	(1969) 2 Mad L J
	(SC) 38	125	73 I T R 224	90FB	72 Pun L R (D) 66		198
	(1970) 1 Andh W R		24 S T C 90	95	---	148	(1969) 1 Mad L J
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Government free from all encumbrances". This is clearly compulsory acquisition of land within the meaning of Article 31 (2) of the Constitution and the compensation determined merely at fifteen times the fair and equitable rent may not, prima facie, be regarded as determination of compensation according to the principles specified by the Act. But Article 31-A which applies to the statute in question provides by the first clause:

"Notwithstanding any thing contained in Article 13 no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

- (b) * * *
- (c) * * *
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shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

* * * *

The principal Act 16 of 1960 and the amending Act 13 of 1965 were both Acts enacted for ensuing agrarian reform, and the lands held by the petitioners were "estates" within the meaning of Art. 31-A. By Section 45 the rights of the land-holders were sought to be extinguished or modified. But to the operative part of Article 31-A by Section 2 of the Constitution (Seventeenth Amendment) Act, 1964, the second proviso was added. The second proviso enacts:

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

By the Constitution (Seventeenth Amendment) Act, 1964, it was clearly enacted that under any law which provides for

the acquisition of any land in an estate under the personal cultivation of the holder, compensation shall not be less than the market value of the land if such land be within the ceiling limit applicable to the holder under any law for the time being in force.

5. Before the High Court it was urged on behalf of the land-holders that when the principal Act was enacted it became law in force, and the ceiling limit prescribed thereby became effective, even though Ch. IV was not extended by a notification under Section 1 (3) of the Act, and since the subsequent legislation seeks to restrict the ceiling limit and to vest the surplus land in the Government under Section 45 as amended, there is compulsory acquisition of land which may be valid only if the law provides for payment to the land-holder for extinction of his interest, the market value of that part of the surplus land which is within the ceiling limit under the principal Act. This argument found favour with the High Court. In their view the expression "law in force" must be "construed only in the constitutional sense and not in the sense of its actual operativeness", and on that account it must be held that "there was a ceiling limit already provided by the principal Act as it was 'law in force' within the meaning of that expression as used in the second proviso to Article 31-A". They proceeded then to hold that Section 47 of the Act as amended provided for payment of compensation at a rate which is less than the market value of the land falling within the ceiling limit as originally fixed under Act 16 of 1960, and the guarantee of the second proviso to Article 31-A of the Constitution is on that account infringed. We are unable to accept this process of reasoning. The right to compensation which is not less than the market value under any law providing for the acquisition by the State of any land in an estate in the personal cultivation of a person is guaranteed by the second proviso only where the land is within the ceiling limit applicable to him under any law for the time being in force. A law cannot be said to be in force unless it is brought into operation by legislative enactment, or by the exercise of authority by a delegate empowered to bring it into operation. The theory of a statute being "in operation in a constitutional sense" though it is not in fact in operation has, in our judgment, no validity.

6. Again Ch. IV of the principal Act was repealed by the Amending Act 15 of 1965. Article 31-A proviso 2 guarantees to a person, for compulsory acquisition of his land, the right to compensation which is not less than the market value, when the land is within the ceiling limit applicable to him under a law for the time being in force. On the plain words of the proviso the law prescribing the ceiling limit must be in force at the date of acquisition. In the present case the law relating to the ceiling limit viz. Ch. IV of the principal Act was never made operative by a notification, and was repealed by Act 15 of 1965. The ceiling limit under Section 47 of the principal Act was on that account inapplicable to the land-holders who challenged the validity of Section 45 of the amending Act.

7. The decision of this Court (Sic in?) A. Thangal Kunju Mudaliar v. M. Venkitachalam Potti, (1955) 2 SCR 1196 = (AIR 1956 SC 246) on which the High Court relied lends no support to the views expressed by them. In that case the Travancore State Legislature enacted Act 14 of 1124 (M. E.) to provide for investigating cases of evasion of tax. The Act was to come into force by Section 1 (3) on the date appointed by the State Government by notification. The States of Travancore and Cochin merged on July 1, 1949 and formed the United State of Travancore and Cochin. By Ordinance 1 of 1124 (M.E.) all existing laws of the Travancore State were to continue in force in the United State. By a notification the Government of the United State brought the Travancore Act 14 of 1124 (M. E.) into force, and referred cases of certain tax-payers for investigation to the Commission appointed in that behalf. The tax-payers challenged the authority of the Commission to investigate the cases. They contended that the Travancore Act 14 of 1124 (M. E.) not being a law in force when the United State was formed the notification bringing the Act into force was ineffective. The Court rejected that plea. Section 1 (3) of Travancore Act 14 of 1124 (M. E.) was existing law on July 1, 1949, and continued to remain in force by virtue of Ordinance 1 of 1124 (M. E.). The notification issued in exercise of the power under Section 1 (3) of the Travancore Act 14 of 1124 (M. E.), the reference of the cases of the petitioners, the appointment of the authorised officials and the proceedings under the Act could not be questioned because Sec-

tion 1 (3) was existing law on July 1, 1949.

8. In A. Thangal Kunju Musaliar's case, (1955) 2 SCR 1196 = (AIR 1956 SC 246) the contention that Travancore Act 14 of 1124 (M. E.) was not law in force until a notification was issued bringing into operation the provisions of the Act, authorising the appointment of a Commission, and referring the cases of tax-payers to the Commission, was rejected. The Court held that Section 1 (3) was in operation on July 1, 1949 and the power to bring into force the provisions of the Travancore Act was exercisable by the successor State. It was not held that the other provisions of the Act were in force even before an appropriate notification was issued. In the case in hand Section 1 (3) of the principal Act was in force, but Ch. IV of the Act was not brought into force. The argument that provisions of the Act which by a notification could have been but were not brought into force, must still be deemed to be law in force, derives no support from the case relied upon.

9. Section 1 (3) of Act 16 of 1960, is undoubtedly a law in force, but until the power is exercised by the State Government to issue an appropriate notification, the provisions of Ch. IV could not be deemed to be law in force, and since no notification was issued before Ch. IV of the principal Act was repealed, there was no ceiling limit applicable to the landholders under any law for the time being in force which attracted the application of the second proviso to Article 31-A.

10. The appeals must, therefore, be allowed, and the order passed by the High Court declaring Ch. IV of Act 13 of 1965 amending Act 16 of 1960 ultra vires, be set aside. The State will get its costs in this Court from the respondents. There will be one hearing fee. There will be no order as to costs in the High Court.

Appeals allowed.

AIR 1970 SUPREME COURT 403

(V 57 C 88)

(From Andhra Pradesh)*

J. C. SHAH AND G. K. MITTER, JJ.

Maganti Subrahmanyam (dead) by his Legal Representative, Appellants v. The State of Andhra Pradesh, Respondent.

Civil Appeal No. 614 of 1966, D/- 17-4-1969.

(A) Tenancy Laws — Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947), Pre. and Section 4 — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Section 63 — Act of 1947 is not a temporary Act and is not repealed by Act of 1948.

The purpose of the Act of 1947 was to prohibit the alienation of communal, forest and private lands in estates in the Province of Madras and the preamble to the Act shows that it was enacted to prevent indiscriminate alienation of communal, forest and private lands in estates in the Province of Madras pending the enactment of legislation for acquiring the interests of land-holders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the above preamble the Act became a temporary Act. In the absence of express words to that effect or necessary implication, it could not, therefore, be contended that with the enactment of the repeal of the Permanent Settlement by the Act of 1948 which also provided for the acquisition of the rights of land-holders in permanently settled estates, the Act of 1947 stood repealed.

(Para 4)

It does not stand to reason to hold that the alienation of large blocks of land which were rendered void under the Act of 1947 became good by reason of the passing of the later Act of 1948. Section 63 of the Act of 1948 in terms is only prospective and it does not seek to impeach any transaction which was effected before the Act and was not applicable to transactions anterior to the Act. By virtue of Section 8 (f) of Madras General Clauses Act (1 of 1891) even if there was a repeal, any investigation started before the repeal would have to be continued and legal proceedings under

*(Civil Revn. Petn. No. 966 of 1962, D/- 24-3-1965—A. P.)

the Act could be prosecuted as if the repealing Act had not been passed.

(Paras 4, 5,)

(B) Tenancy Laws — Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947) Section 2 (b) — “Forest Land” — Inclusion of piece of land as forest land — Notification of Government not a pre-requisite.

The definition of ‘forest land’ in S. 2 (b) is an inclusive one and shows that ‘forest land’ would include not only waste land containing trees, shrubs and pasture lands but also any other class of lands declared by Government to be forest land. This does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act. (Para 6)

(C) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) Section 20 (1) (as substituted by amending Act) (44 of 1956) — Question as to whether land is “forest land” within Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (14 of 1947) — District Judge and not Settlement Officer is competent to adjudicate.

The original Section 20 (1) is substituted, for another by Section 9 of the Madras Estates (Abolition and Conversion into Ryotwari) (Amendment) Act, 1956 which is to be deemed to have come into force on April 19, 1949 being the date on which the Act of 1948 originally came into force. The section as it now stands did not confer any jurisdiction on the Settlement Officer to determine any question as to whether any land was “forest land” within the meaning of the Act (14 of 1947) and consequently the adjudication by the District Judge under sub-sec. (4) of Sec. 4 of Andhra Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act (1947) is quite competent.

(Para 7)

Mr. A. V. V. Nair, Advocate, for Appellants; Mr. P. Ram Reddy, Senior Advocate, (Mr. B. Parthasarathy, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.:— This appeal by special leave is from a common judgment and order of the High Court of Madras disposing of three Revision Applications arising out of O. P. No. 95 of 1948 filed under Section 4 (3) and (4) of the Andhra

Pradesh (Andhra Area) Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act, 1947 (hereinafter called the 'Act').

2. The central question in this appeal is, whether certain transfers of lands alleged to be forest lands made by the 6th respondent herein become void and inoperative under Section 4 of the Act. The said respondent who was a big landholder granted a patta to his wife, 7th respondent, for Ac. 100-00 of land on November 9, 1944. Another patta was similarly granted to the appellant in respect of Ac. 90-00 of land on November 25, 1944. On the same day, respondent No. 6 granted a third patta for Ac. 200-00 of land to respondents 2 to 5. The Act came into force on October 25, 1947. On October 15, 1948 Original petition No. 95 of 1948 was filed in the District Court of Eluru by two ryots for a declaration that the alienations were void and did not confer any rights on the alienees. Thereafter the said petition was split into two parts, O. P. 95/1948 being directed against respondents 1 to 6 while O. P. No. 95-(a) of 1948 was directed against the 7th respondent. The petitions were disposed of by an order of the District Judge dated July 18, 1950 holding that lands covered by the pattas were forest lands and all the alienations were void and inoperative. A Civil Revision Petition was filed in the High Court of Madras by respondents 1 to 5 against the order of the District Judge. This was numbered as C. R. P. No. 22 of 1951. Respondent No. 7 filed a Miscellaneous Petition No. 9534 of 1950 in the High Court of Madras. By order dated 6th August, 1962 both the petitions were dismissed by a single Judge of the Madras High Court. This order was however set aside in a Letters Patent Appeal filed by respondents 1 to 5 (No. 261 of 1952) wherein it was held that the petitioners as ryots had no right to maintain the petition but reasonable opportunity should be given to the State to get transposed as the petitioner. The State Government thereafter got itself transposed as the petitioner. The District Court however held that the petition was not maintainable by reason of the repeal of the Act by reason of the passing of a subsequent Act, XXVI of 1948 styled the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, hereinafter referred to as the Act of 1948. Against this the State Government filed a Revision Peti-

tion in the High Court of Andhra Pradesh numbering 1555 of 1955. The High Court held that the dismissal of the petition on the ground of repeal of the Act was improper and that the petition should be disposed of on the merits and remitted the matter to the District Judge. By a judgment dated November 30, 1960 the District Judge allowed the petition negating the contentions of the respondent but holding that the lands were forest lands and transfers thereof were void. The appellant and others filed Civil Revision Petitions in the High Court of Andhra Pradesh which were disposed of and dismissed by a common judgment dated August 24, 1965. Hence this appeal.

3. The points urged before us by learned counsel for the appellant were: (1) The Act applied only to lands which were admittedly forest lands and the operation thereof could not be extended to lands in respect of which there was a dispute as to the nature thereof. It was argued that any such dispute could only be decided by the Settlement Officer and not by the District Judge. (2) The Act was a temporary Act and all proceedings thereunder came to an end with the repeal of the Act; and (3) A notification by the State Government describing the land as forest land was an essential pre-requisite to the application of the Act.

4. The purpose of the Act was to prohibit the alienation of communal, forest and private lands in estates in the Province of Madras and the preamble to the Act shows that it was enacted to prevent indiscriminate alienation of communal, forest and private lands in estates in the Province of Madras pending the enactment of legislation for acquiring the interests of land-holders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the above preamble the Act became a temporary Act. The definition of 'forest land' is given in Section 2 (b) of the Act reading:

"forest land" includes any waste land containing trees and shrubs, pasture land and any other class of land declared by the State Government to be forest land by notification in the Fort St. George Gazette; Sub-section (1) of Section 3 prohibited landholders from selling, mortgaging, converting into ryoti land, leasing or otherwise assigning or alienating any

communal or forest land in an estate without the previous sanction of the District Collector, on or after the date on which the Ordinance which preceded the Act came into force, namely, the 27th June, 1947. Section 4 (1) provided that:

“Any transaction of the nature prohibited by Section 3 which took place in the case of any communal or forest land, on or after the 31st day of October 1939shall be void and inoperative and shall not confer or take away, or be deemed to have conferred or taken away, any right whatever on or from any party to the transaction:

* * * * *

This sub-section had a proviso with several clauses. Our attention was drawn to Clauses (iii), (iv) and (v) of the proviso but in our opinion none of these provisos was applicable to the facts of the case so as to exclude the operation of sub-section (1) of Section 4. Under sub-section (3) of Section 4.

“If any dispute arises as to the validity of the claim of any person to any land under clauses (i) to (v) of the proviso to sub-section (1), it shall be open to such person or to any other person interested in the transaction or to the State Government, to apply to the District Judge of the district in which the land is situated, for a decision as to the validity of such claim.”

Under sub-section (4) the District Judge to whom such application is made was to decide whether the claim to the land was valid or not after giving notice to all persons concerned and where the application was not made by the State Government, to the Government itself, and his decision was to be final. Madras Act XXVI of 1948 was passed on April 19, 1949 being an Act to provide for the repeal of the Permanent Settlement, the acquisition of the rights of land-holders in permanently settled and certain other estates in the Province of Madras, and the introduction of ryotwari settlement in such estates. Apparently because of the preamble to the Act it was contended that with the enactment of the repeal of the Permanent Settlement by the Act of 1948 which also provided for the acquisition of the rights of land-holders in permanently settled estates, the Act stood repealed. We fail to see how because of the preamble to the Act it can be said that it stood repealed by the enactment of the later Act unless there were express words to that effect or unless there was

necessary implication. It does not stand to reason to hold that the alienation of large blocks of land which were rendered void under the Act became good by reason of the passing of the later Act. Our attention was drawn to Section 63 of the later Act which provided that:

“If any question arises whether any land in an estate is a forest or is situated in a forest, or as to the limits of a forest, it shall be determined by the Settlement Officer, subject to an appeal to the Director within such time as may be prescribed and also to revision by the Board of Revenue.”

In terms the section was only prospective and it did not seek to impeach any transaction which was effected before the Act and was not applicable to transactions anterior to the Act. In our opinion Section 56 (1) of the later Act to which our attention was drawn by the learned counsel does not fall for consideration in this case and the disputes covered by that section do not embrace the question before us.

5. Madras General Clauses Act, 1 of 1891 deals with the effect of repeals of statutes. Section 8 sub-section (f) thereof provides that:

“Where any Act, to which this Chapter applies, repeals any other enactment, then the repeal shall not—

(a) to (c) * * *

(f) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such fine, penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.”

This shows that even if there was a repeal any investigation started before the repeal would have to be continued and legal proceedings under the Act could be prosecuted as if the repealing Act had not been passed.

6. There is also no force in the contention that unless there was a notification under Section 2 (b) of the Act declaring a particular land to be forest land, the applicability of the Act would be excluded. The definition of ‘forest land’ in that section is an inclusive one and shows that ‘forest land’ would include not only waste land containing trees, shrubs and pasture lands but also any

other class of lands declared by Government to be forest land. This does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act.

7. Lastly, counsel contended that sub-section (1) of Section 20 of the later Act as originally enacted applies to forest lands and therefore the later Act became applicable thereto. The original section was however substituted, for another by Section 9 of the Madras Estates (Abolition and Conversion into Ryotwari) (Amendment) Act, 1956 which was to be deemed to have come into force on April 19, 1949 being the date on which the Act of 1948 originally came into force. The section as it now stands did not confer any jurisdiction on the Settlement Officer to determine any question as to whether any land was forest land within the meaning of the Act and consequently the adjudication by the District Judge under sub-section (4) of Section 4 was quite competent. Accordingly we dismiss the appeal, but do not think it necessary to make any order for costs relating thereto.

Appeal dismissed.

AIR 1970 SUPREME COURT 406
(V 57 C 89)

(From Gujarat)*

J. C. SHAH AND G. K. MITTER, JJ.

Baldevdas Shivilal and another, Appellants v. Filmistan Distributors (India) Pvt. Ltd. and others, Respondents.

Civil Appeal No. 1940 of 1967, D/- 29-4-1969.

(A) Civil P. C. (1908), Sections 115, and 11 — Order of trial Court overruling objection to question put to witness of party as to legal relationship arising out of certain agreement — Question held not barred, since previous consent decree had not decided the same — Revision against order — High Court could not give finding on question of res judicata when trial court had not decided the issue. Civil Revn. Appln. No. 328 of 1967, D/- 27-4-1967 (Guj), Reversed.

A consent decree does not operate as res judicata, because a consent decree is

* (Civil Revn. Appln. No 328 of 1967, D/- 27-4-1967—Guj.)

merely the record of a contract between the parties to a suit, to which is super-added the seal of the Court. A matter in contest in a suit may operate as res judicata only if there is an adjudication by the Court; the terms of Section 11 of the Code leave no scope for a contrary view. It is for the trial Court in the first instance to decide that question and thereafter the High Court can if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction decide that question. Where the trial court gave no decision on the question of res judicata but decided that a question seeking information about true relationship of the parties arising out of certain agreement, could be put to a witness of a party, since it was not decided in a previous consent decree between the parties, in the revision against the decision the High Court has no jurisdiction to decide the issue of res judicata. The High Court cannot decide matters on which no decision was recorded by the trial court and which could not be decided by trial court until the parties had opportunity of leading evidence thereon. Civ. Revn. Appln. No. 328 of 1967, D/- 27-4-1967 (Guj), Reversed. (Paras 8, 9)

(B) Civil P. C. (1908), Section 115 — Case decided — Trial Court overruling objection to a certain question put to witness — Not a case decided.

The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. The expression 'case' is a word of comprehensive import; it includes a civil proceedings and is not restricted by anything contained in Section 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But every order of the court in the course of a suit does not amount to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a 'case decided' within the meaning of Section 115. By overruling an objection to a question put to a witness and allowing the question to be put, no case is

decided. AIR 1964 SC 497, Ref. (Para 10)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 497 (V 51) =
(1964) 4 SCR 409, Major S. S.
Khanna v. Brig. F. J. Dhillon 10

Mr. S. T. Desai, Senior Advocate (Mr. I. N. Shroff, Advocate, with him), for Appellants; Mr. M. P. Amin, Senior Advocate (M/s. P. M. Amin, P. N. Duda, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Respondent No. 1; Mr. R. P. Kapur, Advocate, for Respondents Nos. 2 and 3.

The following Judgment of the Court was delivered by

SHAH, J.: By insistence upon procedural wrangling in a comparatively simple suit pending in the Court of Small Causes at Ahmedabad the parties have effectively prevented all progress in the suit during the last six years.

2. A building in the town of Ahmedabad used as a cinematograph theatre belonged originally to Messrs. Popatlal Punjabhai. In proceedings in insolvency, receivers were appointed of the estate of the owners and on August 19, 1954, the receivers granted a lease of the theatre on certain terms and conditions to two persons, Raval and Faraqui. By an agreement dated November 27, 1954, between Raval and Faraqui on the one hand and Messrs. Filmistan Distributors (India) Private Ltd. — hereinafter called 'Filmistan' — on the other hand, right to exhibit cinematograph films was granted to the latter on certain terms and conditions. "Filmistan" instituted suit No. 149 of 1960 in the Court of the Civil Judge (Senior Division) at Ahmedabad against Raval and Faraqui and two other persons claiming a declaration that it was entitled pursuant to the agreement dated November 27, 1954, to exhibit motion pictures in the theatre. By an order dated December 1, 1960 the suit was disposed of as compromised. It was inter alia agreed that Raval and Faraqui were bound and liable to allow Filmistan to exercise its "exhibition rights" in the theatre; that Raval and Faraqui, their servants and agents were not to have any right to exhibit any picture in contravention of the terms and conditions of the agreement dated November 27, 1954; and that Raval and Faraqui shall "execute and register" an agreement in writing incorporating the said

agreement with the variation as to rental. Pursuant to this agreement, a fresh agreement was executed on December 1, 1960. On September 1, 1963, Filmistan filed suit No. 1465 of 1963 in the Court of Small Causes at Ahmedabad, inter alia, for a declaration that a sub-lessee or as lessee under law it was entitled to obtain and remain in possession of the theatre and to exhibit cinematograph films and to hold "entertainment performances" etc. in the theatre, and that one Shabeer Hussain Khan Tejabwala had no right, title or interest in the theatre, that the defendants in the suit be ordered to hand over vacant and peaceful possession of the theatre, and the defendants, their servants and agents be restrained by an injunction from interfering directly or indirectly with its rights to obtain and remain in possession of the theatre or any part thereof and to exercise its right of exhibiting "motion pictures" and entertainment performances etc. This suit was filed against the receivers in insolvency of the owners of the theatre, against Raval and Faraqui, against Tejabwala and also against Baldevdas Shivilal who claimed to be the owner of the theatre. The suit was based on the claim by Filmistan as lessees or sub-lessees of the theatre and was exclusively triable by the Court of Small Causes by virtue of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Three sets of written statements were filed against the claim made by Filmistan but no reference need be made thereto, since at this stage in deciding this appeal the merits of the pleas raised by the defendants are not relevant. After issues were raised on June 20, 1966, the plaint was amended and additional written statements were filed by the defendants. The learned Judge was then requested to frame three additional issues in view of the amended pleadings: the issues were:

"11. Whether in view of the said consent decree in suit No. 149 of 1960 defendants Nos. 5 and 6 are debarred on principles of res judicata from agitating the question that the said document dated November 27, 1954 as confirmed by their letter dated January 31, 1955 and further confirmed by document dated December 1, 1960 is not a lease?

12. Whether in view of the said consent decree defendants 5 and 6 are estopped from contending and leading any evidence and putting questions in cross-examination of plaintiff's witnesses to show

that the said document dated November 27, 1954 as confirmed by their letter dated January 31, 1955 and further confirmed by document dated December 1, 1960 is not a lease?

13. Whether in respect of the terms of the said consent decree as also of the said document dated November 27, 1954, as confirmed by their letter dated January 31, 1955 and further confirmed by document dated December 1, 1960 defendants Nos. 5 and 6 are debarred from leading any evidence of the plaintiff's witnesses in view of Section 92 of the Evidence Act?

In drawing up the additional issues not much care was apparently exercised: whether a party is entitled to lead evidence or to put questions in cross-examination of the plaintiff's witnesses cannot form the subject-matter of an issue.

3. Filmistan then applied to the Court of Small Causes for an order that issues Nos. 11, 12 and 13 be tried as preliminary issues. The learned Judge observed that the issues were not purely of law, that in any event the case or any part thereof was not likely to be disposed of on these issues, and that ordinarily in "appealable cases" the Court should, as far as possible, decide all the issues together and that piecemeal trial might result in protracting the litigation. He also observed that the issues were not of law going to the root of the case and were on that account not capable of being decided without recording evidence.

4. A revision application against that order was dismissed in limine by the High Court of Gujarat. When the case reached hearing and the evidence of a representative of Filmistan was being recorded counsel for the defendants asked in cross-examination the question whether the "agreement between the plaintiff and defendants Nos. 5 and 6 was a commercial transaction and was not a lease?" The question was objected to by counsel appearing for Filmistan. Thereafter elaborate arguments were advanced and the Trial Judge passed an order disallowing the objection.

5. The objection to the question raised by Filmistan was not that it related to a matter to be decided by the Court and on which the opinion of witnesses was irrelevant. The objection was raised as

an attempt to reopen the previous decision given by the Trial Judge refusing to try issues Nos. 11, 12 and 13 as preliminary issues. Counsel for Filmistan contended that an enquiry into the nature of the legal relationship arising out of the agreement dated December 1, 1960 "was barred by the principle of res judicata and estoppel under the provisions of Section 92 of the Evidence Act", since the question was already concluded by the consent decree in suit No. 149 of 1960. The Trial Judge observed that he had carefully gone through the consent decree and the registered agreement dated December 1, 1960, and he found that the consent decree had not decided that the transaction between the parties of the year 1954 was in the nature of a lease; that in the plaint in the earlier suit it was not even averred that the rights granted were in the nature of leasehold rights; that suit No. 149 of 1960 was for declaration of the rights of Filmistan to exhibit motion pictures in the theatre under the agreement dated November 27, 1954, and for an injunction restraining the defendants from violating the said rights of Filmistan under the agreement and that the agreement dated December 1, 1960 was "not plain enough to exclude the oral evidence of the surrounding circumstances and conduct of the parties to explain its terms and language." Accordingly he held that the question asked in cross-examination of the witnesses for Filmistan intended to disclosure of the surrounding circumstances and conduct of the parties in order to show in what manner the language of the document was related to the existing facts, could not be excluded. The Court also rejected the contention that there was any bar of estoppel, and held that evidence as to the true nature of the transaction was not inadmissible by virtue of Section 92 of the Evidence Act.

6. Filmistan feeling dissatisfied with the order invoked the revisional jurisdiction of the High Court of Gujarat under Section 115 of the Code of Civil Procedure. The revision petition was entertained and elaborate arguments were advanced at the Bar. The High Court referred to a number of authorities and observed that the correctness of the findings of the Trial Court on issues Nos. 12 and 13 may not be examined in exercise of the powers under Section 115 of the Code of Civil Procedure. The Court proceeded to observe:

"The question then arises for consideration whether in fact the subordinate Court has decided the question *"res judicata"*, and that "it is true that the jurisdiction of the Court of Small Causes to decide disputes between a tenant and his landlord and falling within the purview of Section 28 of the Bombay Rent Control Act is derived from Section 28 of the said Act, but at the same time if an issue is in fact barred by *res judicata*, then the Court has no jurisdiction on principles of *res judicata* to go into that question or to decide that question over again to the extent to which the Court, viz., the trial Court in the instant case, proposed to go into that question and allow the whole question, that was closed once for all by consent decree of December 1, 1960, to be reopened, it is proposing to exercise the jurisdiction which is not vested in it by law. It is not open to any Court of law to try an issue over again or reopen the same if an earlier decision operates as *res judicata*. Once the jurisdiction of the Court has been taken away, any proposal to reopen the question closed by the earlier decision would be exercise of jurisdiction which is not vested in the Court by law and to that extent the decision would become revisable, even if it is the decision as to the *res judicata* of an issue", and concluded:

"It is not open to me in revision at this stage to express any opinion about the rights and contentions of the parties with reference to the agreement of December 1, 1960. But the only thing that can be said is that so far as the agreement of November 27, 1954, is concerned, it must be held, in view of the consent decree of December 1, 1960, that that document of November 27, 1954, created a lease
x x x".

The consent decree must be held to create a bar of *res judicata* as far as the question of document of November 27, 1954, creating a lease is concerned. The learned Judge will not proceed with the trial".

By Section 115 of the Code of Civil Procedure the High Court is invested with power to call for the record of any case decided by any Court subordinate to such High Court and in which no appeal lies thereto, if such subordinate court appears—(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its juris-

diction illegally or with material irregularity, and to make such order in the case as it thinks fit. Exercise of the power is broadly subject to three important conditions (1) that the decision must be of a Court subordinate to the High Court; (2) that there must be a case which has been decided by the subordinate Court; and (3) that the subordinate Court must appear to have exercised jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

7. In the present case the Court of Small Causes had only decided that a question seeking information about the true legal relationship arising out of the document could be permitted to be put to the witnesses for Filmistan. The Court gave no finding expressly or by implication on the issue of *res judicata* or any other issue. In the view of the Trial Court the question whether the legal relationship arising out of the agreement dated December 1, 1960 was in the nature of a lease or of other character had to be decided at the trial and the previous judgment being a judgment by consent "could not operate as *res judicata*", for, it was not a decision of the Court, and that the consent decree in suit No. 149 of 1960 had not decided that the agreement dated March 27, 1954, was of the nature of a lease, and that in the plaint in that suit it was not even averred that it was a lease.

8. The Trial Judge in overruling the objection did not decide any issues at the stage of recording evidence: he was not called upon to decide any issues at that stage. The observations made by him obviously relate to the arguments advanced at the Bar and can in no sense be regarded even indirectly as a decision on any of the issues. But the High Court has recorded a finding that the agreement dated November 27, 1954, created a lease and that the consent decree operated as *res judicata*. A consent decree (according ?) to the decisions of this Court, does not operate as *res judicata*, because a consent decree is merely the record of a contract between the parties to a suit, to which is superadded the seal of the Court. A matter in contest in a suit may operate as *res judicata* only if there is an adjudication by the Court; the terms of Section 11 of the Code leave no scope for a contrary view. Again it

was for the Trial Court in the first instance to decide that question and thereafter the High Court could if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction, have decided that question. In our judgment, the High Court had no jurisdiction to record any finding on the issue of *res judicata* in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under examination.

9. The true nature of the order brought before the High Court and the dimensions of the dispute covered thereby apparently got blurred and the High Court proceeded to decide matters on which no decision was till then recorded by the Trial Court, and which could not be decided by the High Court until the parties had opportunity of leading evidence thereon.

10. It may also be observed that by ordering that a question may properly be put to a witness who was being examined, no case was decided by the Trial Court. The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in *Major S. S. Khanna v. Brig. F. J. Dillon* (1964) 4 SCR 409 = (AIR 1964 SC 497) that the expression "case" is a word of comprehensive import: it includes a civil proceeding and is not restricted by anything contained in S. 115 of the Code to the entirety of the proceeding in a civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna's case*, (1964) 4 SCR 409 = (AIR 1964 SC 497) (supra) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code of Civil Procedure.

11. The order passed by the High Court is set aside and the Trial Court is directed to proceed and dispose of the

suit. We trust that the suit will be taken up early for hearing and disposed of expeditiously. We recommend that the form of the issues Nos. 11, 12 and 13 will be rectified by the learned Trial Court.

12. Filmistan will pay the costs of the appeal in the Court and in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 410 (V 57 C 90)

(From Calcutta: AIR 1967 Cal 475)

J. C. SHAH, Ag. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

The Commissioner of Income-tax, West Bengal I, Appellant v. India Discount Co., Ltd., Respondent.

Civil Appeal No. 2115 of 1968, D/- 7-8-1969.

Income-tax Act (1922), Secs. 10, 12 — Assessee, a private limited Company whose business inter alia is to deal with shares and securities — Assessee purchasing shares of a Company from a share broker — Shares sold with arrear dividends declared long ago but not claimed by previous owners — Amount of arrear dividends received by the assessee — Amount cannot be treated as income liable to tax either under Section 10 or under Section 12. AIR 1967 Cal 475, Affirmed.

Where an assessee, a private limited company whose business inter alia is to deal in shares and securities, purchases shares of a Company from a share broker and it is evident by the letter from share broker that the shares have been sold with arrear dividends — dividends declared long ago but not claimed by previous owners of the shares — then the arrear dividends amount received by the assessee cannot be treated as income liable to tax either as profit under Sec. 10 or as dividend under Section 12.

The arrear dividends, being the income of vendor, i.e., the registered share holders, are not claimable by the purchaser (assessee) by virtue of his right as such purchaser and cannot become his income from the shares. He is to get the same because the vendor has contracted to pass the arrear dividends on to him. The existence of a contract binding the vendors to make over to the purchaser the arrear dividends clearly implies that the

price paid by the purchaser is not only for the value of the share scrips but also for the sum which is going to be realised in the form of arrear dividends by the purchaser. What the assessee acquires in the form of share scrip represents its stock-in-trade, which consists of the shares and the dividends potential which has to be realised. In such case it is manifest that the assessee pays the purchase consideration not only for the share scrips but also for the arrear dividends which is inextricably connected with the purchase of the share scrips. Hence the arrear dividends amount is not income which can be assessed in the hands of the assessee. AIR 1967 Cal 475, Affirmed. (Paras 3, 4)

Merely by the fact that the assessee erroneously credited the receipt to the profit and loss account the receipt cannot become the income of the assessee. (1962) 46 ITR 144 (SC), Relied on. (Para 4)

Cases Referred: Chronological Paras (1962) 46 ITR 144 (SC), Commr. of

I. T., Bombay v. Shoorji Vallabhdas & Co. 4

Mr. B. Sen Senior Advocate, (M/s. S. A. L. Narayana Rao, R. N. Sachthey and B. D. Sharma, Advocates with him), for Appellant; Mr. S. Mitra, Senior Advocate, (Mr. P. K. Mukherjee, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.:— The respondent is a private limited company (hereinafter referred to as the assessee). The appeal relates to the assessment year 1956-57 for which the previous year is the year ending September 30, 1955. The business of the assessee was to deal with shares and securities. On September 30, 1954 the assessee purchased 11,900 shares of Kedarnath Jute Manufacturing Co. Ltd., in two lots, one at the rate of Rs. 9-8-0 per share and the other at Rs. 9-4-0 per share from one Beharilal Nathani, Share broker, for a total consideration of Rs. 1,12,575. When the assessee purchased the said shares a large amount of dividends was in arrear as the previous owners had not claimed the dividends declared between 1936 and 1945, although a large part of the dividends on the said shares in respect of the years 1945 to 1954 had been collected by the previous owners of the said shares. A letter addressed by Beharilal Nathani to the assessee bearing the date September 30, 1954 goes to show that the shares had been "sold with arrear dividends". It is admitted that the dividends

which had been declared between the years 1936 and 1945 and were received by the assessee during the accounting period amounted to Rs. 43,925. The assessee first credited this sum to the profit and loss appropriation account and thereafter transferred the same to a reserve fund in the accounting year ending September 30, 1955. No adjustment was made in the share purchase account on account of the receipt of dividend. The value of the shares which represented the stock-in-trade of the assessee remained the same both in the opening and the closing stocks. Before the Income-tax Officer it was contended on behalf of the assessee that as the arrear dividends pertained to the years 1936 to 1945 the arrear dividend received by the assessee was not in the nature of income liable to income-tax as it was merely a realisation of capital. The Income-tax Officer rejected the contention of the assessee and treated the amount of arrear dividend as the business income of the assessee liable to tax. On appeal by the assessee the Appellate Assistant Commissioner of Income-tax examined the question whether the amount of Rs. 43,925 should be treated as dividend and should, therefore, be assessed under Section 12 of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act) or whether it should be treated as profits and gains of business arising to the assessee and taxed under Section 10 of the Act. He however, held that the amount could not be regarded as 'dividend' as the assessee was not the registered shareholder in the years for which the arrear dividends were declared. But he held that since the shares were purchased by the assessee with the knowledge that it would be entitled to receive the arrear dividends which represented profits arising on the acquisition of such shares, the assessee could be deemed to have entered into a scheme of profit making, an adventure in the nature of trade. The assessee brought a second appeal to the Appellate Tribunal but the appeal was dismissed. The Appellate Tribunal confirmed the findings by the Income-tax authorities and held that the assessee acquired the shares on which the arrear dividends were received in the course of its share-dealing business and that the sum of Rs. 43,925 so received by the assessee formed an integral part of its income arising from business which was liable to tax. At the instance of the assessee the Appellate Tribunal stated a case to the

High Court on the following question of law:

"Whether on the facts and in the circumstances of the case the sum of Rupees 43,925 received by the assessee represented business income arising under Sec. 10 from an adventure in the nature of trade or it was a dividend within the meaning of Section 12 of the Income-tax Act?"

After looking into the statement of case and also the application of the assessee under Section 66 (1) of the Act the High Court held that the question which the Tribunal had referred did not correctly and accurately describe the stand and contention taken by the assessee throughout which was that no part of the arrear dividends received by the assessee was income at all liable to tax. The High Court thereafter addressed itself to the real issue between the parties and ultimately held that the amount of Rs. 43,925 was not liable to tax. This appeal is brought on behalf of the Commissioner of Income-tax against the judgment of the High Court dated January 6, 1965 by a certificate granted under Section 66A (2) of the Act.

2. It is necessary that the question referred to by the High Court should be reframed in the following manner in order to bring out the real point in controversy between the parties:

"Whether in the facts and circumstances of the case the assessee had purchased the arrears of dividend? If so whether the said sum of Rs. 43,925 could at all be assessed either as dividend or as profit?"

3. It is manifest that dividends declared by Kedarnath Jute Manufacturing Co., between the years 1936 and 1945 were the property of the persons whose names stood on the share register on the relevant dates. When a company declares dividend the same can only be paid to the person who is then the registered holder. A purchaser of shares becomes entitled to all dividends declared since his purchase but not before. If the purchase is made on the eve of declaration of dividend but the purchaser does not get his name mutated in the records of the company in time to have the dividend-warrant issued in his own name he is entitled to call upon his vendor to make over the dividend to him if and when received. It is well settled that after a sale of the shares and so long as the purchaser does not get his name registered, the vendor is for certain pur-

poses considered a trustee for the purchaser of the rights attaching to the shares or accruing thereon, including the voting rights. In the present case there was a contract between the assessee and the registered shareholders to sell the shares to the assessee with arrear dividends. In other words the assessee entered into the contract with the registered shareholders not only to purchase share scrips but the dividends which had been declared but not collected by him or paid over to shareholders. As the dividends had been declared long ago there was no uncertainty as to the exact amount receivable in respect of them. It is, therefore, clear that both the purchaser and the vendor knew exactly what sum of money would come to the vendor by way of such dividend. In other words the purchase consideration included the amount of the arrear dividends and as the dividends had been declared long ago there was no uncertainty as to the exact amount receivable in respect of them. The existence of a contract binding the vendors to make over to the purchaser the arrear dividends clearly implied that the price paid by the purchaser was not only for the value of the share scrips but also for the sum of Rs. 43,925 which was going to be realised in the form of arrear dividends by the purchaser. The High Court held upon an examination of the evidence that such an arrangement implied that the value of Rs. 9-8-0 and Rs. 9-4-0 per share as settled into the broker's bills was not the real value of the share scrips alone but also included the element of the arrear dividends agreed to be receivable by the purchaser. The legal position, therefore, is that the arrear dividends were not claimable by the purchaser by virtue of his right as such purchaser and could not become his income from the shares. He was to get the same because the vendor had contracted to pass the arrear dividends on to him. They were the income of the vendors, i.e., the registered holders but they could not become the income of the purchaser. In fact the assessee had purchased the amount of arrear dividends for a price which was included in the total consideration of Rs. 1,12,575. What the assessee acquired in the form of share scrips represented its stock-in-trade, which consisted of the shares and the dividends potential which had to be realised. In this state of facts it is manifest that the assessee paid the amount of Rs. 1,12,575 not only for the share scrips but also for

the arrear dividends which was inextricably connected with the purchase of the share scrips. In our opinion the High Court rightly held that the amount of Rs. 43,925 was not income which could be assessed in the hands of the assessee.

4. It was said that the assessee had itself credited the amount of Rs. 43,925 to the profit and loss appropriation account and thereafter transferred the same to a reserve fund in the accounting year ending September 30, 1966. No adjustment was made in the share purchase account on account of the receipt of dividend. But it is well established that a receipt which in law cannot be regarded as income cannot become so merely because the assessee erroneously credited it to the profit and loss account. (See Commissioner of Income-tax Bombay City I v. M/s. Shoorji Vallabhadas and Co., (1962) 46 ITR 144 (SC).) The assessee's case, had all along been that the amount of arrear dividends received could not be treated as income of the assessee liable to tax for the assessment year 1956-57. As we have already shown the consideration paid by the assessee was given not only for the shares but also for share dividends amounting to Rs. 43,925 and the amount of Rs. 1,12,575 was paid not only for the share scrips but also for the arrear dividends. In other words there was capital purchase by the assessee of the shares together with arrear dividends due on the shares for the years 1936 to 1945. It is therefore not possible to treat the payment of Rs. 43,925 as income liable to tax either as profit under Section 10 of the Act or as dividend under Section 12 of the Act.

5. For the reasons expressed we hold that there is no merit in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 413
(V 57 C 91)

(From: Allahabad)*

J. C. SHAH, Ag. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

Hargovind, Appellant v. Aziz Ahmad Khan and another, Respondents.

Civil Appeal No. 381 of 1965, D/- 8-8-1969.

*(Exn. First Appeal No. 10 of 1954, D/- 2-5-1961 — All.)

LM/AN/D971/69/KSB/M

Administration of Evacuee Property Act (31 of 1950), Sections 40 and 2 (d) — Administration of Evacuee Property Ordinance (27 of 1949), Sections 38, 39 and 2 (d) — Vendor becoming evacuee after transfer of his property without executing sale deed — Confirmation of custodian for transfer not obtained — Transfer ineffective even if property had not been declared as evacuee property — Decree for specific performance passed on basis of award between vendor and vendee cannot be executed.

Under Section 38 (1) of the Central Ordinance 27 of 1949 as well as under Section 40 (1) of Central Act 31 of 1950 transfer of property was ineffective unless confirmed by the Custodian even if it was made by a person who became an evacuee after the date of the transfer. It was not necessary that the property should have been declared or notified to be evacuee property before the aforesaid provisions were attracted. Under Section 40 (1) of the Act, the transfer was to be ineffective in both eventualities; (1) if the transferor became an evacuee within the meaning of Section 2 after the transfer or (2) if the transferor's property had been declared or notified to be evacuee property. (Para 7)

A entered into an agreement on 16-6-1948 to sell his properties to B for consideration already received by him. A dispute arising between the parties was referred to arbitration and the consequent award was made a rule of Court on 30-11-1949 and a decree in terms of award was passed in favour of B. A migrated to Pakistan some date after 22-11-1949. The Deputy Custodian accorded confirmation of the transfer on 9-5-1951 but the Additional Custodian in exercise of his revisional powers suo motu set aside the Order of confirmation. On 4-4-1952 B sought to execute the award decree but on objection by the Custodian it was dismissed on ground that Section 17 (i) of the Central Act 31 of 1950 created a bar to execution of the decree. An appeal to the High Court being dismissed, B appealed to the Supreme Court by Special leave.

Held (1) that as A had migrated to Pakistan sometime after 22-11-1949 when Central Ordinance 27 of 1949 was in force it was highly doubtful whether the Custodian could take advantage of the provisions of automatic vesting contained in U. P. Ordinance 1 of 1949. AIR 1961 SC 365, Ref. to. (Para 6)

(2) that as A had become an evacuee within the definition of that term in Section 2 (d) of the Ordinance and the Act, it was necessary to obtain the confirmation of the Additional Custodian for the transfer and the same having been refused the transfer remained ineffective. Even according to the award the confirmation or approval of the Custodian had to be obtained before the transfer documents were to be executed and completed in accordance with law. It was incumbent on B to obtain the confirmation order before he could ask for any further steps to be taken by the courts in the matter of execution and registration of the transfer deed. Under Section 39 of the Central Ordinance 27 of 1949 no document could be registered of the nature mentioned in Section 38 unless the Custodian had confirmed the transfer. Similar provisions were contained in Section 40 of the Central Act 31 of 1950. The prayer in the execution application that the Court might grant assistance "by execution of sale deed under the enabling para 5 of the Decree" could not be entertained or acceded to by the Executing Court. (Para 7)

Cases Referred: Chronological Paras

- (1961) AIR 1961 SC 365 (V 48)=
1961-2 SCR 91, Azimunnissa v. Dy.
Custodian Evacuee Properties 6
(1957) AIR 1957 All 561 (V 44)=
1957 All LJ 509, Azimunnissa v.
Asst. Custodian 6

Mr. Naunit Lal, Advocate, for Appellant; Dr. V. A. Seyid Muhammad, Senior Advocate (Mr. S. P. Nayar, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.— This is an appeal by special leave from a judgment of the Allahabad High Court confirming the order of the District Judge dismissing an execution application filed by the appellant.

2. On June 16, 1948 the appellant entered into an agreement with Aziz Ahmed Khan respondent No. 1 for the sale of certain properties comprising houses and plots in the town of Bareilly. The sale consideration of Rs. 1,45,000 was stated to have been already paid by the appellant to the vendor. Subsequently disputes arose between the vendor and the appellant regarding the completion of

the sale. These disputes were referred to the arbitration of Shri R. R. Agarwal who gave an award on August 30, 1949, which was made a rule of the Court on November 30, 1949. A decree on the basis of the award was granted in favour of the appellant.

3. Sometime after November 22, 1949 the vendor Aziz Ahmed Khan left India for Pakistan. On December 7, 1950 the appellant moved the Deputy Custodian (Judicial) Meerut Circle for confirmation of the transfer under Section 38 of the Administration of Evacuee Property Ordinance, 1949 (Ordinance No. 27 of 1949) or under Section 40 of the Administration of Evacuee Property Act 1950 (Act 31 of 1950). On 9th May 1951 the Deputy Custodian accorded confirmation. The Additional Custodian, however, took suo motu action in exercise of his revisional jurisdiction and set aside the order passed by the Deputy Custodian. On April 4, 1952 the appellant filed an application for execution of the decree passed on the basis of the award. On May 10, 1952 objections were filed on behalf of the Custodian to the execution. The District Judge held that the award made on August 30, 1949 could not have the effect of transferring the properties as the approval of the Collector had not been obtained under the notification dated July 29, 1949 which had been issued under Section 26 of U. P. Administration of Evacuee Property Ordinance No. 1 of 1949 and that on the date of the decree the transfer of properties could not be effected unless confirmed by the Custodian. It was held by him that no interest by way of charge in favour of the appellant had been created on the properties in dispute. He was further of the view that Section 17 (1) of the Central Act 31 of 1950 created a bar to execution of the decree. The execution application was consequently dismissed.

4. The appellant filed an appeal to the High Court which was dismissed. When the appeal came up for hearing before this Court on February 22, 1968 it was considered expedient to have further findings on certain points. The following questions were therefore framed and remitted to the High Court for that purpose.

(1) The date on which Aziz Ahmed Khan migrated to Pakistan.

(2) Whether the properties of Aziz Ahmed Khan vested in the Custodian of Evacuee Property under U. P. Ordinance

1 of 1949 or Central Ordinance 12 of 1949 as made applicable to the State of U. P. by U. P. Ordinance 20 of 1949 or under the Central Ordinance 27 of 1949 or under Central Act of 1950.

The High Court remitted these matters to the District Judge. His finding on the first question was that Aziz Ahmed Khan had migrated to Pakistan on some date after November 22, 1949. On the second question he found that Aziz Ahmed Khan's properties did not vest in the Custodian of Evacuee Property under any of the Ordinances or under the Central Act 31 of 1950. Certain additional evidence was produced before the High Court. The High Court expressed agreement with the conclusions of the District Judge on both the points. It may be mentioned that on certain subsidiary points the learned District Judge had also found that it had not been proved that a valid declaration under Section 7 (1) of the Central Ordinance 27 of 1949 or of the corresponding provision in the Central Act 31 of 1950 was made for declaring Aziz Ahmed Khan an evacuee. In the opinion of the learned Judge such a declaration was necessary if his properties were to be declared evacuee properties.

5. In view of the findings which have been returned by the High Court on the points referred, it has been contended on behalf of the appellant that there could be no bar to the execution of the decree which was based on the award. It is pointed out that on the conclusions at which the High Court has now arrived the properties of Aziz Ahmed Khan were never declared to be evacuee properties either under the Central Ordinance 27 of 1949 or the Central Act 31 of 1950, and they could not vest in the Custodian unless they had been declared after appropriate proceedings. It is urged that the decree in favour of the appellant was of the nature of a decree passed in a suit for specific performance. The Court could and should have executed a conveyance in favour of the appellant since Aziz Ahmed Khan was no longer available or was refusing to do so and the confirmation of the Custodian could be obtained before the registration was effected. According to the counsel for the appellant the additional Custodian had declined to confirm the transfer at the previous stage because there was no deed of sale or transfer.

6. Counsel for the respondent has drawn attention to a decision of this Court

in *Azimunissa v. The Deputy Custodian Evacuee Properties, District Deoria*, 1961-2 SCR 91=(AIR 1961 SC 365) in which the effect of the declaration of U. P. Ordinance 1 of 1949 to be invalid by the Courts came up for consideration, as also of the subsequent evacuee legislation namely, Central Ordinance 27 of 1949, Central Act 31 of 1950 and the Administration of Evacuee Property (Amendment) Act 1960. It appears to have been held in that case that the property which had vested under the U. P. Ordinance 1 of 1949 continued to vest in the Custodian notwithstanding the fact that High Court of Allahabad in *Azimunnissa v. Assistant Custodian*, AIR 1957 All 561, held the vesting to be invalid. This was the result of the introduction of Section 8(2-A) in the Central Act of 1950 by the Central Amendment Act 1 of 1960. In the present case, however, Aziz Ahmed Khan migrated to Pakistan after November 22, 1949. At that point of time it was Central Ordinance 27 of 1949 which was in force. It appears highly doubtful that the respondent could take advantage of the provisions of automatic vesting contained in U. P. Ordinance 1 of 1949.

7. There is, however, a serious hurdle in the way of the appellant even when the provisions of Central Ordinance 27 of 1949 or the Central Act 31 of 1950 are taken into consideration. Section 38 (1) of that Ordinance provided that no transfer of any right or interest in any property after the 14th day of August 1947 by or on behalf of an evacuee or by or on behalf of a person who had become an evacuee after the date of the transfer shall be effective so as to confer any rights or remedies on the parties to such transfer unless it was confirmed by the Custodian. The provisions of Section 40 of the Central Act 31 of 1950 were similar though there was a certain change in the language. Sub-section (1) of that section was in the following terms:

"No transfer made after the 14th day of August, 1947, but before the 7th day of May 1954, by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto or any person claiming under them or either of them, if, at any time after the transfer, the transferor becomes an evacuee within the meaning of Section 2 or the property of the transferor is declared or notified to be evacuee pro-

property within the meaning of this Act, unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act."

Under both these enactments transfer of property was ineffective unless confirmed by the Custodian even if it was made by a person who became an evacuee after the date of the transfer. It was not necessary that the property should have been declared or notified to be evacuee property before the aforesaid provisions were attracted. Under Section 40 (1) of the Act, the transfer was to be ineffective in both eventualities; (1) if the transferor became an evacuee within the meaning of Section 2 after the transfer or (2) if the transferor's property had been declared or notified to be evacuee property. It is abundantly clear that if Aziz Ahmed Khan became an evacuee even after the transfer, Section 38 (1) of the Ordinance and Section 40 (1) of the Act became applicable. One of the meanings of the word "evacuee" as given in the definition in Section 2 (d) of the Ordinance and of the Act was:

Section 2 (d) "(i). 'evacuee' means any person, who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances leaves or has, on or after the 1st day of March, 1947, left any place in a Province for any place outside the territories now forming part of India."

Aziz Ahmed Khan became an evacuee within the meaning of the above definition. It was necessary, therefore, for the appellant to have obtained the confirmation of the Custodian in respect of the transfer which had been made by Aziz Ahmed Khan in his favour of the properties in question. The Additional Custodian declined to confirm the transfer and thus the condition precedent for the transfer to become effective remained unsatisfied. It is significant that even in the award which formed the basis of the decree it had been provided "the second party (Aziz Ahmed Khan) is hereby directed to execute the necessary documents in respect of the transfer by him of the properties referred to above within one month from the date of the receipt of the confirmation or approval according to law failing which the first party will, at his option, get the same executed and registered through Court on the basis of this award which would be made a rule

of the Court. Therefore according to the award the confirmation or approval of the Custodian had to be obtained before the transfer documents were to be executed and completed in accordance with law. It was incumbent on the appellant to obtain the confirmation order before he could ask for any further steps to be taken by the Courts in the matter of execution and registration of the transfer deed. Under Section 39 of the Central Ordinance 27 of 1949 no document could be registered of the nature mentioned in Section 38 unless the Custodian had confirmed the transfer. Similar provisions were contained in Section 40 of the Central Act 31 of 1950. The prayer in the Execution Application that the Court might grant assistance "by execution of sale deed under the enabling para 5 of the Decree" could not be entertained or acceded to by the Executing Court.

8. There is one matter, however, on which we would like to express no view and leave it open to the appellant to take such steps as he may be advised. Para 6 of the award which became part of the decree was as follows:—

"The claim of the first party for this transfer and exchange consideration is Rs. 1,50,000/- (one lac fifty thousand) on account of all principal money and interest and other expenses calculated to date against the second party Sri Aziz Ahmed Khan, which the second party will pay with interest at 12 per cent per annum in case the transaction and transfer of the properties referred to above in favour of the first party Sri Sardana is not confirmed or approved in any way and for any other reasons whatsoever.

Sri Sardana will enforce the payments against the properties referred to above and these properties are hereby charged with this claim and Sri Sardana will have his remedies to enforce the payment of the above claim against all other properties of the second party and also against his person."

The High Court in the judgment under appeal dealt with this question as if the charge was on the evacuee property. On the reasoning which has been pressed before us about the necessity of a declaration under the provisions of Central Ordinance 27 of 1949 or Central Act 31 of 1950 this part of the judgment does not appear to be correct. We would, however, refrain from expressing any final opinion as in fairness to both sides this question should be left for being decid-

ed, if taken, in appropriate proceedings including proceedings before the Executing Court.

9. With the above observations the appeal is dismissed but in view of the entire circumstances we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 417 (V 57 C 92)

(From Mysore: (1968) 2 Mys LJ 331)

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.

City Municipal Council, Mangalore and another, Appellants v. Frederick Pais etc., Respondents.

Civil Appeals Nos. 1302 to 1306 of 1968,
D/- 13-10-1969.

Municipalities — Mysore Municipalities Act (12 of 1964), Sections 382 (1) Provisos 2 and 3, 101 (2) — Madras District Municipalities Act (5 of 1920), Section 82 (2) — Municipality which originally formed part of Madras State and on reorganisation became part of Mysore State, issued demand notice for property tax for assessment year 1965-66 determining rateable annual value under Sec. 101 (2) of Mysore Act but assessed tax at rates under Madras Act of 1920 — Tax paid as per demand notice — Demand notice for year 1966-67 under Madras Act held not justified in view of second and third provisos to Section 382 (1) of Mysore Act.

The Municipality which originally formed part of the Madras State and which on reorganisation of the States, became part of the State of Mysore, issued demand notice for property tax for the assessment year 1965-66 determining the rateable annual value under Sec. 101 (2) of Mysore Municipalities Act (12 of 1964) which came into force on 1-4-1965. The tax was assessed on the basis of that annual rateable value, at rates under the Madras District Municipalities Act (1920) and the tax was paid as per the demand notices. On March 16, 1967 the Municipality issued notices of demand under the Madras Act for payment of property tax for the year 1966-67. The tax demanded on the basis of Madras Act was considerably higher than that originally demanded and paid under the Mysore Act for the assessment year 1965-66;

Held that the second and third provisos to Section 382 (1) of the Mysore Act did not justify the issue of the demand notices for the period in question. Having due regard to the second and third provisos to S. 382 (1) and the other material provisions of the Mysore Act, the position was that a property tax must have been imposed by the Madras Act and even though the rates of such tax were higher than under the Mysore Act, the said higher tax could be collected. But no such tax having been imposed under the Madras Act, the second and third provisos to Section 382 (1) did not apply and hence the demands for payment of property tax for the period were not justified. (Paras 12, 13)

The essential requisite for attracting the two provisos is that the tax should have been imposed under the Madras Act, as per the second proviso and tax at a higher rate should have been imposed again under the Madras Act as per the third proviso. By merely preparing the assessment registers under the Madras Act on April 1, 1964 it cannot be stated that a tax has been imposed under the first proviso or a tax at a higher rate has been imposed under the third proviso. The Municipal tax is an annual tax leviable for a particular official year and the assessment list on the basis of which the tax is assessed is for such official year.

(Para 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 642 (V 55)=
(1968) 2 SCR 125, Municipal Corporation, Indore v. Hiralal 10

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— These five appeals, by special leave, by the City Municipal Council, Mangalore and the Commissioner of the City Municipal Council, are directed against the order passed by the Mysore High Court in Writ Petitions Nos. 907, 1004, 1005, 1175 and 1245 of 1967, quashing the demand notices issued by the appellants against the first respondent in each of these appeals for payment of property tax for the half-year ending September 30, 1966. As the grounds of attack levelled against the demand notices by the said respondents are common, we will only refer to the averments contained in Writ Petition No. 907 of 1967 out of which Civil Appeal No. 1302 of 1968, arises.

2. The first respondent therein was the owner of a number of buildings situated in Ward II and Ward XX, within Mangalore Municipality in the South Canara District, which originally formed part of the Madras State and which, on reorganisation of the States, became part of the State of Mysore. The Mysore Municipalities Act, 1964 (Act XXII of 1964) (hereinafter referred to as the Mysore Act) came into force from April 1, 1965 as per the notification, dated September 23, 1965, issued by the State Government. Certain sections had already come into force. Till the Mysore Act came into force, the Mangalore Municipality was governed by the Madras District Municipalities Act, 1920 (Act V of 1920) (hereinafter called the Madras Act). The Madras Act had provided for levy of property tax, the procedure to be adopted for the same and as to how the annual value of a building was to be arrived at as well as the percentage at which the property tax was to be levied. Similarly the Mysore Act had also provided for levy of property tax, prescribing the ascertainment of annual rateable value and also the rate at which the tax was to be levied. Although the Mysore Act came into force from April 1, 1965, the appellants issued demand notices for property tax under the said Act for the assessment year 1965-66. In those demand notices, the Municipal Council determined the rateable annual value under Sec. 101 (2) of the Mysore Act and assessed the tax on the basis of that annual rateable value, but at rates under the Madras Act. The tax was paid as per the demand notices. But on March 16, 1967 the appellant issued the impugned notices of demand under the Madras Act for payment of property tax for the year 1966-67. The tax demanded on the basis of the Madras Act was considerably higher than that originally demanded and paid under the Mysore Act for the assessment year 1965-66. Notwithstanding the protest made by the first respondent, the appellants threatened to collect the tax as per the demand notices and hence the first respondent filed writ petition No. 1907 of 1967 challenging the demand notices. The main grounds of attack against the demand notices, as raised in the said writ petition were that after the passing of the Mysore Act the appellants had no power to levy property tax under the Madras Act and therefore the demands were illegal. The demand notices were

further attacked on the ground that S 382 of the Mysore Act, which related to the repeal of many Acts including the Madras Act and the saving provisions contained therein did not justify the issue of the demand notices. The first respondent accordingly prayed for quashing the demand notices issued under the Madras Act. He had also raised certain contentions regarding the levy of health cess included in the notices; but it is unnecessary to refer to those averments as the High Court has held against the first respondent and that question does not arise in these appeals.

3. The appellants pleaded that under the Mysore Act, property tax, among other things, has been imposed after following the procedure prescribed in Sections 95 to 97 therein and the imposition of tax has come into force from April 1, 1967, but for the period in question viz., the year 1966-67 the demands were legal and valid in view of the provisions contained in Section 382 of the Mysore Act. Notwithstanding the repeal of the Madras Act, the provisions contained in Sec. 382 of the Mysore Act clearly saved the right of the appellants to levy property tax under the Madras Act to adopt both the annual value as well as the rate of tax as per the assessment registers maintained under the said Act. In particular, the appellants relied upon the second proviso in Section 382 (1) of the Mysore Act and the third proviso inserted in the said section with retrospective effect, by the Mysore Municipalities (Amendment) Act, 1966 (Mysore Act XXXIV of 1966). According to the appellants, as necessarily the imposition of property tax under the Mysore Act, after following the procedure contained therein will take time, the Legislature had made consequential provisions in Section 382 with a view to enable the imposition of property tax under the repealing enactments during the interim period.

4. The High Court has, by and large, accepted the contentions of the first respondent. According to the High Court, although the higher rate of tax under the Madras Act is preserved by proviso 3 to Section 382 (1) of the Mysore Act, the provision for the determination of the annual value under Section 82 (2) of the Madras Act is not saved. The High Court is further of the view that the second proviso to Section 382 (1) of the Mysore Act only continues the old im-

post and the third proviso preserves the old rates and that they do not continue the old annual value. The net result of the decision of the High Court is that the Municipal Council has to determine the annual rateable value of the building as provided by Section 101 (2) of the Mysore Act and to assess the property tax at the rate at which it is assessed under the Madras Act. Finally the High Court quashed the demand notices issued by the appellants.

5. The learned Solicitor General, appearing for the appellants, urged that the High Court was in error in interpreting the second and third provisos to Sec. 382 (1) of the Mysore Act. It was urged that as the levy of property tax after adopting the procedure indicated in the Mysore Act will take time, the Legislature had, by incorporating the necessary provisions in Section 382, particularly the second and third provisos to sub-section (1), preserved the right of the Municipal Council concerned to adopt not only the annual value but also the rate of property tax payable according to the assessment registers maintained under the Madras Act, till they are superseded by anything done under the Mysore Act. The learned Solicitor General, further urged that the view of the High Court that the annual rateable value has to be determined under the Mysore Act and the computation of the rate of tax has to be under the Madras Act, was anomalous and was not warranted by the provisions of the Mysore Act.

6. On the other hand, Mr. Veerappa, learned Counsel appearing for the first respondent in all the appeals, has supported the view taken by the High Court and urged that a proper interpretation had been placed on Section 382 of the Mysore Act. According to the learned Counsel, normally, after the coming into force of the Mysore Act, no assessments could be made under the Madras Act, but Section 382 of the Mysore Act, repealing the Madras Act, had made certain special provisions the existence of which alone would attract certain actions taken under the Madras Act.

7. In order to appreciate the contentions, noted above, it is necessary to refer broadly to the scheme of the two Acts relating to the levy of property tax. We shall first advert to the Madras Act. Under Section 78 (1) power is given to the Municipal Council

to levy, among other taxes, a property tax. Under sub-section (3), a resolution of a municipal council determining to levy a tax has to specify the rate at which such tax is to be levied and the date from which it shall be levied. Section 81(1) provides that if a Council, by resolution, determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within the municipal limits save those exempted by the statute or by any other law. Sub-section (2) states that the tax shall be levied at such percentages of the annual value of the buildings or lands as may be fixed by the Municipal Council, subject to Section 78. Under this Section, we are informed that 25% has been fixed as the maximum rate. Sub-section (2) of S. 82 provides that the annual value of the lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to be let from month to month or from year to year less a deduction in the case of buildings, of 10 % of that portion of such annual rent which is attributable to buildings alone. It further provides that the said deduction shall be in lieu of all allowances for repairs or on any other account. Section 86 provides that the property tax shall be levied every half year and shall, excepting as otherwise provided in Schedule IV, be paid by the owner within thirty days of the commencement of the half-year. Section 124 provides that the rules and tables embodied in Schedule IV shall be read as part of Chapter VI, dealing with Taxation and Finance. Schedule IV deals with Taxation and Finance Rules. Rule 2 provides for the preparation and maintenance of assessment books showing the persons and property liable to taxation under the Act and the assessment books being made available for inspection by the tax payers. Rule 6 provides for the value of any land or building for purposes of the property tax being determined by the executive authority. Under rule 7, the executive authority has to enter in the assessment books the annual or capital value of all lands and buildings and the tax payable thereon. Rule 8 (1) states that the assessment books shall be completely revised by the executive authority once in every five years. Sub-rule (2) thereof provides for amending the assessment books at any time between one general revision and another in the manner indicated therein. A perusal of the provisions referred to above,

shows that under the Madras Act the property tax is levied on the annual value of buildings which is deemed to be the gross annual rental value less a deduction of ten per cent of that portion of annual rent which is attributable to the buildings alone. The Municipal Council has to pass a resolution determining to levy the property tax and that resolution should also specify the rate at which such tax is to be levied as also the date from which it shall be levied and the tax is levied every half year. The executive authority has to maintain the assessment books containing entries regarding the annual value as well as the tax payable thereon. The executive authority is under an obligation to completely revise the assessment books once in every five years.

8. There is no controversy that the Madras Act was applicable to the City of Mangalore, even after it formed part of the Mysore State on the reorganization of the States. The Madras Act, as we have mentioned earlier, was repealed by the Mysore Act, which came into force with effect from April 1, 1965.

9. Coming to the Mysore Act, Chapter VI deals with Municipal Taxation. Section 94 enables a municipal council to levy a tax on buildings or lands or both situated within the municipality, after complying with the procedure indicated therein and subject to any general or special orders of Government and at rates not exceeding those specified in Schedules I to VII. The maximum rate has been fixed at 24% of the annual rateable value. Section 2 (1) defines 'annual rateable value' as the gross annual rent for which any building or land exclusive of furniture or machinery might reasonably be expected to be let from month to month or year to year. Section 95 deals with the procedure to be adopted preliminary to imposing a tax. Section 101 (2) provides that the annual rateable value of a building shall be the gross annual rent as defined in Clause (1) of Section 2, less a deduction of sixteen and two-thirds per cent of such annual rent. It further states that the said deduction shall be in lieu of all allowances for repairs or on any other account whatsoever. Section 103 deals with the preparation of an assessment list. Section 382 (1) repeals the various enactments referred to therein, including the Madras Act. The first proviso, which saves certain matters, does not come into the picture in this case.

The second proviso as well as the third proviso, introduced by the Mysore Municipalities (Amendment) Act, 1966 are relevant for our purpose and they are as follows:

"(2) Provided further that subject to the preceding proviso anything done or any action taken (including any appointment or delegation made, tax, fee or cess imposed, notification, order, instrument, or direction issued, rule, regulation, form, bye-law or scheme framed, certificate obtained, permit or licence granted or registration effected) under the said laws shall be deemed to have been done or taken under the corresponding provisions of this Act and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under this Act:

(3) Provided further that notwithstanding anything contained in the preceding proviso where any tax, duty, fee or cess other than a duty on transfers of immovable properties has been imposed under the said laws at a rate higher than the maximum rate permissible under this Act, such tax, duty, fee or cess may continue to be imposed and collected at such higher rate unless and until superseded by anything done or any action taken under this Act."

The third proviso has been introduced with retrospective effect by the Amending Act. It is not really necessary for us to consider more elaborately the scheme of the Mysore Act because, even according to the appellants, the procedure indicated therein—whatever may be the procedure about which we express no opinion—has not been taken before the issue of the demand notices which were under challenge before the High Court. On the other hand, the appellants have exclusively relied on the second and third provisos to Section 382 (1) of the Act.

10. The learned Solicitor General has urged that the assessment books under the Madras Act were prepared on April 1, 1964 and, if so, under the second and third provisos to Section 382 (1), the property tax can be levied and collected as per the provisions of the Madras Act. In particular, the learned Solicitor General placed reliance upon the provision of the Madras Act relating to the maintenance of assessment books and the assessment books having to be revised only once in every five years and pointed out that in this case the assessment books having

been prepared on April 1, 1964 they will have currency for a period of five years till March 31, 1969. The first proviso to Section 382 (1) no doubt saves any tax which had been imposed under the Madras Act. Similarly, under the third proviso, the Municipal Council will have authority to collect tax even at a rate higher than the maximum rate permissible under the Mysore Act; but the essential requisite for attracting the two provisos is that the tax should have been imposed under the Madras Act, as per the second proviso and tax at a higher rate should have been imposed again under the Madras Act as per the third proviso. We are not inclined to accept the contention of the learned Solicitor General that, by merely preparing the assessment registers under the Madras Act on April 1, 1964 it can be stated that a tax has been imposed under the first proviso or a tax at a higher rate has been imposed under the third proviso. We have already referred to the material provisions of the Madras Act relating to the levy of property tax. Those provisions show that the municipal tax is an annual tax leviable for a particular official year and the assessment list on the basis of which the tax is assessed is for such official year. This was the view expressed by this Court in *Municipal Corporation v. Hiralal*, (1968) 2 SCR 125 = (AIR 1968 SC 642), while interpreting certain provisions of the Madhya Bharat Municipalities Act, 1954. No doubt the wording in the Madhya Bharat Act in Section 76, dealing with assessment list was slightly different, but, in our opinion, the principle enunciated in that decision regarding the municipal tax being an annual tax leviable for a particular official year and the assessment list, on the basis of which the tax is assessed having currency for each such official year, is applicable also to the interpretation of the Madras Act. No resolution passed by the Municipal Council regarding the levy of the property tax and the rate at which it is to be levied, having currency for the year 1966-67, has been brought to our notice.

11. The learned Solicitor General has drawn our attention to the minutes, dated September 15, 1966 as well as the Council's resolution No. 1280 dated December 20, 1966 relating to the levy of property tax in the City of Mangalore for the period in question, under the Mysore Act. Those proceedings will not assist the appellant as the necessary procedure,

under the Mysore Act, has not been followed and therefore that resolution cannot have any legal validity, so as to justify the imposition of tax. Normally, the municipal council will have to prepare a fresh assessment list, every year. By virtue of Section 124 of the Madras Act, the rules and tables embodied in Schedule IV have to be read as Part of Chapter VI dealing with Taxation and Finance. Though, ordinarily, the Municipality would have to prepare a fresh assessment list every year, Rule 8 of Schedule IV permits the Municipal Council to continue the same assessment list for the next four succeeding years and to revise it once every five years. But, in order to enable the Municipal Council to levy and collect a tax, it has to pass a resolution determining to levy a tax, the rate at which such tax has to be levied as also the date from which it shall be levied. That the tax is an annual tax is also borne out by sub-section (2) of Section 82. If the contention of the learned Solicitor that the assessment list, once prepared, has to be adopted for five years is accepted, it will result in the annual value on a particular building or house being static for five years, during which a municipal council can go on adopting the assessment list prepared in an earlier year and the owner or occupier of the building being deprived of the right to object to the valuation regarding the annual value or the tax assessed thereon. This will be the result even though the annual value may have decreased for one reason or the other. It follows that the contention that the preparation of the assessment books amounts to imposing of a tax so as to justify the issue of the demand notice, cannot be accepted.

12. Having due regard to the second and third provisos to Section 382 (1) and the other material provisions of the Mysore Act, the position is that a property tax must have been imposed by the Madras Act and even though the rates of such tax were higher than under the Mysore Act, the said higher tax could be collected. But no such tax having been imposed under the Madras Act, the second and third provisos to S. 382 (1) do not apply and hence the demands for payment of property tax for the period are not justified.

13. Though we are not in agreement with some of the reasons given by the High Court for issuing the writ, the con-

clusion arrived at by the High Court that the second and third provisos to Section 382 (1) of the Mysore Act do not justify the issue of the demand notices for the period in question is correct.

14. The result is that the appeals fail and are dismissed with costs. There will be only one hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 422

(V 57 C 93)

M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER AND
A. N. GROVER, JJ.

A. V. S. Narasimha Rao and others, Appellants v. The State of Andhra Pradesh and another, Respondents; 1. Andhra Pradesh Non-Gazetted Officers' Association. 2. Andhra Pradesh Secretariat Association, Interveners.

Writ Petn. No. 65 of 1969, D/- 28-3-1969.

Civil Services — Public Employment (Requirement as to Residence) Act (1957), Section 3 — Section in so far as it relates to Telangana and Rule 3 of the A. P. Public Employment (Requirement as to Residence) Rules 1959 framed under it are ultra vires Article 16 (3) — Clause (3) of Article 16 is an exception to the rule contained in Clauses (1) and (2) and must be strictly construed — Constitution of India, Articles 16 (3), 35.

Clause (3) of Article 16 enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union Territory prior to appointment, as a condition of employment in the State or Union Territory. Under Article 35 (a) this power is conferred upon Parliament but is denied to the Legislature of the States, notwithstanding anything in the Constitution, and under (b) any law in force immediately before the commencement of the Constitution in respect to the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament. The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union Ter-

ritory prior to employment or appointment to an office in that State or Union Territory. (Paras 6-7)

The claim for supremacy of Parliament is misconceived. Parliament in this, as in other matters, is supreme only in so far as the Constitution makes it. Where the Constitution does not concede supremacy, Parliament must act within its appointed functions and not transgress them. What the Constitution says is a matter for construction of the language of the Constitution. By the first Clause of Article 16 equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented, and a residential qualification may, therefore, have to be prescribed, the exception in Clause (3) was made. Even so, that clause spoke of residence within the State. The words 'any requirement' cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. The Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Talugas, Cities, Towns or Villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. Wide and liberal construction upon the words "any law" and "any requirement" cannot be placed. These words are obviously controlled by the words "residence within the State or Union Territory" which words mean what they say, neither more nor less. Section 3 of the Public Employment (Requirement as to Residence) Act 1957, in so far as it relates to Telangana and Rule 3 of the Andhra Pradesh Public Employment (Requirement as to Residence) Rules 1959 under it are therefore ultra vires the Constitution. (Para 10)

Mr. S. V. Gupte, Senior Advocate (M/s. P. A. Choudhury and K. Rajendra Chaudhuri, Advocates with him), for Petitioner; Mr. M. C. Setalvad, Senior Advocate and

Mr. P. Ramachandra Rao, Advocate General, for State of Andhra Pradesh (Mr. A. Raghuvir, Government Pleader, Andhra Pradesh High Court and Mr. A. V. Ranganam, Advocate with them), for Respondent No. 1; Mr. M. C. Setalvad, Senior Advocate (Mr. R. N. Sachthey, Advocate with him), for Respondent No. 2; M/s. R. V. Pillai, H. S. Gururaj Rao and Subodh Markandeya, Advocates, for Respondents Nos. 3 to 45; M/s. Sardar Ali Khan and P. N. Duda, Advocates, and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Respondent No. 46; M/s. P. A. Choudhury, K. Rajendra Chaudhuri and C. S. Sreenivasa Rao, Advocates, for Interveners.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:—The petitioners are persons employed in the Ministerial Services of the Andhra Pradesh Government. All of them were working in various offices located in the cities of Hyderabad and Secunderabad. On January 19, 1969, leaders of all political parties in the Legislature of the Andhra Pradesh State appeared to have met and reached a decision that to implement what are called 'Telangana Safeguards', the following measures should be taken:

"All non-domicile persons, who have been appointed either directly, by promotion or by transfer to posts reserved under the Andhra Pradesh Public Employment (Requirement as to Residence) Rules 1959 for domiciles of Telangana region will be immediately relieved from service. The posts so rendered vacant will be filled by qualified candidates possessing domicile qualifications and in cases where such candidates are not available the posts shall be left unfilled till qualified domicile candidates become available. Action on the above lines will be taken immediately.

All non-domicile employees so relieved shall be provided employment in the Andhra region without break in service and by creating supernumerary posts, if necessary."

2. The Government of Andhra Pradesh then passed an order [G. O. Ms. 36, G. A. (SR) Dept.] on January 21, 1969 relieving before February 28, 1969 all non-domicile persons appointed on or after November 1, 1956 to certain categories of posts reserved for domiciles of Telangana under the Andhra Pradesh

Public Employment (Requirement as to Residence) Rules, 1959. Names of such incumbents were to be shown in a pro forma and they were to be employed in the Andhra region without break in service by creating supernumerary posts, if necessary. These supernumerary posts were to be treated as temporary addition to the strength of the office concerned and were to be adjusted against future vacancies in corresponding posts as they arose. The action was based upon Section 3 of the Public Employment (Requirement as to Residence) Act, 1957 (44 of 1957) which was an Act of Parliament made in pursuance of Clause (3) of Article 16 of the Constitution making special provision for requirement as to residence and brought into force on March 21, 1959. Section 3 of the Act gave the power to make Rules in respect of certain classes of employment in certain areas. It provided:

"3. Power to make rules in respect of certain classes of public employment in certain areas—

(1) The Central Government may by notification in the Official Gazette, make rules prescribing, in regard to appointments to—

(a) any subordinate service or post under the State Government of Andhra Pradesh, or

* * * * *

any requirement as to residence within the Telangana area or the said Union Territory as the case may be, prior to such appointment.

(2) In this section,—

(a) * * * * *

(b) "Telangana area" comprises all the territories specified in sub-section (1) of Section 3 of the States Reorganisation Act 1956."

Under Section 4, the Rules had to be laid before each House of Parliament for a period of not less than 30 days and Parliament could make such alterations as it liked. Under Section 5 the Rules had a life of 5 years but by subsequent legislation the period was extended to 10 years. It is said that the period is to be extended by another 5 years. The Rules were made on March 21, 1959. They are called the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. Rule 3 provides:

"3. Requirement as a residence Prior to Appointment:

A person shall not be eligible for appointment to a post within the Telengana area under the State Government of Andhra Pradesh or to a post under a local authority (other than a cantonment board) in the said area unless—

(i) he has been continuously residing within the said area for a period of not less than fifteen years immediately preceding the prescribed date; and

(ii) he produces before the appointing authority concerned, if so required by it, a certificate of eligibility granted under these rules;

Provided that in relation to posts in the secretariat Departments and the Offices of the Heads of Departments of the State Government of Andhra Pradesh situated in the cities of Hyderabad and Secunderabad, the requirement as to residence laid down in this rule shall apply to the filling of only the second vacancy in every unit of three vacancies which are to be filled by direct recruitment;

Provided further that any period of temporary absence from the Telengana area for the purpose of prosecuting his studies or for undergoing medical treatment or any period of such temporary absence not exceeding three months for any other reason shall not be deemed to constitute a break in the continuity of such residence, but for purpose of calculating the said period of fifteen years any such period of temporary absence shall be excluded."

3. The petitioners were appointed between December 27, 1956 and July 4, 1968. They challenge the Act, the Rules and the proposed action as ultra vires the Constitution. Their case is that Article 16 (3) under which the Act and the Rules purport to be made has been misunderstood as conferring a power to make a law prescribing requirement as to residence in a part of a State. For this reason Section 3 of the Act is challenged as ultra vires the Constitution.

4. Article 16 on which the Act, the Rules and the present action are all based reads:

"16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

"(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place

of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) * * * * *

(5) * * * * *

5. The question is one of construction of this article, particularly of the first three clauses, to find out the ambit of the law-making power of Parliament. The first clause emphasises that there shall be in India equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The word 'State' here is to be understood in the extended sense given to it by the definition of that word in Article 12. The second clause then specifies a prohibition against discrimination only on the grounds of religion, race, sex, descent, place of birth, residence or any of them. The intention here is to make every office or employment open and available to every citizen, and inter alia to make offices or employment in one part of India open to citizens in all other parts of India. The third clause then makes an exception. This clause was amended by the Constitution (Seventh Amendment) Act, 1956. For the original words of the clause 'under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State', the present words from 'under the Government' to 'Union territory' have been substituted. Nothing turns upon the amendment which seeks to apply the exception in the clause to Union Territory and to remove ambiguity in language.

6. The clause thus enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union Territory prior to appointment, as a condition of employment in the State or Union territory. Under Article 35 (a) this power is conferred upon Parliament but is denied to the Legislatures of the States, notwithstanding anything in the Constitution, and

under (b) any law in force immediately before the commencement of the Constitution in respect of the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament.

7. The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union territory prior to employment or appointment to an office in that State or Union Territory. Two questions arise here. Firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State; and, secondly, whether Parliament can delegate this function by making a declaration and leaving the details to be filled in by the rule-making power of the Central or State Governments.

8. Mr. S. V. Gupte, for the petitioners, points out that the Constitution is speaking of State and Union Territory. It has already made a declaration that no person shall be disqualified for any office in the territory of India because of his residence in any particular part of India. The exception, therefore, must be viewed narrowly and not carried to excess by interpretation. The article speaks of residence in a State and means only that. If it chose to speak of residence in parts of State such as Districts, Taluqas, cities, towns etc., more appropriate and specific language could have been used such as 'any requirement as to residence within that State or Union territory or part of that State or Union territory.' Having used the word State, the unit State is only meant and not any part thereof. Reference is made to the history of the drafting of the Article and the debates in the Constituent Assembly which bear out this contention.

9. On the other hand, Mr. Setalvad bases his argument on two things. He contends that the power is given to Parliament to make any law and, therefore, Parliament is supreme and can make any law on the subject as the article says. He very ingeniously shifts the emphasis to the words 'any requirement' and contends that the requirement may be as to resi-

dence in the State or any particular part of State.

10. The claim for supremacy of Parliament is misconceived. Parliament, in this, as in other matters, is supreme only in so far as the Constitution makes it. Where the Constitution does not concede supremacy, Parliament must act within its appointed functions and not transgress them. What the Constitution says is a matter for construction of the language of the Constitution. Which is the proper construction of the two suggested? By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented, and a residential qualification may, therefore, have to be prescribed, the exception in Clause (3) was made. Even so, that clause spoke of residence within the State. The claim of Mr. Setalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose all its meaning. The words 'any requirement' cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr. Setalvad seeking to put a very wide and liberal construction upon the words 'any law' and 'any requirement'. These words are obviously controlled by the words 'residence within the State or Union Territory' which words mean what they say, neither more nor less. It follows, therefore, that Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telangana (and we say nothing

about the other parts) and Rule 3 of the Rules under it are ultra vires the Constitution.

11. In view of our conclusion on this point it is not necessary to express any opinion whether delegation to the Central and/or State Governments to provide by rules for the further implementing of the law made by Parliament is valid or not.

12. It was argued that the Mulki rules existing in the former Hyderabad State must continue to operate by virtue of Article 35 (b) in this area. This point is not raised by the petitions under consideration and no expression of opinion by us is desirable.

13. For the reasons given above we quash the orders passed and declare Section 3 of the Public Employment (Requirement as to Residence) Act, 1957 as also Rule 3 of the Rules ultra vires the Constitution. The petitions shall be allowed but there shall be no order about costs.

Petitions allowed.

AIR 1970 SUPREME COURT 426 (V 57 C 94)

(From: Labour Court Delhi)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Bennett Coleman and Co. Pvt. Ltd.,
Appellant v. Punya Priya Das Gupta,
Respondent.

Civil Appeal No. 1702 of 1966, D/- 2-4-1969.

(A) Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), Sections 2 (c), (f), (g), 5, 17 — Expression “who is employed” in definition of “working journalist” in Section 2 (f) — It includes employee whose service has come to an end by resignation — Claim for gratuity from such employee is maintainable.

The expression “who is employed” in Section 2 (f) of the Act is not restricted to a newspaper employee who is presently employed in a newspaper establishment but it also relates to an ex-employee whose employment has come to an end as a result of acceptance of his resignation. Therefore such an ex-employee can also resort to the provisions of the Act.

* (W. J. No. 2 of 1964, D/- 28-2-1968 — Lab Court — Delhi).

AIR 1949 FC 111 and AIR 1957 SC 104, Rel. on; AIR 1957 SC 264 and AIR 1958 SC 353, Disting. (Para 6)

The claim for gratuity under Section 17 read with Section 5 of the Act would itself be one which accrues after the termination of employment. These provisions therefore, clearly indicate that it is not only a newspaper employee presently employed in a particular newspaper establishment who can maintain an application for gratuity. The scheme of all Acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There can, therefore, be no doubt that the definitions of a “newspaper employee” and “working journalist” being subject to a context to the contrary, the benefit of Sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity.

(Para 7)

(B) Evidence Act (1872), Section 115 — Burden of proving ingredients of Section lies on party claiming estoppel — Representation must be clear.

The burden of proving the ingredients of Section 115 lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted. Under the Section the representation which estops a person making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true.

(Para 9)

(C) Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), Sections 2 (g) and 5 — Industrial Disputes Act (1947), Section 2 (rr) — Term “wages” not defined in former Act — Definition of that term in Section 2 (rr) can be applied — Car allowance and benefit of free telephone and newspapers given to employee not only for his personal use but for use connected with his employment — Held, that both the items were relevant in fixation of fair wages as they were allowed to him to directly reduce the expenditure which would

otherwise have gone into his family budget — These items could properly be regarded as part of the wages and had to be taken into account into calculation of gratuity payable to him. AIR 1967 SC 948, Rel. on. (Para 11)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 948 (V 54) =
 (1967) 1 SCR 652, Hindustan Anti-biotics Ltd. v. Workmen 11
 (1958) AIR 1958 SC 353 (V 45) =
 1958 SCR 1156, Workmen v. Management of Dimakuchi Tea Estate 6
 (1957) AIR 1957 SC 104 (V 44) =
 1956 SCR 956, Central Provinces Transport Services Ltd. v. Raghu-nath 5
 (1957) AIR 1957 SC 264 (V 44) =
 1957 SCR 152, Dharangadhara Chemical Works Ltd. v. State of Saurashtra 6
 (1949) AIR 1949 FC 111 (V 36) =
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M/s. G. B. Pai and J. Mahajan, Advocates and M/s. O. C. Mathur and J. B. Dadachanji, Advocates of M/s. J. B. Dadachanji and Co., for Appellant; M. K. Ramamurthi, Senior Advocate (Mrs. Shyamla Pappu, M/s. J. Ramamurthi, M. Mohan, P. S. Khera, Miss B. Thakur and Mr. Vineet Kumar, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

SHELAT, J.: This appeal by special leave, is directed against the award of the Labour Court, Delhi in a reference made to it under Section 17 (2) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (referred to hereinafter as the Act.)

2. The relevant facts leading to the said reference may first be stated.

3. By its letter dated 16-1-1953 the appellant-company appointed the respondent as a staff correspondent at Gauhati on a basic salary of Rs. 300 and dearness allowance at 40 per cent thereof in addition to a fixed conveyance allowance of Rs. 100 per month. Sometime thereafter the respondent was transferred to the company's branch office at Delhi where he worked as a special correspondent. By 1963 the remuneration payable to him came to Rs. 700 as basic pay, Rs. 497 as

dearness allowance, Rs. 200 per month as car allowance in addition to a free telephone and free newspapers. On October 8, 1963, while he was on leave, the respondent tendered his resignation. On October 14, 1963 P. K. Roy, the company's General Manager, informed the respondent that his letter of October 8, 1963 could not be considered as one of resignation as under the company's rules he would have first to report on duty and then to give a notice. On October 21, 1963, however, the company accepted the resignation with effect from that date and thereupon the respondent joined the Indian Express on October 23, 1963. Meanwhile, one V. G. Karnik, on behalf of the company, informed the respondent by his letter dated November 19, 1963 that in the absence of a proper notice by him there could be no termination of employment and that "your reported acceptance of another employment in the circumstances is in contravention of the terms and conditions of service of this company". The respondent had, in the meantime, claimed compensation for leave due to him, to which claim the said letter of Karnik replied that the company's rules did not permit any such compensation where an employee had resigned. On November 21, 1963 the respondent wrote to the said Roy (Ex. W/4) that (1) after he had tendered his resignation there was a discussion between them when the matter of acceptance of his resignation was amicably settled and that it was thereafter that he joined the Indian Express, (2) the letter of Karnik that there was no termination of his employment was not correct, (3) after October 21, 1963 he had gone to the company's office to settle his accounts and collect the dues payable to him as also the letter of acceptance of his resignation but he was told that the accounts were not yet ready and he was not then paid even his salary and dearness allowance due up to October 20, 1963 although "I had asked for these amounts at least", (4) the letter accepting his resignation was held back until he was prepared to sign a document "purporting to waive all my rights to leave salary" which he had first refused to sign, (5) on receiving the said letter of Karnik he had thought necessary to get a written acceptance of resignation, that, as apprehended by him, that letter was handed over to him on that day only after he accepted a cheque for Rs. 2810.47 P. and had given receipt

therefor "in full and final settlement of all my claims" and that he wanted to specify in that receipt that full and final settlement on his side did not include compensation for one month's leave due to him but the accountant did not allow him to do so. The statement of account which was given to the respondent on November 21, 1963 and on which he signed the said receipt stated that he had received the said cheque "in full and final settlement of all my claims against the company subject to the bonus for 1963 if declared and payable to me". The statement of account mentioned Rs. 901.34 only as remuneration for 20 days of October 1963 on the basis of his monthly remuneration being Rs. 1,397 comprised of Rs. 700 as basic salary, Rs. 497 as dearness allowance and Rs. 200 as car allowance. The statement of account thus shows that though he was on leave in October 1963, the company included the car allowance while calculating his wages due for these 20 days. But it also shows that no compensation for leave due to him was paid and further that in calculating the gratuity payable to him the monetary value of free telephone and free newspapers and the car allowance were not included as part of his wages. In reply to the respondent's letter of November 21, 1963, the said Roy, by his letter of December 5, 1963, wrote that as the respondent had not taken away the company's letter of acceptance of resignation by the time Karnik addressed the said letter, Karnik was "right on facts" but, in view of the settlement of his affairs and the subsequent settlement of accounts, "it was better to forget the past and part amicably". He also made it clear that the respondent's claim for leave compensation was not admissible under the company's rules.

4. The respondent thereafter applied to the Delhi Administration and the latter as aforesaid, referred his claim to the Labour Court for adjudication. In his statement of claim before the Labour Court, the respondent claimed that the monthly wages payable to him were Rs. 700 basic, Rs. 497 as dearness allowance, Rs. 200 conveyance allowance and Rs. 50 being the estimated value of the benefit of a free telephone and newspapers, aggregating Rs. 1,447 per month. He claimed gratuity computable on the basis of Rs. 1,447 as being his monthly wages, Rs. 1,447 as compensation for the month's leave, in all, Rs. 6,000.34 P. He

did not deduct from the said claim the said amount of Rs. 2810.47 P. as he had not encashed the cheque given to him against the receipt dated November 21, 1963. The company in its written statement denied the claim relying on the said receipt and further denied that the car allowance and the monetary value for the free telephone and newspapers could be included in the wages payable to the respondent either as due to him or for calculating gratuity. Before the Labour Court the company did not dispute the value of the benefit of the free telephone and newspapers estimated by the respondent, but it raised the question whether the said value and the car allowance formed part of the respondent's wages and whether the amount of gratuity payable to him could be ascertained on the footing of their being part of his wages. The Labour Court held that there was no evidence that the car allowance was not payable to the respondent while he was on leave as was the case in respect of another working journalist, C. V. Vishwanath, whose claim also the Labour Court was trying along with that of the respondent. The Labour Court found this difference a significant one and held that the car allowance had to be taken as part of the wages. The Labour Court also held that the car allowance and the free telephone and newspapers were an allowance and an amenity respectively falling under the definition of Section 2 (rr) of the Industrial Disputes Act, 1947, both forming the component parts of monthly wages payable to the respondent. As regards the leave, the respondent was undoubtedly entitled to 30 days leave. But the company's plea was, firstly, that its rules did not permit compensation for such leave and secondly, that it was set off against the period of notice which the respondent was required to give. No rules, however were produced to show that they contained any provision disallowing such compensation. As regards the notice period of one month, the Labour Court held that as the resignation dated October 8, 1963 was accepted with effect from October 21, 1963 there was compliance of 13 days only and therefore the management was not liable to pay for the balance of 17 days leave. The Labour Court rejected the company's plea that the receipt given by the respondent in full settlement of all his claims estopped him from making these

claims on the ground that as these items were claimable under the Act there could be no estoppel against law. In the result, the Labour Court held that the respondent was entitled to claim car allowance at Rs. 200 per month, Rs. 50 per month for telephone and newspapers and compensation for 13 days leave, that the first two were parts of his wages, that his monthly remuneration was, therefore Rs. 1447 and gratuity equivalent to 5½ months wages would have to be calculated on the basis of Rs. 1447 being his wages per month and directed the company to pay on the aforesaid calculations Rs. 2002 over and above Rs. 2810.47 for which the company had issued the said cheque.

5. The first contention raised by counsel for the company against the award was that the respondent, not being in the company's employment at the time he filed his claim in the Labour Court, was not a working journalist, and therefore, was not entitled to avail himself of the provisions of the Act. Section 2 (c) provides that "unless the context otherwise requires" a newspaper employee "means any working journalist, and includes any other person employed to do any work in, or in relation to, any newspaper establishment". Clause (f) of that section defines a "working journalist" to mean a person whose principal avocation is that of a journalist and "who is employed as such in, or in relation to, any newspaper establishment." Clause (g) provides that all words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 shall have the meanings respectively assigned to them in that Act. Counsel strenuously relied on the words "who is employed" as a journalist in, or in relation to, any newspaper establishment in Clause (f) of Section 2, his contention being that it is only a newspaper employee who is presently employed in a newspaper establishment who can resort to the Act and not an ex-employee whose employment has come to an end as a result of acceptance of his resignation. A question, similar to that raised by counsel, also arose in *Western India Automobile Association v. Industrial Tribunal*, 1949 FCR 321 = (AIR 1949 FC 111). The contention there was that in the light of the definitions of 'industrial dispute' and 'an employee' as they stood in the Industrial Disputes Act, 1947 before the Amending Act 36 of 1956 was passed, a dispute as

to reinstatement of a discharged or dismissed workman could not fall within the scope of an industrial dispute. The contention was rejected. The Court observed that the definition of 'industrial dispute' used the words "employment or non-employment", that whereas one was a positive, the other was a negative act of an employer, that such an act related to an existing employment or to an existing non-employment. After giving certain examples to illustrate the four stages when a dispute could arise, the Court at page 330 (of SCR) = (at pp. 114, 115 of AIR) concluded thus:

"The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the term "employment or non-employment". Reinstatement is connected with non-employment and is therefore within the words of the definition. It will be a curious result if the view is taken that though a person discharged during a dispute is within the meaning of the word "workman", yet if he raises a dispute about dismissal and reinstatement, it would be outside the words of the definition "in connection with employment or non-employment"."

A similar question was canvassed in *Central Provinces Transport Services Ltd. v. Raghunath*, 1956 SCR 956 = (AIR 1957 SC 104) in connection with the C. P. and Berar Industrial Disputes Settlement Act, XXIII of 1947. Section 2 (10) of that Act defined an 'employee' in terms identical with those in the Industrial Disputes Act as it stood before the amendment in 1956, i. e., as meaning "any person employed by an employer to do any skilled or unskilled manual or clerical work for contract or hire or reward in any industry and includes an employee discharged on account of any dispute relating to a change—whether before or after the discharge". Section 2 (12) defined an 'industrial dispute' to mean "any dispute or difference connected with an industrial matter arising between employer and employee or between employers or employees". It was not disputed that the question of reinstatement was an industrial dispute but the controversy was as to whether it was an industrial dispute as defined by Section 2 (12) of that Act. The argument was that as the workman concerned was already dismissed and his employment had thereby come to an end, he could not be termed an employee as

the intention of the legislature could not be to include in the definition of an employee even those who had ceased to be in service as otherwise there was no need for the further provision in Section 2 (10) which included those who were discharged from service on account of the dispute. The Court dismissed this contention following the decision in *Western India Automobile Association, 1949 FCR 321 = (AIR 1949 FC 111)* (supra) and held that a dispute between an employer and an employee regarding the latter's dismissal and reinstatement would be an industrial dispute within Sec. 2 (12) of that Act, that the inclusive clause in Section 2 (10) was not an indication that dismissed employees would not fall within the meaning of 'employee' or that the question of their reinstatement would not be an industrial dispute and that that clause was inserted *ex abundanti cautela* to repel a possible contention that employees discharged under Sections 31 and 32 of the Act would not fall within the meaning of Section 2 (10). Since the definitions of "an employee" in these two Acts were in language similar to the one used in the present Act, these decisions would be authorities for the view that an ex-employee would for the purposes of the present controversy be a working journalist.

6. It was, however, argued that though these two decisions considered a dismissed employee as a workman as defined by the Industrial Disputes Act and the C. P. and Berar Act, there are two decisions of this Court which express contrary views and that, therefore there is a conflict of opinion which should be resolved by a larger bench. The two decisions relied on in this connection are: *Dharangadhara Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 = (AIR 1957 SC 264)* and *Workmen v. The Management of Dimakuchi Tea Estate, 1958 SCR 1156 = (AIR 1958 SC 353)*. In *Dharangadhara Chemical Works Ltd.*, the appellants were lessees holding a licence for manufacturing salt on the demised lands. The salt was manufactured by a class of professional labourers, known as agarias, from rain water that got mixed up with saline matter in the soil. The work was seasonal and commenced after the rains and continued till June when the agarias left for their villages. The demised lands were divided into plots which were allotted to the agarias with a sum of Rs. 400 for each

plot to meet the initial expenses. Generally the same plot would be allotted to the same agarias every year, but if the plot was extensive in area it would be allotted to two agarias in partnership. After the manufacture of salt these agarias were paid at the rate of -/5/6 per maund. Accounts would be settled at the end of each season and the agarias would be paid the balance due to them. These agarias worked together with the members of their families and were also free to engage extra labour on their own account, the appellant company having no concern therewith. No hours of work were prescribed, no muster rolls were maintained nor were working hours controlled by the appellant company. There were also no rules as regards leave or holidays and the agarias were free to go out of the factory after making arrangements for the manufacture of salt. On these facts the question was whether the agarias were workmen as defined by S. 2 (s) or independent contractors. Bhagwati J. speaking for the Court, after quoting Section 2 (s) of the Industrial Disputes Act, as it stood prior to its amendment in 1956, said thus:

"The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act."

Relying in particular on the words "unless a person is thus employed", counsel argued that this decision was at variance with what was said in the *Central Provinces Transport Services Ltd., 1956 SCR 956 = (AIR 1957 SC 104)* (supra) and was, besides, an authority for the proposition that as the definition of a workman then stood, an ex-employee would not be a workman within the meaning of the Act. We are of the view that this decision does not warrant such a contention or that there is any conflict between this decision and the two earlier decisions. The question before the Court was the distinction between an employee and an independent contractor and it was only while describing the characteristics of the

two relationships that the learned Judge observed that unless there was a relationship of master and servant and the person concerned "is employed" he could not be regarded as "a workman" as defined by the Act. The Court was not concerned in that case with the question posited in the Central Provinces Transport Services Ltd., 1956 SCR 956 = (AIR 1957 SC 104) (supra) whether an employee who has been discharged or dismissed and who claims a relief such as reinstatement is a workman or not. Not having to consider such a question and being only concerned with the distinction between an employee and an independent contractor, the observations made by the Court to delineate the features of the two relationships cannot be regarded either as laying down that an ex-employee is not a workman or as being in conflict with the two earlier decisions which are specific decisions on the definitions of "a workman" in the Act. In the case of Workmen of Dimakuchi Tea Estate, 1958 SCR 1156 = (AIR 1958 SC 353) (supra), the dispute related to the dismissal of one Dr. K. P. Bannerjee. The management in the written statement pleaded that Dr. Bannerjee was not a workman as defined by Section 2 (s) of the Industrial Dispute Act, that therefore his dismissal could not be an industrial dispute as defined in Section 2 (k) and the Tribunal could have no jurisdiction to decide whether the management were justified or not in dismissing the Doctor. The Tribunal as also the Labour Appellate Tribunal held, presumably because Dr. Bannerjee was not in the words of Section 2(s) a person employed in any industry to do any skilled or unskilled manual or clerical work, that he was not workman within the meaning of Section 2 (s), that the question of his dismissal was not an industrial dispute, and that therefore, his case was beyond the Tribunal's jurisdiction. The workman thereupon applied for special leave under Article 136 and though leave was granted, it was limited to the question whether a dispute in relation to a person who is not a workman was an industrial dispute as defined by S. 2 (k) of the Industrial Disputes Act, 1947. In view of the special leave being so limited, the Court proceeded on the assumption that Dr. Bannerjee was not "a workman" under the definition of that word as it then stood. The problem was, whether even so, the dispute regarding his dismissal could still be an industrial dis-

pute, the contention of the workmen being that it would be so as by the use of the expression 'of any person' in the third part of Section 2 (k) a dispute relating to a person, though not a workman, would be an industrial dispute. In answering this problem the Court entered into an elaborate discussion of the several provisions and the scheme of the Act and came to the conclusion that though the clause defining 'industrial dispute' had used the expression "of any person", that expression must be given a restricted meaning, namely, that the dispute must be a real dispute between the parties thereto so as to be capable of settlement or adjudication by one party to the dispute giving necessary relief to the other and the person regarding whom the dispute was raised must be one in whose employment, non-employment, terms of employment or conditions of labour the parties to the dispute had a direct or substantial interest. In the absence of such an interest the dispute could not be said to be a real dispute between the parties. At page 1172 (of SCR) = (at p. 360 of AIR) of the Report, the Court however, has made certain observations which apparently appear to be in variance with the Western India Automobile Association, 1949 FCR 321 = (AIR 1949 FC 111) (supra) and in the Central Provinces Transport Services Ltd., 1956 SCR 956 = (AIR 1957 SC 104) (supra). The observations relied on by counsel are as follows:

"It is clear enough that prior to 1956 when the definition of 'workman' in the Act was further widened to include a person dismissed, discharged or retrenched in connection with, or as a consequence of the dispute or whose dismissal, discharge or retrenchment led to the dispute, a workman who had been discharged earlier and not during the dispute was not a workman within the meaning of the Act. If the expression "any person" in the third part of the definition clause were to be strictly equated with 'any workman', then there could be no industrial dispute, prior to 1956, with regard to a workman who had been discharged earlier than the dispute. That seems to be the reason why the Legislature used the expression 'any person' in the third part of the definition clause so as to put it beyond any doubt that the non-employment of such a dismissed workman was also within the ambit of an industrial dispute."

These observations, however, were made to show that as the definition of the workman stood before the 1956 amendment there was a gap between a workman and an employee, that though all workmen would be employees, the vice versa would not be correct as the supervisory staff would not fall within the definition of workman and that that gap was reduced to a certain extent by the Amendment Act of 1956 and that it would not be always correct to say that the workmen would have a direct and substantial interest in questions relating to all kinds of employees. At p. 1173 (of SCR) = (at p. 360 of AIR) S. K. Das, J. observed:

"The expression 'any person' in the definition clause means, in our opinion, a person in whose employment, or non-employment, or terms of employment, or conditions of labour the workmen as a class have a direct or substantial interest—with whom they have, under the scheme of the Act, a community of interest."

While dealing with the decisions in Western India Automobile Association, 1949 FCR 321 = (AIR 1949 FC 111) (supra) and Central Provinces Transport Services Ltd., 1956 SCR 956 = (AIR 1957 SC 104) (supra), the learned Judge clearly stated at page 1176 (of SCR) = (at p. 362 of AIR) that the problem in those cases was whether an industrial dispute included within its ambit a dispute with regard to reinstatement of certain dismissed workmen, a problem quite different from the one before them and that the illustrations given by Mahajan J. (as he then was) in the Western India Automobile Association, 1949 FCR 321 = (AIR 1949 FC 111) (supra) "to elucidate a different problem", could not be taken as determinative of a problem which was not before the Court in that case. The problem in each of these decisions being different and in view particularly of the fact that the case proceeded on the assumption that Dr. Bannerjee was not "a workman", it becomes difficult to agree that the observations relied on by counsel were meant to be or are in fact in variance with those in the two earlier decisions, or that therefore, there is any conflict of opinion on the question that a workman whose services are terminated would still be a workman as defined by Section 2 (a) before it was amended in 1956.

7. But assuming that there is such a conflict as contended, we do not have to

resolve that conflict for the purposes of the problem before us. The definition in Sec. 2 of the present Act commences with the words "In this Act unless the context otherwise requires" and provides that the definitions of the various expressions will be those that are given there. Similar qualifying expressions are also to be found in the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the C. P. and Berar Industrial Disputes Settlement Act, 1947 and certain other statutes dealing with industrial questions. It is, therefore, clear that the definitions of "a newspaper employee" and "a working journalist" have to be construed in the light of and subject to the context requiring otherwise. Section 5 of the Act, which confers the right to gratuity, itself contemplates in Clause (b) of subsection (1) a case of payment of gratuity to the nominee or the family of a working journalist who dies while he is in the service of a newspaper establishment. Section 17 (1) provides that where any amount is due under the Act to a newspaper employee from an employer, such an employee himself or a person authorised by him or, in case of his death, any member of his family can apply to the State Government or other specified authority for the recovery thereof. Similar provisions are also to be found in Section 33C (1) of the Industrial Disputes Act. Claims under that section include those for compensation in cases of retrenchment, transfer of an undertaking and closure under Ch. VA of that Act, all of which would necessarily be claims arising after termination of service and the claimant would obviously be one in all those cases who would not be presently employed in the establishment of the employer against whom such claims are made. Likewise the claim for gratuity under Section 17 read with Section 5 of the Act would itself be one which accrues after the termination of employment. These provisions, therefore, clearly indicate that it is not only a newspaper employee presently employed in a particular newspaper establishment who can maintain an application for gratuity. The scheme of all these acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There

can, therefore, be no doubt that the definitions of a "newspaper employee" and "working journalist" being subject to a context to the contrary, the benefit of Sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity. The contention that the respondent was not entitled to maintain his application as he was not in the service of the appellant company on the date of his claim before the Labour Court cannot be sustained.

8. The next contention was that the respondent having signed the said receipt in full settlement of all his claims and having thereby induced the company to accept his resignation without insisting on a full month's notice was estopped from making claims in respect of his leave for one month, the car allowance and the free telephone and newspapers and for including them as part of his wages for calculating gratuity. Certain decisions of this Court seem, however, to have expressed doubt whether technical pleas such as acquiescence, estoppel and waiver suitably apply to industrial adjudication. But assuming that the rule of estoppel, as incorporated in Sec. 115 of the Evidence Act, were to apply, the foundation of that rule is that it is inequitable and unjust to a person, that if another person by a representation induces him to act as he would not have otherwise acted, the person who made the representation should be allowed to deny the effect of his former statement to the loss and injury of the person who has acted on it. [See *Sarat v. Gopal*, (1892) 19 Ind App 203 (PC)]. The rule is one of evidence only and does not create any substantive right or confer any cause of action on the other. It comes into operation if a statement as to the existence of a fact has been made with the intention that the other person to whom it is made should believe and act on it and that that another person does in fact act upon the faith of it. The question whether the respondent is estopped from making his said claims may be looked at firstly, as regards his leave period, and secondly, as regards his claims for car allowance and free telephone and newspapers. As to the claim for leave due to him, the record of the case makes it clear that he had been making that claim from the very outset. Though the receipt

given by him mentions that it was given in full settlement of all his claims, the respondent on that very day in his letter Ex. W/4 to the said Roy protested that though he wanted to clarify in that receipt that it was in full settlement of his salary and dearness allowance for the 20 days of October 1963 and gratuity only, he was not allowed to make that reservation although he had already preferred his claim for compensation for one month's leave due to him. We must note that though this letter went in as Ex. W/4 before the Labour Court the company led no evidence to controvert the statements made therein. The reason for not doing so seems to be that the respondent had made the claim before one Mitra, the accountant in the Delhi Office, and that claim was a matter of dispute. This position emerges from Roy's reply dated December 5, 1963 to the respondent's said letter of November 21, 1963 wherein the stand taken by Roy was that the respondent was not entitled to compensation for leave, not because he had given up that claim when he had signed the said receipt, but because the company's rules did not permit such compensation. It is, therefore manifest that the respondent did not make any representation when he signed the said receipt that he had waived his claim for leave period or that the company did any act on any such representation which otherwise it would not have done. In spite of the letter Ex. W/4, the company failed to produce before the Labour Court its rules under which it was said that such a claim was not permissible. In its special leave petition in this Court, the company, however, cited a rule but we could take no notice of it as no application for producing the rules or proving them as additional evidence was made and it was hardly fair or just to take notice of it at such a late stage without an opportunity to the respondent to verify or controvert it. Roy's reply also indicates that the company's case, that the respondent's claim for compensation for leave was at the time of preparing his statement of account adjusted or set off against its claim for the notice period, could not be correct. For, if that was so, he would have straightway said so in his said reply, or in any event the company would have led evidence of its accountant to that effect before the Labour Court. The rule of estoppel thus could not be in-

voked against the claim for compensation for leave period.

9. We next examine the question whether the respondent was precluded from making the rest of his claim. The burden of proving the ingredients of S. 115 of the Evidence Act lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted. The statement of account prepared at the time when the respondent gave the said receipt appears to indicate that the benefit of the free telephone and newspapers and the car allowance were not taken into account and gratuity due to the respondent was calculated on the amount of pay being comprised of basic wages and dearness allowance only. But the inference that the respondent had given up his aforesaid claims when he passed the said receipt appears to be rebutted by the following facts: (1) though the resignation was accepted on October 21, 1963 the letter of acceptance was not communicated to the respondent till November 21, 1963 when the company obtained from the respondent the said receipt, (2) in the meantime, the respondent received Karnik's said letter of November 19, 1963 to the effect that there was no termination of the respondent's service in the absence of a month's notice, and on receipt of which, according to the respondent, he considered it necessary to secure the letter of acceptance of his resignation from the company. If the termination of his service depended on the giving of a month's notice, how was it that the company's Manager, D'Souza, had accepted the resignation and signed the letter of acceptance Ex. W/1 on October 21, 1963; (3) the company was aware, as Karnik's said letter October 21, 1963 (shows that?) the respondent had joined the Indian Express on 23-10-1963. The respondent's case was that it was after he was told that his resignation had been accepted that he joined that Indian Express. But when he received Karnik's said letter he decided that he could not rest content without jeopardising his interests on the mere oral intimation of acceptance of his resignation, and therefore, went to the company's office to secure a written acceptance when he was told that unless he passed a receipt in full settlement of his claims, the letter of acceptance would not be issued

to him. There appear to be two good reasons why the respondent's case cannot be easily discarded. Firstly, since his resignation was accepted with effect from October 21, 1963 and even a letter to that effect was made ready and signed by the company's manager, it would ordinarily have been communicated to him. If the company had any claim against him or if it wanted that his account should be settled before the letter was issued to him, surely an intimation to that effect would have been given to him. Secondly, though the respondent had put on record his version as to how the said receipt was obtained from him as early as November 21, 1963, i.e., on the very day that the said receipt was secured from him, no refutation of any of the allegations in that letter is to be found in Roy's reply to it dated December 5, 1963 save that the respondent's claim for compensation for leave period was not admissible under the company's rules. It is significant that there was no denial in that reply that the receipt was obtained from the respondent in the manner alleged in the said letter dated November 21, 1963. Even at the later stages the company did not examine its accountant before the Labour Court to refute the said allegations. The statements of the respondent in that letter having thus remained unchallenged, the Labour Court could not reject them. In these circumstances, it becomes doubtful whether he could be said to have been estopped from making the said claims on the ground only of the said receipt, if that receipt was obtained, as alleged by him, under the stress of circumstances. In this connection the fact that he kept the said cheque uncashed is not totally without relevance. Under Section 115 of the Evidence Act the representation which estops a person making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true. Such a conclusion is difficult in face of the uncontradicted statements in the letter Ex. W/4 that the management would not give him the letter of acceptance of his resignation unless he signed the said receipt in full settlement of all his claims. The plea of estoppel made on behalf of the company, therefore, cannot be accepted.

10. The third contention was that the monetary value of the free telephone and newspapers and the car allowance could not be included as part of his wages for

calculating gratuity. The value in terms of money of the benefit of free telephone and free newspapers, as estimated by the respondent, was not in question. But the argument was that this benefit as also the car allowance were given to the respondent by way of reimbursement for expenses which as a special correspondent he would otherwise have had to incur for the proper and efficient discharge of his duties. The two items, therefore, were neither an allowance nor an amenity. The facts, however, are that the telephone was installed by the company at the respondent's residence and stood in his and not in the company's name. All payments connected with it, including charges for calls, were made by the company. There was no restriction that he could use the telephone only for his official work or that he could not use it for personal calls. He was not called upon to keep an account of personal calls, the payment of which he would be called upon to make. Nor was any estimated amount for such personal calls either demanded or deducted from his wages. The newspapers were subscribed by the respondent but the bills for them were paid by the company. It was not the case of the company that the bills for them would be paid by it provided they were made use of by the respondent for his work as a special correspondent. As regards the car allowance, the car belonged to and stood registered in his name but the company paid him a monthly allowance of Rs. 200/-. There was no evidence whatsoever, not even a suggestion in the correspondence, that that amount was estimated as being equivalent to the expenses of conveyance which the respondent would incur in the discharge of his duties. No such indication is to be found in the company's evidence, nor was such a suggestion put to the respondent when he examined himself before the Labour Court.

11. Since 'wages' has not been defined in the Act, its meaning is the same as assigned to it in the Industrial Disputes Act. Under Section 2 (rr) of that Act, 'wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes (i) such allowances (including dearness allowance) as the workman is for the time being entitl-

ed to; (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles; (iii) any travelling concession; but does not include any bonus and other items mentioned therein. Mr. Ramamurthi's argument was that the car allowance as also the benefit of the free telephone and newspapers would fall under the first part of the definition as they are remuneration capable of being expressed in terms of money. The argument, however, cannot be accepted as neither of them can be said to be remuneration payable in respect of employment or work done in such employment. Neither the car allowance nor the benefit of the free telephone was given to the respondent in respect of his employment or work done in such employment as the use of the car and the telephone was not restricted to the employment, or the work of the respondent as the special correspondent. There was no evidence that the car allowance was fixed after taking into consideration the expenses which he would have ordinarily to incur in connection with his employment or the work done in such employment. Even if the respondent had not used the car conveying himself to the office or to other places connected with his employment and had used other alternative or cheaper means of conveyances or none at all, the car allowance would still have had to be paid. So too, the bills for the telephone and the newspapers whether he used them or not in connection with his employment or his work as the special correspondent. Therefore, we have to turn to the latter part of the definition and see if the two items properly fall thereunder. So far as the car allowance is concerned, there was, as aforesaid, nothing to suggest that it was paid to reimburse him of the expenses of conveyance which he would have to incur for discharging his duties as the special correspondent, or that it was anything else than an allowance within the meaning of Section 2 (rr) of that Act. It would, therefore, fall under the inclusive part (i) of the definition. Likewise, the benefit of the telephone and newspapers was allowed to the respondent not merely for the use thereof in connection with his employment or duties connected with it. Both the car allowance and the benefit of the free telephone and newspapers appear to have been allowed to him to directly

reduce the expenditure which would otherwise have gone into his family budget and were therefore items relevant in fixation of fair wages. (See *Hindustan Antibiotics Ltd. v. Workmen*, (1967) 1 SCR 652 at pp. 674, 675=(AIR 1967 SC 948 at pp. 961, 962)). That being the position, the two items could on the facts and circumstances of the present case be properly regarded as part of the respondent's wages and had to be taken into calculation of the gratuity payable to him.

12. These were the only points raised before us and since in our judgment none of them can be upheld the appeal must fail and has to be dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 436
(V 57 C 95)

(From: Rajasthan)*

**S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE, JJ.**

Madan Raj Bhandari, Appellant v. The State of Rajasthan, Respondent.

Criminal Appeal No. 82 of 1967, D/- 29-7-1969.

Criminal P. C. (1898), Sections 237, 238 — Accused charged under Section 314 read with Section 109, Penal Code for abetting R to cause miscarriage of A — At no stage he was notified that he would be tried for offence of having abetted A — Throughout the trial accused was asked to defend himself against the charge on which he was tried — Conviction for abetting A to cause miscarriage, held, not proper — Accused was likely to have been prejudiced by charge on the basis of which he was tried — (Penal Code (1860), Sections 314, 109). Cr. App. No. 219 of 1965, D/- 15-3-1967 (Raj), Reversed. (Para 14)

Cases Referred: Chronological Paras

- (1959) AIR 1959 SC 673 (V 46)=
(1959) 2 Supp SCR 1=1959 Cri
LJ 917, Faguna Kanta Nath v.
State of Assam 14
- (1958) AIR 1958 SC 813 (V 45)=
1959 SCR 861=1958 Cri LJ 1352,
Gallu Sah v. State of Bihar 14
- (1956) AIR 1956 SC 116 (V 43)=
1955-2 SCR 1140=1956 Cri LJ
291, Willie (William) Slaney v.
State of M. P. 14

(*Criminal Appeal No. 219 of 1965, D/- 15-3-1967 — Raj.)

LM/AN/E10/69/LGC/M

(1939) AIR 1939 PC 47 (V 26)=

40 Cri LJ 364, Pakala Narayan
Swamy v. Emperor 11

(1924) AIR 1924 Cal 1031 (V 11)=
ILR 52 Cal 112=26 Cri LJ 11,

Umadasai Dasi v. Emperor 14

M/s. Sobhag Mal Jain and V. S. Dave,
Advocates, for Appellant; Mr. K. B.
Mehta, Advocate, for Respondent.

The following Judgment of the Court
was delivered by

HEGDE, J.:— The appellant's conviction by the learned Additional Sessions Judge, Jodhpur under Section 314 read with Section 109, Indian Penal Code, having been affirmed by the High Court of Rajasthan, he appeals to this Court after obtaining special leave. The charge on the basis of which he was tried was that some days prior to May 1, 1963, he abetted one Mst. Radha at Jodhpur to cause the miscarriage of one Miss Atoshi Dass alias Amola who as a result of administration of tablets and introduction of "laminaria dento" by the said Mst. Radha, died on May 1, 1963. The case for the prosecution is that in about the year 1962-63, the appellant was the President of Oramotthan Pratishthan at Jalore. Miss Atoshi Dass was a teacher working in Indra Bal Mandir, Tikhi, an institution under the management of appellant. She was young and unmarried. Illicit relationship developed between the aforementioned Atoshi Dass and the appellant as a result of which Miss Atoshi Dass became pregnant. With a view to cause abortion of the child in her womb, the appellant took Miss Dass to Jodhpur and there attempted to cause the miscarriage mentioned above through one Mst. Radha. The attempt was not successful. The insertion of "laminaria dento" in the private parts of Miss Dass caused septicaem as a result of which she died in the hospital on May 1, 1963.

2. The appellant's case is that he had no illicit relation with Miss Atoshi Dass nor did he abet the alleged abortion. He denies that Miss Atoshi Dass died as a result of any attempt at abortion.

3. As seen earlier the appellant was charged and tried for the offence of abetting Mst. Radha to cause the miscarriage in question but he was ultimately convicted of the offence of abetting Miss Dass in the commission of the said offence.

4. It may be stated at this stage that one Mst. Radha was tried along with the appellant in the trial Court but she was acquitted on the ground that there was no

evidence to show that she had anything to do with the abortion complained of.

5. Despite the contentions of the appellant to the contrary, we think there is satisfactory evidence to show that the death of Miss Dass was due to septicaemia resulting from the introduction of "laminaria dento" into her private parts. On this point we have the unimpeachable evidence of Dr. A. J. Abraham, P. W. 4.

6. There is also satisfactory evidence to show that the appellant was in terms of illicit intimacy with Miss Dass. It is true that the principal witness on this point is Miss Chhayadass, P. W. 6, the sister of the deceased, a witness who has given false evidence in several respects. But as regards the illicit relationship between the appellant and Miss Atoshi Dass, her evidence receives material corroboration from the evidence of P. W. 7, M. B. Sen and P. W. 5, Misri Lal. Further it also accords with the probabilities of the case. It is not necessary to go into that question at length as we have come to the conclusion that the appellant is entitled to an acquittal for the reasons to be stated presently.

7. While we are of opinion that there was illicit intimacy between the appellant and the deceased, we are unable to accept the assertion of Miss Chhayadass that the appellant was her only paramour. Exh. D. 3 conclusively proves that the deceased had illicit relationship with one Sood at Delhi. In the committal Court Miss Chhayadass admitted that the address on Exh. D-3 is in the handwriting of the deceased. In that Court she was positive about it; but in the trial Court she went back on that admission. In many other respects also she had deviated from the evidence given by her in the committal Court. Hence we are unable to accept her statement in the trial Court that the address found on Exh. D-3, an inland letter is not in the handwriting of the deceased. Exh. D-3, appears to be a self-addressed letter sent by the deceased to one Sood. The fact that the deceased had more than one paramour is not a material circumstance though it may indicate that the appellant could not have had any compelling motive to abet the abortion complained of. The fact that the appellant was in terms of illicit intimacy with the deceased, an unmarried girl and that later became pregnant through him is without more, not sufficient to connect the appellant with the crime.

8. From the evidence of Misrilal and Sengupta, it is clear that the appellant and the deceased had gone together to Jodhpur on April 24, 1963. But from the evidence of Sengupta, it is also clear that the deceased had some work to attend to at Jodhpur. It is also clear from the evidence of Miss Chhayadass that the deceased and the appellant were going together to Jodhpur and other places off and on. It may be noted that while returning from Jodhpur to his native place, the appellant left the deceased with Mr. and Mrs. Sengupta. Hence the circumstance that the appellant and the deceased went together to Jodhpur on April 24, 1963, cannot be held to be an incriminating circumstance.

9. This leaves us with the evidence relating to the actual abetment. On this aspect of the case the only evidence brought to our notice is the evidence of Miss Chhayadass and the letter Ex. P. 4. Miss Chhayadass reposed in the trial Court that when the pregnancy of the deceased became noticeable, the appellant told the deceased in the presence of that witness that he would get the child aborted through Mst. Radha. As mentioned earlier Miss Chhayadass is a highly unreliable witness. She had admitted in the committal Court that she had been tutored by the police to give evidence. In fact she pointed out a police officer who was in the Court as the person who had tutored her. In the trial Court she denied that fact. There is no gainsaying the fact that she was completely under the thumb of the police. She deviated from most of the important admissions made by her during her cross-examination in the committal Court. Coming to the question of the abetment referred to earlier, this is what she stated during her cross examination in the committing Court:

"My sister did not tell Madan Raj about her illness (arising from her pregnancy) in my presence. On being enquired by me about my sister at Jalore I was informed that my sister had gone to Mst. Radha Nayan in the hospital for treatment. No talks about it were held before me prior to my talk at Jalore (talks between Madanraj and my sister about treatment)."

10. According to the admissions made by her in the committal Court she came to know for the first time about her sister's intention to cause miscarriage only after her death. No reliance can be placed on the evidence of such a witness.

11. Now coming to Exh. P. 4, this is a letter said to have been written by the deceased sometime before her death intending to send the same to the appellant which in fact was not sent. It was found in her personal belongings after her death. There was some controversy before the Courts below whether the same is admissible under Section 32 (1) of the Evidence Act and whether it could be brought within the rule laid down by the Judicial Committee in *Pakala Narayana Swami v. Emperor*, AIR 1939 PC 47. We have not thought it necessary to go into that question as in our opinion the contents of the said letter do not in any manner support the prosecution case that the appellant instigated the deceased to cause miscarriage. The letter in question reads thus:

"Shanti Bhawan
28-4-63.

I went with your letter to the father. Since I could not get money from him, I dropped you a letter. I went to Mst. Radha and asked her to give me medicine. I further said that the money would be received. She gave me a tablet and told me that injection would be given on receipt of full payment. This tablet is causing unbearable pain and bleeding but the main trouble will not be removed without the injection. How can I explain but the pain is intolerable. I have left Sen's residence. He and particularly neighbouring doctor would have come to know every thing by my condition, which is too serious. (Meri is halat se unaki vishesker pas me Daktarji ko sub kuch pata chal jati powon tak ulati ho jati). Firstly I intended to proceed to Jalore but on reaching the Station I could not dare to proceed. I feel that you are experiencing uneasiness and trouble for me. I am causing monetary as well as mental worries to you. I have been feeling this for a considerable longer period. Please do not be annoyed.

It has become very difficult for me to stay alone for the last several days.

Had you accepted me as your better half you would have not left me alone in my such serious condition. You cannot know what sort of trouble I am experiencing. Had you been with me I would not have felt it so much. Please do not be annoyed. Perhaps no one has given you so much trouble.

I will write all these facts to my mother. I will also write about our marriage.
28-4-63.

Today is Sunday. I cannot book a trunk call to you in the Court. Today I tried on the Phone number of Hazarimal but it was engaged, and later on it was cancelled. My Pranam.

Yours Ritu.

Today I have taken injection and have come from Shanti Bhawan".

12. No portion of that letter indicates that the appellant was in any manner responsible for the steps taken by the deceased for causing miscarriage. No other evidence has been relied upon either by the trial Court or by the High Court in support of the finding that the appellant was guilty of the offence of abetting the deceased to cause miscarriage.

13. For the reasons mentioned above we are of the opinion that there is no legal basis for the conviction of the appellant.

14. The learned Counsel for the appellant challenged the conviction of the appellant on yet another ground. As mentioned earlier he was charged and tried for the offence of abetting Mst. Radha to cause abortion of the child in the womb of the deceased but curiously enough he was convicted for abetting the deceased to cause miscarriage. Abetment as defined in Section 107 of the Indian Penal Code, can be by instigation, conspiracy or intentional aid. If the abetment was that of Mst. Radha, it could have been only by instigation or conspiracy but if it was an abetment of the deceased, it could either be by instigation or by conspiracy or by intentional aid. Throughout the trial the accused was asked to defend himself against the charge on which he was tried. At no stage he was notified that he would be tried for the offence of having abetted the deceased to cause miscarriage. It is now well settled that the absence of charge or an error or omission in it is not fatal to a trial unless prejudice is caused — see *Willie (William) Slaney v. The State of Madhya Pradesh*, 1955-2 SCR 1140 = (AIR 1956 SC 116). Therefore the essential question is whether there is any reasonable likelihood of the accused having been prejudiced in view of the charge framed against him. From what has been stated above one can reasonably come to the conclusion that the accused was likely to have been prejudiced by the charge on the basis of which he was tried. From the cross-examination of the prosecution witnesses, it is seen that the principal attempt made on behalf of the appellant

was to show that he had nothing to do with the co-accused, Mst. Radha. He could not have been aware of the fact that he would be required to show that he did not in any manner abet the deceased to cause miscarriage. The facts of this case come within the rule laid down by this Court in *Faguna Kanta Nath v. State of Assam*, (1959) 2 Supp. SCR 1= (AIR 1959 SC 673). The case of *Gallu Sah v. State of Bihar*, 1959 SCR 861= (AIR 1958 SC 813) relied on by the High Court is distinguishable. Therein *Gallu Sah* was a member of an unlawful assembly. He was said to have abetted *Budi* to set fire to a house. One of the members of the unlawful assembly had set fire to the house in question though it was not proved that *Budi* had set fire to the house. Under those circumstances this Court held that the offence with which *Gallu Sah* was charged was made out. As observed by Calcutta High Court in *Umadasi Dasi v. Emperor*, ILR 52 Cal 112= (AIR 1924 Cal 1031) that as a general rule, a charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions. *Gallu's* case was one such exception.

15. For the reasons mentioned above we allow the appeal and acquit the appellant. He is on bail. His bail bonds stand cancelled.

Appeal allowed.

AIR 1970 SUPREME COURT 439 (V 57 C 96)

(From: Bombay at Nagpur)*

J. C. SHAH, Ag. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

Kalanka Devi Sansthan, Appellant v. The Maharashtra Revenue, Tribunal Nagpur and others, Respondents.

Civil Appeal No. 862 of 1966, D/- 19-8-1969.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Sections 2 (12) Explanation I and 2 (22) — Hindu idol is juristic person — It cannot cultivate personally within Explanation I to Section 2 (12).

When property is given absolutely for the worship of an idol it vests in the idol

* (L. P. A. No. 40 of 1965, D/- 8-4-1965 — Bom at Nag.)

itself as a juristic person. However, the idol cannot take advantage of the provisions contained in the Act by which possession can be claimed from the tenant on the ground that it is required for personal cultivation. The position of idol is not the same as minor and the idol does not fall within Explanation I to S. 2(12). (Para 4)

Physical or mental disability as defined by Section 2 (22) lays emphasis on the words "personal labour or supervision". The dominating idea of anything done personally or person is that the thing must be done by the person himself and not by or through some one else. It is true that the idol is capable of holding property in the same way as a natural person. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. But the requirement of personal supervision under the third category of personal cultivation provided for in the definition under S. 2 (12) does not admit of an intermediary between the landlord and the labourer, who can act as agent of the landlord for supervising the operations of the agricultural worker. If that is not possible in the case of one landlord, it cannot be said that it is possible in the case of another landlord merely because the landlord in the latter case is a juristic person. The cultivation of the land concerned must be by natural persons and not by legal persons. The provisions of the Berar Regulation of Agricultural Leases Act (C. P. Act 24 of 1951) which is already repealed, are of no help in deciding whether idol can cultivate personally within meaning of Explanation I to Section 2 (12) of the Bombay Act. L. P. A. No. 40 of 1965, D/- 8-4-1965 (Bom at Nag.), Affirmed; 1964 Mah LJ 589, Approved; AIR 1968 SC 1364, Disting.

(Paras 4, 5)

(B) Hindu Law — Religious endowments — Manager or shebait of idol and trustee — Distinction between.

The distinction between a manager or a shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the She-

bait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager. (Para 5)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Section 2 (12) — Bombay Tenancy and Agricultural Lands Amendment Act (13 of 1956), Pre. — Both Acts are protected by Article 31A — Their validity cannot be challenged on ground of violation of Articles 14 and 19 (1) (f) — Constitution of India, Articles 31A, 14, 19 (1) (f). AIR 1961 SC 1517 and AIR 1959 SC 459, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1364 (V 55) =
1968-3 SCR 441, Ishwardas v. Maharashtra Revenue Tribunal 5
(1964) 1964 Mah LJ 589 = ILR
(1965) Bom 14, Shri Keshoraj Deo Sansthan, Karanja v. Bapurao Deoba 4
(1961) AIR 1961 SC 1517 (V 48) =
1962-1 SCR 733, Mahadeo Palkaji Kolhe, Yavatmal v. State of Bombay 6
(1959) AIR 1959 SC 459 (V 46) =
(1959) Supp 1 SCR 489, Sri Ram Ram Narain Medhi v. State of Bombay 6

Dr. W. S. Barlingay, Senior Advocate (M/s. R. Mahalingier and Ganpat Rai, Advocates with him), for Appellant; M/s. M. S. K. Sastri and S. P. Nayar, Advocates, for Respondents Nos. 2, 3 and 5; Mr. M. Veerappa, Advocate, for Respondent No. 4.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the High Court of Bombay dismissing a petition under Article 227 of the Constitution which had been filed by appellant Sansthan.

2. The appellant is a private religious Trust, which is managed by Laxman Anant Mulay who is described as a Wahiwatdar (Manager). The main source of income for performing the several acts including the daily worship of the family deity (Shri Kalanka Devi) is stated to be derived from endowed agricultural land. Respondent No. 4 is the tenant in field survey No. 94 with an area of 30 acres 8 gunthas in Mouza Malrajura, district Akola. On January 30, 1961 a notice was served on behalf of the ap-

pellant on respondent No. 4 under the provisions of Section 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter called the Act. It was mentioned in the notice that an earlier notice under Section 9 (i) of the Berar Regulation of Agricultural Leases Act had been served in the year 1955 that the Sansthan required the aforesaid field for personal cultivation and, therefore, he should give up possession. Those proceedings were pending but a notice under Section 38 of the Act was given to terminate the tenancy without prejudice to the previous proceedings. As the notice was not complied with an application was filed on behalf of the appellant under Section 36 of the Act for possession which was opposed by respondent No. 4. The Naib Tehsildar rejected the application on the ground that the Sansthan was not a land-holder who could cultivate the land personally. His order was confirmed by the Sub-Divisional Officer and by the Maharashtra Revenue Tribunal to whom appeals were taken. The appellant ultimately filed a petition under Article 227 of the Constitution before the High Court which, as stated before, was dismissed.

3. The only point which has to be determined is whether the Sansthan could take advantage of the provisions contained in the Act by which possession can be claimed from the tenant on the ground that it is required for personal cultivation. Section 2 (12) of the Act defines the words "to cultivate personally" in the following manner:

S. 2 (12) "to cultivate personally" means to cultivate on one's own account—

- (i) by one's own labour, or
- (ii) by the labour of any member of one's family, or
- (iii) under the personal supervision of one-self or of any member of one's family by hired labour or by servants on wages payable in cash or kind but not in crop share;

Explanation I.—A widow or a minor or a person who is subject to any physical or mental disability, or a serving member of the armed forces shall be deemed to cultivate the land personally if it is cultivated by her or his servants or by hired labourer;

Explanation II.....
According to Section 2 (22) the "physical or mental disability" means physical or mental disability by reason of which the person subject to such disability is in-

capable of cultivating land by personal labour or supervision. The word "tenant" is defined by Section 2 (32) as meaning a person who holds land on lease including a person who is deemed to be a tenant under Sections 6, 7 or 8 and a person who is a protected lessee or occupancy tenant. It is provided that the word "landlord" shall be construed accordingly. Section 38 deals with termination of tenancy by landlord for cultivating land personally. It says that after giving notice to a tenant in writing at any time on or before February 15, 1961 and making an application for possession under Section 36 on or before March 31, 1961 the landlord may terminate the tenancy other than an occupancy tenancy if the landlord bona fide requires the land for cultivating it personally. Sub-section (3) gives the conditions subject to which the tenancy can be terminated.

4. Now it is well known that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person. As pointed out in Mukherjea's Hindu Law of Religious and Charitable Trust at Pages 142-143 this view is in accordance with the Hindu ideas and has been uniformly accepted in a long series of judicial decisions. The idol is capable of holding property in the same way as a natural person. "It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir". The question, however, is whether the idol is capable of cultivating the land personally. The argument raised on behalf of the appellant is that under Explanation I in Section 2 (12) of the Act a person who is subject to any physical or mental disability shall be deemed to cultivate the land personally if it is cultivated by the servants or by hired labourer. In other words an idol or a Sansthan that would fall within the meaning of the word "person" can well be regarded to be subject to a physical or mental disability and land can be cultivated on its behalf by servants or hired labourers. It is urged that in Explanation (I) the idol would be in the same position as a minor and it can certainly cultivate the land personally within the meaning of Section 2 (12). It is difficult to accept the suggestion that the case of

the appellant would fall within Explanation (I) in Section 2 (12). Physical or mental disability as defined by S. 2 (22) lays emphasis on the words "personal labour or supervision". As has been rightly pointed out in Shri Kesheoraj Deo Sansthan, Karanja v. Bapurao Deoba, 1964 Mah LJ 589 in which an identically similar point came up for consideration, the dominating idea of anything done personally or in person is that the thing must be done by the person himself and not by or through someone else. In our opinion the following passage in that judgment at p. 593 explains the whole position correctly:

"It should thus appear that the legislative intent clearly is that in order to claim a cultivation as a personal cultivation there must be established a direct nexus between the person who makes such a claim, and the agricultural processes or activities carried on the land. In other words, all the agricultural operations, though allowed to be done through hired labour or workers must be under the direct supervision, control, or management of the landlord. It is in that sense that the words "personal supervision" must be understood. In other words, the requirement of personal supervision under the third category of personal cultivation provided for in the definition does not admit of an intermediary between the landlord and the labourer, who can act as agent of the landlord for supervising the operations of the agricultural worker. If that is not possible in the case of one landlord, we do not see how it is possible in the case of another landlord merely because the landlord in the latter case is a juristic person".

In other words the intention is that the cultivation of the land concerned must be by natural persons and not by legal persons.

5. It has next been contended that in the provisions of the Berar Regulation of Agricultural Leases Act 1951 public trusts of charitable nature were included among those who could claim possession from a tenant on the ground of personal cultivation. It is not possible to see how the provisions of a repealed statute which was no longer in force, after the enactment of the Act, could be of any avail to the appellant. The decision in Ishwardas v. Maharashtra Revenue Tribunal, (1968) 3 SCR 441 = (AIR 1968 SC 1364) has also been referred to by the counsel for the appellant. In that case it was

said that under Section 2 (18) of the Bombay Public Trusts Act a trustee has been defined as meaning a person in whom either alone or in association with other persons the trust property is vested and includes a manager. In view of this definition the properties of the trusts vest in the managing trustee and he is the landlord under Clause 32 of Sec. 2 of the Act. As he is the landlord, he can ask for a surrender from the tenant of the lands of the trust "to cultivate personally." In the present case it is common ground that the Sansthan is a private trust and is not governed by the provisions of the Bombay Public Trusts Act. The manager or the Wahiwardar of the Sansthan cannot, therefore, fall within the definition of the word "trustee" as given in Section 2 (18) of that Act. It may be mentioned that in Ishwardas case, (1968) 3 SCR 441 = (AIR 1968 SC 1364) the court refrained from expressing any opinion on the question whether a manager or a Shebait of the properties of an idol or the manager of the Sansthan can or cannot apply for surrender by a tenant of lands for personal cultivation. The distinction between a manager or a Shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the Shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager.

6. It has lastly been contended that the relevant provisions of the Act which have the effect of debaring the appellant from claiming possession for personal cultivation violate the provisions of Articles 14 and 19 (1) (f) of the Constitution. It is urged that discrimination is writ large between animate and juristic persons who fall within the definition of the word "person". Such a contention, however, cannot be entertained in view of Article 31A of the Constitution. The Act had received the assent of the President and is rendered immune from attack or challenge on the ground of violation of Articles 14 or 19 of the Constitution. In Mahadeo Paikaji Kolhe Yavatmal v. State of Bombay, (1962) 1 SCR 733 = (AIR 1961 SC 1517) the constitutional validity of the Act itself was canvassed but the challenge failed. Similarly the validity of the Bombay Tenancy and Agricultural Lands Amendment Act, 1956 as

applied to Vidarbha Region and Kutch Area was upheld in Sri Ram Ram Narain Medhi v. The State of Bombay, (1959) (Supp) 1 SCR 489 = (AIR 1959 SC 459).

7. The appeal consequently fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 442 (V 57 C 97)

(From: Madhya Pradesh)*

V. BHARGAVA AND K. S. HEGDE, JJ.

Raghuvir Singh, Appellant v. Raghubir Singh Kushwaha, Respondent.

Civil Appeal No. 1597 (NCE) of 1968, D/- 7-10-1969.

(A) Representation of the People Act (1951), Section 116A — Appeal to Supreme Court — No re-appreciation by Supreme Court unless there are special reasons.

In the matter of appreciating oral evidence, the appellate Courts attach great value to the opinion formed by the trial judges. That would be more so in the case of an election petition containing charges of corrupt practices, firstly because those charges are quasi criminal in character and secondly they are tried by a judge of the High Court. The Supreme Court does not reappreciate oral evidence unless there are special reasons for doing so. (Para 11)

(B) Representation of the People Act (1951), Sections 100 (1) (b) and 123 (4) — Publication of false statements of facts by election agent before his appointment as such — Consent of returned candidate not established — Publication held did not invalidate election.

The election of respondent, a returned candidate was challenged on the ground that his election agent, who was also the editor of a newspaper, had published false statements of facts relating the personal character and conduct of the petitioner but there was no allegation in the petition that the statements were published either with the consent or knowledge of the respondent or at his instance. The petitioner attempted to establish consent by showing that the relevant issues of the newspaper were distributed by the respondent but failed

*(Ele. Petn. No. 37 of 1967 M. P. — Indore Bench.)

LM/AN/F156/69/YPB/P

to establish satisfactorily that the respondent either personally or through others got distributed the issues. It was found that the statements were published by the election agent earlier to the date when he was appointed as such. Held, that publication of false statement in question did not invalidate the election. Election Petition No. 37 of 1967 (M. P. — Indore Bench) Affirmed.

(Paras 8, 9, 10, 15)

The following Judgment of the Court was delivered by

HEGDE, J.: This is an appeal under Section 116A of the Representation of the People Act 1951 (to be hereinafter referred to as the Act). It arises from election petition No. 37 of 1967 in the High Court of Madhya Pradesh (Indore Bench). That was an application filed by the appellant under Section 81 of the Act challenging the validity of the election of the respondent from the Bhind Assembly Constituency of Madhya Pradesh on various grounds. The election in question took place in February, 1967. In that election as many as five candidates contested, amongst whom the respondent, the nominee of the S. S. P. was one. His main rival was the congress candidate Shri Narsingh Rao Dixit. The polling took place on February 17, 1967 and the votes were counted on February 21, 1967. The respondent secured 20928 votes and his nearest rival Shri Narsingh Rao Dixit secured 14873 votes. The other candidates secured much less and it is not necessary to refer to them in the course of this judgment. The respondent was declared duly elected.

2. The petitioner is one of the electors in the Bhind Assembly constituency. Obviously he is a supporter of Shri Dixit. From the facts and circumstances of the case it is clear he is fighting the battle of Shri Dixit.

3. The election of the respondent was challenged in the High Court on numerous grounds. On the pleadings, several issues were raised. As many as 35 witnesses were examined on behalf of the appellant, and 49 on behalf of the respondent. The learned trial judge came to the conclusion that none of the grounds alleged in the petition was established. He accordingly dismissed the election petition with costs. Hence this appeal.

4. Though various allegations of corrupt practices were made against the respondent, most of them were not pressed

at the hearing of the appeal. Only three out of the many grounds taken in the petition were pressed for our acceptance. Hence we shall confine our attention only to those grounds.

5. It was alleged in the election petition that Shri Triyogi Narain Sharma, the election agent of the respondent who was also the Editor of the newspaper 'Udgar' had published false statements of facts, knowing them to be false regarding the personal character of Shri Dixit with a view to prejudice his chances in the election, in the 'Udgar' issues dated February 1, 1967, February 8, 1967 and February 15, 1967. It was further alleged that those issues were freely distributed by the respondent, Shri Sharma and other supporters of the respondent. In the election petition it was alleged that Shri Sharma had been appointed as the election agent of the respondent on January 25, 1967.

6. The High Court came to the conclusion that Shri Sharma was appointed as the election agent of the respondent only on February 16, 1967 and not on January 25, 1967. This finding was not challenged before us.

7. After a careful examination of the articles complained of, the High Court held that they contained false statements of fact relating to the personal character and conduct of Shri Dixit; those statements were known to be false to Shri Sharma and they were published with a view to prejudice Shri Dixit's chances in the election. On a reading of the articles in question, there can be hardly two opinions about those articles. We are in complete agreement with the High Court on this aspect of the case.

8. The question whether those articles were published with the consent or knowledge of the respondent does not arise for decision as it was not alleged in the election petition that they were published either with the consent or knowledge of the respondent or at his instance. It is clear from the evidence on record that Shri Sharma and Shri Dixit were bitter enemies from a very long time. Shri Dixit had filed a suit for defamation against Shri Sharma and had obtained a decree for damages against him. That matter was pending in appeal at the time of the election in 1967. It is also clear from the evidence that Shri Sharma had worked against Shri Dixit in the earlier elections as well. Therefore, Shri Sharma needed no provocation from any outside

source for publishing scurrilous articles against Shri Dixit.

9. As mentioned earlier, Shri Sharma was appointed as the election agent of the respondent only on February 16, 1967. Therefore the publication of any false statement by him earlier to that date would not invalidate the election of the respondent unless it is proved that the respondent had consented to the same.

10. The respondent's consent to the publication of those statements was attempted to be established by showing that the relevant issues of 'Udgar' were distributed by the respondent. The allegations relating to the distribution of those issues are found in Paragraph 7A (ii) of the petition. The same reads thus:

"That the circulation of the said weekly paper was of fairly large during the election period and the copies of the said newspapers were distributed by the returned candidate and his election agent, Shri Triyogi Narain Sharma and M/s. Rajhans Singh, Padma Singh of the village Pandri, workers and agents of the returned candidate with the consent of the returned candidate and his election agent in villages Akoda, Bilav, Dahoha, Laholi, Pulaoli, Bajhai, Kanawar, Pandri, Bisalpora, Umri, Nunheta and the town of Bhind on 1-2-67, 10-2-67, 12-2-67, 15-2-67, 16-2-67 and 17-2-67 in order to prejudicially effect the prospects of the election result of Shri Narsingh Rao Dixit, the Congress candidate". The allegation in question is quite vague. The same does not make it clear as to which persons distributed which issues in which villages and on what date. We asked the learned Counsel for the appellant to make it clear to us as to whether all the persons mentioned in the petition distributed all the issues in all the villages and on all the dates mentioned therein. His answer was that they did so. Such an allegation appears to be wholly unbelievable. It is most unlikely that the candidate and his election agent could have concentrated on distributing Udgar issues on the election day as well as on the day previous to the election. Anybody who knows something about election can easily visualise the various duties that a candidate and his election agent have to perform on the day prior to the election. On the date of the election there is little time for canvassing. Moreover, it is most unlikely that all these people could have visited all the villages mentioned in the petition on all the dates mentioned. Evi-

dently a wide net was thrown in the election petition to see if anything can be caught. Canvassing is forbidden for 24 hours before election. The allegation as regards the distribution of 'Udgar' issues appears to us to be artificial.

11. The learned judge of the High Court was unable to rely on the evidence adduced by the petitioner relating to the distribution of the Udgar issues mentioned earlier. He has rejected the evidence of all the witnesses examined by the appellant to prove the factum of distribution. In the matter of appreciating oral evidence, the appellate Courts attach great value to the opinion formed by the trial judges. That should be more so in the case of an election petition containing charges of corrupt practices, firstly because those charges are quasi-criminal in character and secondly they are tried by a judge of the High Court. This Court does not re-appreciate oral evidence unless there are special reasons for doing so.

12. If the evidence adduced by the appellant is true, then thousands of copies of Udgar should have been printed on the dates mentioned earlier. We have it from the testimony of the printer of those issues who was examined as a witness on behalf of the respondent that on each of those dates only 250 copies of 'Udgar' were printed. There is no reason to disbelieve his testimony. The same has been accepted as true by the learned trial judge. That circumstance largely falsifies the evidence adduced on behalf of the appellant.

13. In the course of the hearing of this appeal, only the evidence relating to the distribution of the issues in question in the town of Bhind was commended for our acceptance. We were not referred to the evidence relating to the distribution of those issues in other places. The witnesses who speak to the distribution of those issues in Bhind town are P. Ws. 1, 3, 4, 8, 9, 16, 18, 23, 26, 27, 31 and 33. P. W. 1's evidence is to the effect that the respondent, Shri Sharma and other workers of the respondent distributed those issues at Bhind every day during the 15 or 20 days prior to the date of poll. It is obvious that this statement is a highly exaggerated one. As seen earlier, the statements complained of are those published in the issues on 1st, 8th and 15th of February (Exhs. P-1 and P-3). P. W. 1 is a witness to support most of the corrupt practices alleged

in the petition. The same is true of P. Ws. 3, 4, 9, 16, 18 and 23. These are all omnibus witnesses. P. W. 8 was one of the candidates at the election. From the admissions made by him it is clear that he was not a genuine candidate. It is likely that he had been put up by Shri Dixit to divide the votes. He is also an omnibus witness. P. W. 8, is a Congressman. He was an active congress worker. He was also the congress member of the Nagar Palika, Bhind. P. W. 16 says that he was an ex-Congress man but at the time of the election, he did not belong to the congress party, but he admitted that Shri Dixit had accompanied the Barat of his son's marriage from Bhind to Jhansi about 10 months before he gave evidence in the court. It also appears from his evidence that he had taken a loan of Rs. 15,000 from the Gramini project under the control of the Industries Minister. It may be noted at this stage that till the last election Shri Dixit was one of the Ministers of the Madhya Pradesh Government. It is clear from the evidence of P. W. 18, that he was interesting himself in the election and there can be hardly any doubt that he was siding with Shri Dixit. P. W. 26, is a member of the congress party. P. W. 27's evidence instead of helping the appellant supports the case of the respondent. He deposed that "five or 10 days before the polling date the respondent with 2 or 4 persons whose names, I do not know had visited my Mohalla at the time of the last election. He simply asked for votes from us, the Mohalla people and did nothing. I did not receive any issue of the newspaper from the respondent or his companions on that occasion." But he did add that respondent's companions distributed them in his Mohalla. Obviously this last statement refers to some occasion other than that referred to by him earlier. P. W. 31, is also a Congressman.

14. It is common knowledge that as a result of excitement and faction feelings generated during election, assistance of large number of seemingly disinterested witnesses can be availed of to support an election petition. It is regrettable that several candidates are not able to take their defeat sportingly. From the spate of election petitions coming to courts, one is almost left with the feeling as if an election petition is an essential part of the election itself. But that is not to say that no corrupt practice is employed during election. The task of the court

to separate the grain from the chaff is an extremely difficult one.

15. On an assessment of the entire evidence in the case, we are in agreement with the trial court that the allegations that the respondent either personally or through others got distributed the 'Udgar' issues of the dates mentioned earlier is not satisfactorily established.

16. The next contention taken is the one relating to the alleged statement made by the respondent in a public meeting held at Bhind on January 23, 1967, accusing Shri Dixit as having procured the withdrawal of the candidature of P. W. 11, Shri Ramphal, the nominee of the Republican Party after paying him a bribe of Rs. 2,000. Shri Ramphal was nominated as one of the candidates for the election. He was put up as the nominee of the Republican Party. He withdrew his candidature on January 23, 1967. It is alleged that immediately after Shri Ramphal withdrew his candidature, the respondent held a public meeting in Bhind and at that meeting announced that Shri Dixit had procured the withdrawal of Shri Ramphal by giving him a bribe of Rs. 2,000. This allegation was denied by the respondent. He denied that he addressed any meeting on the 23rd of January, 1967. He also denied that in any of his meetings he had alleged that Shri Dixit had procured the withdrawal of the candidature of Shri Ramphal by paying him bribe. According to the respondent's case the withdrawal of the candidature of Shri Ramphal was resented by the Republican Party; consequently they arranged a procession and a public meeting on January 24, 1967 wherein slogans were raised and speeches made accusing Shri Dixit of having procured the same by bribing Shri Ramphal.

17. The High Court came to the conclusion that a meeting was held at Bhind on 23rd January, 1967. It also came to the conclusion that a procession was taken on the 24th with the effigy of Shri Ramphal which effigy was disgraced and burnt. From the facts proved, there is no doubt that Shri Ramphal's conduct had incensed the members of the Republican Party. They had condemned it as an act of betrayal. His effigy was taken out in a procession. It was beaten with sandals and burnt. There is also no doubt that the members of the Republican Party rightly or wrongly thought that Shri Dixit was responsible for the withdrawal of the candidature of Shri Ram-

phal. They also appear to have been under the impression that Shri Ramphal had been bribed. The petitioner seems to have exploited that incident and given it a different shape. The respondent's case in this regard is supported by the testimony of R. Ws. 35 and 39. R. W. 39, Raja Ram is the President of the Republican Party of Bhind District. On an overall appreciation of the evidence in this case, we are in agreement with the finding of the trial Court that it is not proved that the respondent had arranged for any public meeting in connection with the withdrawal of the candidature of Shri Ramphal or that he had accused Shri Dixit of having procured the said withdrawal by paying bribe. The witnesses examined in support of the said charge are again P. Ws. 1, 3, 4, 8, 9, 16, 18, 19 and 23. We have already considered their evidence. For the reasons earlier mentioned, we feel unable to rely on their testimony.

18. The only other plea taken is that in a public meeting held in the village Pulaoli, Shri Madho Rao Scindia of Gwalior who was supporting the respondent announced on the eve of the election a bribe of Rs. 20,000 for completing the school building of that place, if not even a single voter of that village voted for the congress. This allegation is unworthy of serious consideration. It is most improbable that any person would make an offer of that type. If any such offer had been made it would have been considered as a joke. None could seriously believe that not even a single voter of a village would vote for the congress candidate. The condition said to have been attached to the offer of bribe is such as to make the version unbelievable. That apart, the votes of each village are not counted separately. No one can find out whether the voters of any particular village have voted for any particular candidate or not. Pulaoli village was one of the many villages forming part of a single polling booth. If any supporter of the respondent had made an offer like the one complained of, immediately his opponents would have exploited the same by exposing its hollowness. The witnesses who support the petitioner's case on this part of his case are P. Ws. 2, 16, 17, 28 and 34. The respondent has examined R. Ws. 34, 45, 46 and 49 to repudiate the charge. We have already considered the reliability of the testimony of the P.W.16. We shall not refer to his evidence again. So far as P.W.2 is concerned, he was a worker

in the J.C. Mill at Gwalior since 1946. His explanation for being in the Pulaoli village at the time of the meeting in question is that he was on leave at that time and had come to the Pandri village as his wife's health was not good. In cross-examination he admitted that during the period in question his wife was not under the treatment of any Doctor or physician nor was it necessary to give her any treatment at that time. He deposed that his wife was deranged in mind for the last about 13 years. It was suggested during his cross-examination that he had taken leave during elections in order to work for Shri Dixit. There appears to be force in this suggestion. P. W. 17 was a witness for Shri Dixit in the defamation case that he filed against Shri Sharma. P. W. 28, is one of those omnibus witnesses who have supported petitioner's case in several aspects. P. W. 34, is the petitioner himself. The trial Court has rejected the testimony of these witnesses and preferred to accept the testimony of the witnesses examined on behalf of the respondent. We are in agreement with the trial Court that the charge in question has not been established.

19. None of the other grounds taken in the election petition was pressed before us.

20. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 446 (V 57 C 98)

(From Delhi: AIR 1969 Delhi 235)

S. M. SIKRI AND V. RAMASWAMI, JJ.
Nanak Chand, Appellant v. Chandra Kishore Aggarwal and others, Respondents.

Criminal Appeal No. 6 of 1969, D/- 20-5-1969.

(A) Criminal P. C. (1898), Section 488 — Hindu Adoptions and Maintenance Act (1956), Section 4 (b) — Section 4 (b) of Maintenance Act does not repeal or affect in any manner the provisions of Sec. 488, Cr. P. C.

Section 4 (b) of the Hindu Adoptions and Maintenance Act (1956), does not repeal or affect in any manner the provisions of Section 488, Cr. P. C. There is no inconsistency between the Maintenance Act and Section 488, Cr. P. C. Both

can stand together. The scope of the two laws is different. The Maintenance Act is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. Section 488, Cr. P. C. provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. AIR 1963 All 355 & (1962) 2 Cr LJ 528 (Cal) & AIR 1965 Pat 442, Approved. (Para 5)

(B) Criminal P. C. (1898), Section 488 (1) — “Child”, meaning of — Does not mean a minor son or daughter — Real limitation is contained in expression “unable to maintain itself”. AIR 1967 Mad 77, Overruled.

The word “child” in Section 488 does not mean a minor son or daughter. The real limitation is contained in the expression “unable to maintain itself.” (Para 12)

The word “child” is not defined in the Criminal Procedure Code itself. This word has different meaning in different context. Where the word “child” is used in conjunction with parentage, it is not concerned with age. In Section 488 of the Criminal Procedure Code the word is used with reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself. There is no justification for saying that this section is confined to children who are under the age of majority. Case law discussed. AIR 1943 Bom 48, Foll.; AIR 1967 Mad 77, Overruled. (Para 7)

(C) Criminal P. C. (1898), Section 488 — Maintenance grant to child — Court held rightly taken into consideration the existing situation, such as that one of the child was a student of M.Com., and the other was of M.B.B.S. Course, at the time of passing order. (Para 13)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Mad 77 (V 54)=
1967 Cri LJ 205, Amirithammal v. Marimuthu
- (1965) AIR 1965 Pat 442 (V 52)=
1965 (2) Cri LJ 530, Nalini Ranjan v. Kiran Rani
- (1963) AIR 1963 SC 1521 (V 50)=
1964-2 SCR 73, Jagir Kaur v. Jaswant Singh
- (1963) AIR 1963 All 355 (V 50)=
1963 (2) Cri LJ 117, Ram Singh v. State
- (1962) 1962 (2) Cri LJ 528 (Cal),
Mahabir Agarwala v. Gita Roy

- (1950) AIR 1950 Cal 455 (V 37)=
Smt. Puranasashi Devi v. Nagendra Nath
- (1950) AIR 1950 Nag 231 (V 37)=
ILR (1951) Nag 474, State v. Ishwar Lal
- (1943) AIR 1943 Bom 48 (V 30)=
ILR (1943) Bom 38, Ahmed Shaikh v. Bai Fatma
- (1910) 6 Ind Cas 960=11 Cri LJ 427 (Punj), Bhagat Singh v. Emperor
- (1873) 5 NWPHCR 237, In the matter of W. B. Todd

Mr. Sardar Bahadur Saharya and Miss Yougindra Khushalani, Advocates, for Appellant; M/s. S. C. Mazumdar and Yogeshwar Dayal, Advocates, for Respondents.

The following Judgment of the Court was delivered by

SIKRI, J.:— This appeal by certificate of fitness granted by the High Court of Delhi arises out of an application under Section 488, Criminal Procedure Code, filed on September 4, 1963, in the Court of Magistrate, 1st Class, Delhi, by four children of the respondent, Nanak Chand. The first applicant, Chandra Kishore, was born on January 23, 1942, the second, Ravindra Kishore, was born on September 23, 1943, the third Shashi Prabha, was born on February 23, 1947, and the fourth, Rakesh Kumar, was born on September 21, 1948. The first two applicants were thus majors at the time of the application, the third though a minor at the time of the application was a major on the date of the order passed by the Magistrate, i.e., on March 26, 1965. The learned Magistrate allowed the application and ordered the respondent, Nanak Chand, to pay Rs. 35/- p. m. to Chandra Kishore for four months only, Rs. 35/- p. m. to Ravindra Kishore for 3 years only in case he continued his medicine studies, Rs. 45/- p. m. to Shashi Prabha as her maintenance allowance and education expenses and Rs. 45/- p. m. to Rakesh Kumar as his maintenance allowance and education expenses from March 26, 1965.

2. Both the applicants and the respondent, Nanak Chand, filed revisions against the order of the Magistrate, to the Additional Sessions Judge, who dismissed the revision petition filed by the respondent, Nanak Chand, and accepted the revision petition of the applicants. The Additional Sessions Judge submitted the case to the High Court with the recommendation to enhance the maintenance allowance of the applicants in terms of the proposals made by him. The Additional

Sessions Judge observed that the maintenance under Section 488 did not include the costs of college education, and therefore he did not propose to allow Chandra Kishore and Ravindra Kishore the expenses of their college education. But taking into consideration the income of the respondent and the status of the family, the Additional Sessions Judge proposed to allow Chandra Kishore and Ravindra Kishore Rs. 100 p. m. each as maintenance allowance until they finished their courses of M. Com. and M. B. B. S., respectively. He further proposed to allow to Rakesh Kumar and Shashi Prabha each a monthly maintenance allowance of Rs. 50 until Shashi Prabha was able to earn or was married, whichever was earlier, and until Rakesh Kumar was able to maintain himself.

3. The High Court accepted the reference made by the learned Additional Sessions Judge and dismissed the criminal revision filed by the respondent. The High Court granted the certificate under Article 134 (1) (c) of the Constitution because there is conflict of opinion on the question of the interpretation to be given to the word 'child' in Section 488, Criminal Procedure Code.

4. The learned Counsel for Nanak Chand has raised three points before us: first, that Section 488, Criminal Procedure Code stands impliedly repealed by Section 4 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956)—hereinafter referred to as the Maintenance Act—insofar as it is applicable to Hindus; secondly, that the word 'child' in Sec. 488 means a minor; and thirdly, that the maintenance fixed for Chandra Kishore and Ravindra Kishore was based on wrong principles and was excessive inasmuch as expenses for education have been taken into consideration.

5. Section 4 of the Maintenance Act reads:

"4. Save as otherwise expressly provided in this Act,—

(a)

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

The learned Counsel says that Sec. 488, Criminal Procedure Code, in so far as it provides for the grant of maintenance to a Hindu, is inconsistent with Chapter III of the Maintenance Act, and in particular, Section 20, which provides for maintenance

to children. We are unable to see any inconsistency between the Maintenance Act and Section 488, Criminal Procedure Code. Both can stand together. The Maintenance Act is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, in so far as it dealt with the maintenance of children was in any way inconsistent with Section 488, Criminal Procedure Code. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Recently the question came before the Allahabad High Court in *Ram Singh v. State*, AIR 1963 All 355, before the Calcutta High Court in *Mahabir Agarwalla v. Gita Roy*, 1962 (2) Cri LJ 528 (Cal), and before the Patna High Court in *Nalini Ranjan v. Kiran Rani*, AIR 1965 Pat 442. The three High Courts have, in our view, correctly come to the conclusion that Section 4 (b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in Section 488, Criminal Procedure Code.

6. On the second point there is sharp conflict of opinion amongst the High Court and indeed amongst the Judges of the same High Court. In view of this sharp conflict of opinion we must examine the terms of Section 488 ourselves. Section 488 (1) reads as follows:

"488(1):—If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

We may also set out sub-section (8) of Section 488 because some courts have placed reliance on it:

"488(8):—Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or as the

case may be the mother of the illegitimate child."

7. The word 'Child' is not defined in the Code itself. This word has different meanings in different contexts. When it is used in correlation with father or parents, according to Shorter Oxford Dictionary it means:

"As correlative to parent, 1. The offspring, male or female, of human parents."

Beaumont, C. J., in *Shaikh Ahmed Shaikh Mahomed v. Bai Fatma*, ILR (1943) Bom 38 at p. 40=(AIR 1943 Bom 48 at pp. 48, 49) observed:

"The word 'child' according to its use in the English language has different meanings, according to the context. If used without reference to parentage, it is generally synonymous with the word 'infant' and means a person who has not attained the age of majority. Where the word 'child' is used with reference to parentage, it means a descendant of the first degree, a son or a daughter and has no reference to age. In certain contexts it may include descendants of more remote degree, and be equivalent to 'issue'. But, at any rate, where the word 'child' is used in conjunction with parentage, it is not concerned with age. No one would suggest that a gift 'to all my children' or 'to all the children of A' should be confined to minor children. In Section 488 of the Criminal Procedure Code the word is used with reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself. In my opinion, there is no justification for saying that this section is confined to children who are under the age of majority."

8. We agree with these observations and it seems to us that there is no reason to depart from the dictionary meaning of the word.

9. As observed by Subba Rao, J., as he then was, speaking for the Court in *Jagir Kaur v. Jaswant Singh*, (1964) 2 SCR 73 at p. 84=(AIR 1963 SC 1521 at p. 1525), "Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose." If the concept of majority is imported into the section a major child who is an imbecile or otherwise handicapped will fall outside the purview of this section. If this concept is not imported, no harm is done for the section itself provides a limitation by saying that the child must be unable to maintain it-

self. The older a person becomes the more difficult it would be to prove that he is unable to maintain himself. It is true that a son aged 77 may claim maintenance under the section from a father who is 97. It is very unlikely to happen but if it does happen and the father is able to maintain while the son is unable to maintain himself no harm would be done by passing an appropriate order under Section 488. We cannot view with equanimity the lot of helpless children who though major are unable to support themselves because of their imbecility or deformity or other handicaps, and it is not as if such cases have not arisen. As long ago as 1873, Pearson, J., in the matter of *W. B. Todd*, 1873-5 NWP HCR 237 had to deal with a major son who was deaf and dumb, and he had no hesitation in granting an order of maintenance. The same conclusion was arrived at by Chevis, J., in 1910 in *Bhagat Singh v. Emperor*, (1910) 6 Ind Cas 960=(11 Cri LJ 427 (Punj)) and he allowed maintenance to a young man of about 20 who was very lame having a deformed foot. We have seen no case in which a man of 77 has claimed maintenance and we think, with respect, that unnecessary emphasis has been laid on the fact that it might be possible for a man of 77 to claim maintenance.

10. It is not necessary to review all the case law. The latest judgment which was brought to our notice is that of the Madras High Court in *Amirithammal v. Marimuthu*, AIR 1967 Mad 77 in which Natesan J., has written a very elaborate judgment. He has referred to all the Indian cases and a number of English cases and statutory provisions both in England and in India. We are unable to derive any assistance from the statutory provisions referred to by him or from the English Law on the point. He relied on the use of the word "itself" in Section 488 as showing that what was meant was a minor child. We are unable to attach so much significance to this word. It may well be that it is simpler or more correct to use the word "itself" rather than use the words "himself or herself".

11. We may mention that *Das Gupta, J.*, in *Smt. Puranasashi Devi v. Nagendra Nath*, AIR 1950 Cal 455, and *Mudholkar, J.*, in *State v. Ishwar Lal*, ILR (1951) Nag 474=(AIR 1950 Nag 231) came to the same conclusion as we have done.

12. In view of the reasons given above we must hold that the word "child" in

Section 488 does not mean a minor son or daughter and the real limitation is contained in the expression "unable to maintain itself."

13. Coming to the third point raised by the learned counsel we are of the view that the learned Additional Sessions Judge and the High Court were right in taking into consideration the existing situation, the situation being that at the time the order was passed Chandra Kishore was a student of M. Com. and Ravindra Kishore was a student of M. B. B. S. course. We need not decide in this case whether expenses for education can be given under Section 488 because no such expenses have been taken into consideration in fixing the maintenance in this case. It has not been shown to us that the amount fixed by the learned Additional Sessions Judge and confirmed by the High Court is in any way excessive or exorbitant.

14. In the result the appeal fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 450

(V 57 C 99)

(From: Punjab)

M. HIDAYATULLAH. C. J. AND
A. N. GROVER, J.

Lachman Dass, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 118 of 1968, D/- 10-10-1969.

(A) Criminal P. C. (1898), Section 423 — Appeal to Supreme Court — Accused found guilty on facts by Courts below concurrently — No interference by Supreme Court ordinarily — High Court however, brushing aside entire defence version briefly and failing to consider whether it is believable — Held, Supreme Court could appreciate evidence on facts to decide guilt or otherwise of accused.

(Para 2)

(B) Prevention of Corruption Act (1947), Section 5 (1) (d) read with Section 5 (2) — Penal Code (1860), Section 161 — Accused charged for taking bribe — His conviction on uncorroborated statement of complainant — Circumstantial and documentary evidence, however, supporting defence version — Conviction set aside — Decision of Punjab High Court, Reversed.

LM/LM/F178/69/DVT/M

Accused, an Accountant in Municipality, was charged for receiving ten rupee note as bribe from a municipal contractor. Accused, being entrusted with the work of scrutinising bills submitted by the contractor, had reduced the amounts of bills substantially. Case of the complainant i.e., Contractor, was that the accused demanded him 10 Rs. and threatened that on his failure to pay the amount, bills would be further scrutinised and reduced. The accused accepted receipt of Rs. 10/- but his defence was that he had actually deducted Rs. 8-12 p. for making good the over-payment already made to the complainant and has returned Rs. 1-88 p. to him. The record of the municipality as well as the evidence of three witnesses including the Executive Officer of the Municipality supported the defence case. The trial Court convicted the accused for taking bribe depending on the sole evidence of the complainant and the High Court maintained the conviction though the evidence of the Executive Officer was not disbelieved.

Held, as the conviction was based on the sole evidence of the complainant who had reason to harm the accused, having reduced the bills substantially, and as there was nothing to show why the Executive officer should give false evidence in order to extricate the accused, conviction of the accused should be set aside. Circumstantial and documentary evidence created room for doubt that the defence version was probably true and the statement of the complainant could not be accepted without corroboration. Decision of Punjab High Court, Reversed. (Para 8)

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.— The appellant Lachman Dass who was an accountant of the Municipal Committee, Budhlada has been convicted under Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act and Section 161 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 250/- (in default to undergo rigorous imprisonment for six months). His appeal to the High Court failed and he now appeals to this Court by special leave granted by this Court.

2. Ordinarily, this Court does not consider a case after the High Court and the Court below have concurrently found the accused guilty on facts. In this case,

however, the judgment of the High Court merely brushes aside the entire defence version in one sentence which defence in our opinion merited close consideration with the prosecution case, to see which was believable. The learned Judge in the High Court who heard the appeal merely endorsed the findings of the Special Judge without attempting to weigh the evidence as was necessary in the appeal. We have accordingly allowed the appellant to read to us certain portions of the material evidence and have appraised it for ourselves. It is for these reasons that we shall narrate the facts a little more fully and then discuss the evidence in detail.

3. The incident is said to have taken place on the 24th March, 1964, at about 10 A. M. The complainant in the case is one Kishori Lal who was a plumber working in the Budhlada Municipality. For the work which he had done, he had submitted bills which it was the duty of the appellant to check and verify and certify for payment. It appears that the appellant had strictly verified these bills and reduced them from Rs. 935/- to Rs. 683/- and odd. In fact a cheque in payment of all the dues had been prepared and handed over to the complainant as far back as 16th March, 1964. The case of the complainant was that the appellant had made demands on him for bribe and had also told him that Rs. 10/- should be paid to him after the cheque had been encashed, threatening him at the same time that if the amount was not paid, the bills would be further scrutinised and reduced. This amount, it was stated, was paid by the complainant on 24th March in furtherance of this suggestion of the appellant and that is the foundation of the charge.

4. Before this amount was paid, the complainant made his report to the Sub-Divisional Magistrate who asked a police officer to arrange for a trap. The usual procedure for such traps was followed, the currency note of Rs. 10 which was the amount in demand was initialled by the Sub-Divisional Magistrate and the number of the note was taken down before it was made over to the complainant for passing it to the appellant in furtherance of his demand for bribe. The Sub-Inspector with the complainant, accompanied by two witnesses, went to the office of the appellant. None of the witnesses entered the office of the appellant. The complainant alone entered it. After some time, the complainant came out and

raised his turban which was the signal that the amount had been paid. The raid followed and the currency note was found in the left hand pocket of the bush-shirt of the appellant. He was thereupon arrested. The two witnesses who accompanied the Sub-Inspector stated that the appellant had become pale and was trembling and that he gave no explanation at that time. It is however not clear whether any opportunity was given to him to explain how this money came to be with him.

5. The appellant admitted receipt of Rs. 10 in one currency note from the complainant. His explanation was that the complainant had complained to his superior officer about the strict scrutiny of the bills by the appellant. The bills were ordered to be scrutinised again. The last bill was found to be correct, but in the previous bill the appellant found an over-payment to the complainant of Rs. 8.12 p. Therefore the appellant was asked to recover this amount from the complainant or pay it himself. He thereupon sent a notice to the complainant to bring Rs. 8.12p. and pay it into the Municipal account. The complainant came and gave a currency note of Rs. 10. The appellant returned Rs. 1.88p. from the imprest with him and prepared a receipt for Rs. 8.12p. and gave to the complainant. This statement the appellant mentioned was borne out by numerous circumstances appearing in the evidence in the case.

6. First, there were two witnesses who claimed to be present when the money was paid. They are, Chaman Lal (D. W. 1) and Ambresh Narain (D. W. 2). Chaman Lal is the Municipal Commissioner of the Budhlada Municipality. He stated that he had gone to the office of the appellant on the morning of the 24th March to enquire from the appellant what rent was payable by his friend Hans Raj towards the 90 years lease of the site in front of his house. The appellant told him that the question could properly be answered only by Shri A. N. Dhanoka, Secretary of the Municipal Committee. He therefore brought Shri Dhanoka to the office and at that time, one person whom he identified as Kishori Lal the complainant, came to the office and gave a currency note of Rs. 10 to the appellant. The appellant then started preparing a receipt for him. This receipt according to the witness was given to Kishori Lal. This part of the statement of Chaman Lal was

corroborated by the evidence of Ambresh Narain (D. W. 2). He is the Secretary of the Municipal Committee, Budhlada and he also stated that at that time, Kishori Lal came to the office and gave a currency note of Rs. 10 to the appellant saying that that was the amount which he had demanded through the peon. The appellant took the currency note and issued a receipt to Kishori Lal. Immediately afterwards, a Sub-Inspector came and arrested the appellant and conducted his search.

7. These two witnesses were disbelieved by the Special Judge who tried the case on the ground that the first witness — Chaman Lal seemed to be a chance witness and the second witness — Ambresh Narain Dhanuka need not have been called in, because the information could have been supplied by the appellant himself. There was no other reason assigned why these persons should have perjured themselves in support of the appellant. As we shall show presently, there is further corroboration of the testimony of these witnesses from quite an independent source and in documentary records of the Municipal Committee's office. The next defence witness is Siri Pal Jain. He is the Executive Officer of the Municipal Committee. He proved that the appellant had checked the bills of the complainant and reduced it from Rs. 935 to Rs. 683 and odd. He proved Exs. DE/1 and DE/2 which were the bills and his endorsements. He also proved that on 16th March, 1964 a cheque of about Rs. 216 was given to the complainant in full and final settlement of his account. After this bill was given, says the witness, the two bills were again checked and the witness told the appellant that he should ascertain what was the amount due. The appellant then went to him at 3.30 P. M. the same evening and told him that he had checked the account and that the second bill was correct, but that there was some overpayment in the first bill Ex. DE. The witness then asked him to make a report in writing and the report Ex. DF was made to him that Rs. 8.12 p. had been overpaid. The witness then passed an order Ex. DF/1 on 17-3-1964. Ex. DF has been produced before us. The endorsement of the Executive Officer on the report is:

"This is certainly very bad. It shows the lack of proper care and diligence. Either the recovery be made or deposit yourself."

As a result of this, the notice Ex. DG/1 was issued by the appellant. The witness proved the signature of the appellant on Ex. DG/1. This notice demanded from the complainant the sum of Rs. 8.12p. as excess payment to him. This notice had an endorsement on it of the office peon that the copy was attempted to be served upon Kishori Lal but he was not present in his house, that the peon met him in the Bazar but he refused to accept the notice and that the notice was pasted at his house. There was a cash receipt which was purported to be prepared on 24th March, 1964 Ex. DH on which the signature of the appellant was found. This receipt was the counterfoil in the office of the Municipality and it bore the name of the contractor Kishori Lal and the fact that excess payment was made to him vide Entry No. 48 dated 24-1-1964 and the amount shown was Rs. 8.12p. This was followed by a letter which Siri Pal Jain purports to have written to the appellant bringing to his notice that the amount of the cash was checked against the cash book and it was found by the Cashier that the receipt for Rs. 8.12p. existed but it had not been entered nor had the amount been deposited with the Cashier and what his explanation was. This explanation was given to the Executive Officer by the appellant on 25th March, 1964 in which he stated that it was true that a receipt No. 31/34 had been issued in the name of Kishori Lal for Rs. 8.12p. He also stated that he had been given Rs. 10 in currency note by Kishori Lal and he paid Rs. 1.88 p. as change to him from his imprest but that the Sub-Inspector immediately came and took away Rs. 10 note from him and it could not be deposited with the Cashier. All this evidence is certified to be existing by the Executive Officer. The Executive Officer also stated that after the arrest of the appellant, he got the office locked and left the key with the peon. He had questioned the peon if he had parted with the key to anybody else and the peon satisfied him that the key had not been handed over to anybody. All this evidence fitted in with the explanation of the appellant that he had received a Rs. 10 note towards payment of Rs. 8.12p. which had been demanded from the contractor, that he had paid Rs. 1.88p. as change to him and that the entry could not be made because both the money and the appellant were taken away by the police. There is evidence to show that

on the checking of the money on the 26th March, 1964, there was a shortage of Rs. 1.88p. between the amount in the cash book and the amount found in the imprest. This shortage clearly shows that the amount of Rs. 1.88p. had been paid.

8. To this explanation of the appellant and the evidence adduced by the defence witnesses, the comment of the Special Judge was that all these witnesses were falsely supporting the appellant and trying to shield him. We have not been able to find why three persons including the Executive Officer should go out of their way to shield the appellant. Nothing has been suggested before us which would show that the Executive Officer in particular had any reason to forge documents and to give false evidence to extricate the appellant. In fact the learned Judge in the High Court tried more the case of the Executive Officer than the case of the appellant and after reasoning it fully, exonerated the Executive Officer but maintained the conviction of the appellant. If the Executive Officer is to be believed, it would be difficult to hold that all this story about Rs. 8.12p. being sought to be recovered from the complainant is entirely false. There is too much documentary evidence which has the support of the Executive Officer's sworn testimony to be brushed aside as the learned Judge in the High Court has done. If that story is accepted and if we compare it with the evidence of the Cashier that a sum of Rs. 1.88p. was found short in the cash and that a receipt for Rs. 8.12p. had already been prepared, we reach the conclusion that the explanation of the appellant is probably true. As against this, there is only the sworn testimony of Kishori Lal to compare, because none of the witnesses for the said ever heard any conversation. There is no other witness to support Kishori Lal in what he says. Kishori Lal had reason to harm the appellant as he had twice reduced his bills substantially. There ought to be some other evidence before his word can be accepted with so much other evidence to contradict him. In trap cases at least some panchas overhear the conversation or see something to which they can depose. In this case as against Kishori Lal's evidence we have circumstantial and documentary evidence and the evidence of the Executive Officer, of Chaman Lal and of Ambresh Narain in whose presence the receipt was pre-

pared and given to Kishori Lal. On the whole, therefore, we are satisfied that there is considerable room for doubt in this case and that the statement of Kishori Lal which alone is the foundation of the charge against the appellant cannot be accepted without corroboration. We are satisfied that his conviction and sentence should be set aside. We order accordingly. The appellant is acquitted. The appellant is on bail. His bail bonds are cancelled. If the fine has been paid by the appellant, it shall be refunded to him.

Appeal allowed.

AIR 1970 SUPREME COURT 453
(V 57 C 100)

(From: Bombay)

S. M. SIKRI, G. K. MITTER AND P.
JAGANMOHAN REDDY, JJ.

Shivagonda Subraigonda Patil and others, Appellants v. Rudragonda Bhimagonda Patil and another, Respondents.

Civil Appeal No. 734 of 1966, D/- 14-10-1969.

(A) Bombay Hereditary Offices Act (3 of 1874) (as subsequently amended insofar as applicable to State of Kolhapur), Section 5 — Applicability of the Act — Alienation by sale of Patel-ki-watan inam land — Held on construction of various Wat Hukums specifically prohibiting alienation of Patel-Ki-Watan and other similar inams that the alienation was void under the then prevailing law in Kolhapur State — Act did not apply to that State so as to override specific directions of Wat Hukums which had legal and binding force in the State. AIR 1951 Bom 258, Rel. on; Decision of Bombay High Court, Reversed. (Para 4)

(B) Limitation Act (1908), Article 142 — Suit for recovery of possession against the person not entitled to possession — Suit not based on ground that plaintiff has been dispossessed by him — Article 142, held not applicable. (Para 5)

(C) Limitation Act (1908), Articles 142, 144 — Sale of suit land in favour of plaintiff — After redeeming mortgage possession of suit land given to plaintiff — Under a misapprehension Collector forfeiting property and taking possession in

LM/AN/F193/LGC/M

year 1928 — But subsequently realising the mistake releasing property and handing over possession to wrong person namely defendant, in 1951 — Suit for ejectment and for recovery of possession on ground of title filed in 1953, held not barred — Right to file suit accrued to plaintiff only after the possession was handed over to defendant — It could not be said that plaintiff was out of possession from 1928 till the date of suit.

(Para 5)

Cases Referred: Chronological Paras

(1951) AIR 1951 Bom 258 (V 38) =

52 Bom LR 839, R. Vanappa

Akale v. Laxman M. Akale

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The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.: This is an appeal by special leave against the judgment of the Bombay High Court confirming the judgment of the Assistant Sessions Judge, Kolhapur who reversed the judgment and decree of the civil judge of Junior Division at Gadhinglaj whereby the suit of the plaintiff-respondent was dismissed. The respondent had filed a suit against the appellant Shivagonda Subraigonda Patil and his sons Nijappa Shivagounda Patil, Virgonda Shivagounda Patil, Bhimappa Shivagounda Patil and Rayappa Shiva-gonda Patil with the allegation that on 27-5-1921 the first defendant, Shiva-gounda who was the karta of the joint family consisting of himself and his four sons, sold by a registered sale deed for a sum of Rs. 2400 the suit properties ad-measuring 6 acres and 37 guntas out of R. S. No. 62/2 and 62/3 to the plaintiff's father Bhimgonda. The properties sold to the plaintiff's father were previously mortgaged and it was averred that the first defendant had undertaken to pay the mortgage debt and hand over the suit property to the plaintiff's father. It ap-pears that part of the property out of R. S. 62/2 to the extent of four acres, 36 guntas was mortgaged to Hanmgond Balgonda Patil for Rs. 1000 and two acres and one gunta out of S. No. 62/3 was mortgaged to Virgonda and four other persons. It was the case of the plaintiff that after the death of Hanmgond Bal-gonda the first defendant repaid the debt to his widow Gangabai and obtained pos-session of the hypotheca but instead of handing over possession to the plaintiff's

father as stipulated in the sale deed he retained the possession. In respect of the other two acres and one gunta which was mortgaged to Virgonda and others he alleged that the first defendant re-deemed the mortgage and handed over the possession to the plaintiff's mother as the guardian of the plaintiff who was then a minor and that after the plain-tiff's mother got into possession of the property the Kolhapur government at-tached the property and took possession of it in 1928 on the ground that the mortgage in favour of Virgonda and others was contrary to Wat Hukums. However, it appears that on or about 3-3-51 attachment was vacated but the possession of this land was handed over by the collector to the first defendant in-stead of the plaintiff from whose posses-sion it was taken. It was the plaintiff's case that both in respect of the pro-perty that was mortgaged to Hanmgonda Balgonda and that which was mortgaged to Virgonda and others it was the first defendant that retained possession of the said lands contrary to the stipulation and the sale effected in favour of the plain-tiff's father. It was also the plaintiff's case that Bhimgonda who was a hissadar bhauband of the suit land which was a part of Patilki watan inam land on the date of the sale deed dated 27-5-21 was entitled to claim possession of the pro-perty on the strength of his title deed; as such the revenue court erred in hand-ing over possession of the portion of the suit property to the first defendant on 3-3-51.

2. The first defendant respondent No. 1 contended in his written statement that the suit being patilki watani service inam property, its transfer was declared by Wat Hukums of the Kolhapur State to be il-legal and void because neither the plain-tiff nor his father was either the 'nawa-wala' of the patilki watani service inam lands or the male members of the senior branch of the senior family. It was also contended that the mortgage in 1915 by the first defendant in favour of Hanam-gonda was also contrary to wat hukums and therefore void. Even apart from this defect the suit property was never in the possession of the deceased Hanam-gonda in his capacity as the mortgagee but that it has always been in his pos-session as the owner thereof. Accord-ingly the suit was barred by limitation. On these pleadings several issues were framed but for the purposes of this ap-

peal having regard to the arguments addressed before us only two issues are relevant, namely whether the sale under exhibit 37 in favour of the father was void under the then prevailing law in Kolhapur State and whether the suit was in time. It may be mentioned that the trial court had dismissed the suit of the plaintiff but the District Judge in appeal allowed it, set aside the decree and remanded the suit to the trial Court for fresh disposal according to law with the direction that the parties should be allowed to amend their pleadings. After remand, the trial Court reframed the issues having regard to the amendment of the pleadings but in so far as the issues with which we are concerned it held against the plaintiff and again dismissed the suit. The plaintiff appealed to the District Court which allowed the appeal, holding that the impugned alienation was legal and did not offend any of the provisions of the wat hukumts that were in force and that the suit was within time. The appeal to the High Court of Bombay was unsuccessful. The High Court held that under the law in force alienation of service inams were alone declared to be invalid but since the subject matter under appeal did not pertain to the service inam land, the alienation was not void, nor was the suit barred by reason of the defendant's adverse possession.

3. The question we are called upon to determine in this appeal is whether according to the law in force as can be ascertained from the relevant wat hukumts and the provisions of the Bombay Hereditary Offices Act III of 1874, as subsequently amended in so far as it is applicable to the State of Kolhapur, the alienation of the patel-ki-watan inam land, is void and whether the suit of the plaintiff-respondent is barred by limitation. Before we embark upon an enquiry in respect of these two questions, it would be necessary to understand the nature and significance of the wat hukumts and the terms used therein, appertaining to watans and inams. In the princely State of Kolhapur, the word wat hukum has been used not only for the firmans or decrees of the ruler but also for the orders issued by several authorities. This indiscriminate use of the words has caused a great deal of confusion, and no wonder the Supreme Court of that State had occasion to observe that they constituted a "wilderness". This term, it was noticed was not confined to orders passed by the

ruler, but also referred to those orders which were issued by the Chief Justice, by Sarsubha (the Commissioner of Revenue Division) and also even by sub-divisional officers like the Prant Officer who corresponded to the Deputy Collector. But it was not every wat hukum that had the force of law. Only those wat hukumts which were purported to have been expressly issued by the authority of the ruler whether they emanated from the Prime Minister, the Political Agent, Sarsubha or the Prant Officer, had the force of law. All the other wat hukumts which were issued by the several officers as executive orders, did not have any legal force. We shall refer to those relevant wat hukumts which pertain to the inams in order to determine whether those inam grants were inalienable and subject to the rule of primogeniture. A watan or inam which in its primary sense means a gift was a grant made by a ruler who had the power or authority to make these inams. These inams were of several kinds, namely, religious endowments, saranjams, service inams, etc., but we are here concerned only with service inams. These service inams have an origin of antiquity and go back to a feudal era where the ruler administered the government through village administration by compensating various services required to be performed by it generally by the grant of lands. The servants or officers of the village who rendered these services were known as 'balute' and the number of them generally were twelve known collectively as 'bara balute' of which in Maratha villages and others where it was adopted the village headman was one of such balutas known as patel. There were others like Kulkarni (accountant) Deshpandya (district accountant) washerman, barber, etc., with which we are not here concerned (vide Wilson's Glossary of Judicial and Revenue terms). The land which was granted for the performance of each of these services was hereditary and held subject to the terms of the grant in the sanad which governed inheritance, inalienability, etc. The subject matter of the suit as already noticed formed part of the patelki watan land and was situated in the Kolhapur State, where it is contended that according to the wat hukumts then in force a sale in favour of a bhauband of the vendor but not a 'nawawala' was valid. The bhauband we are informed by the learned advocate for the appellant, Shri Karkhanis, and it is not denied by the respondents' learned advocate,

literally means kinsman or relative, has been translated as watandar of the same watan in the Supreme Court, and kinsman by the translator in the High Court. A reference to Wilson's Glossary shows that the word Bhau means a brother, a cousin. There is no doubt that it refers to relatives of the vendor. The word nawawala means the registered holder of the watan. An excerpt from page 12 of V. S. Desai's book—The Kolhapur Inam Law—has been cited before us namely that whenever the holder of an inam died, it became necessary to undertake a succession inquiry "in order to ascertain the person upon whom the inam should descend" and "the person so designated was called the nawawala". He was the holder of the inam and had the right to render service, if service had to be rendered. It was therefore urged by the plaintiff that as both the vendor and the vendee belonged to the watandar's family the transaction was valid under the wat hukums of the Kolhapur Darbar, as such we will have to examine these wat hukums.

4. The first of the documents upon which reliance is placed is wat hukum No. 76 of 1282 fasli issued on 13-4-1873. This prohibits by cancelling all prior orders pertaining to service inams, the partition and mortgage of watan lands. Para. 7 of this wat hukum states that the owner of the lands above-mentioned not being private property has no right to alienate by way of mortgage, sale, gift, etc., and such transfer will not be recognised by civil or revenue courts in the Kolhapur State. Only the right of the person taking such land will be recognized. If deeds alienating by way of mortgage, etc., as mentioned above are got executed from the owner and registered in the government offices, such registration should not be construed as approval of the government to such transfers. On 13-9-1876, the Political Agent issued circular No. 28 of 1286 fasli with reference to the wat hukum No. 12 of 1283 fasli issued on July 12, 1871. It said even though the wat hukum issued in the year 1871 had declared that a person in whose name the watan was continued should not give or take by way of mortgage, gift, etc., that provision is not complied with and it was, accordingly, made known by that circular that those who had mortgaged, etc., their lands should redeem within three months failing which the lands will be forfeited. It ad-

ded that even if the lands were mortgaged hereafter they would be forfeited. Again on 4-8-1887, Sarsubha issued wat hukum No. 19 of 1297 fasli, after referring to the orders issued from time to time that the watan lands of patel kul-karni, mahdra, etc. should not be mortgaged or sold, it proceeded to make an exception in these words: "It should not be understood that this order puts any restrictions on village officers, patel kul-karni, etc., mortgaging etc., their lands with bhaubands". While all the previous wat hukums appear to have prohibited alienations whether by way of sale or mortgage absolutely on pain of their being forfeited if the provisions were not complied with, this wat hukum seems to make an exception in favour of mortgages between bhaubands. Thereafter in 1896, wat hukum No. 9 of 1306 issued by Sir Nayadhish (Chief Justice) cancelled all wat hukums pertaining to service wat hukums issued prior to 1876. A subsequent wat hukum No. 39 of 1305 issued on 26-2-1896 states that as some doubts had been raised because of the use of vernacular words in wat hukum No. 19 of 4-8-1887 pertaining to watans of the watandars performing service, it was decided to prohibit the watandars or his pot bhaubands from alienating watan in any form. It was directed that an endorsement to this effect should be made on wat No. 19 dated 4-8-1887 and that the same be brought into force. This Sarsubha wat was a huzur resolution having the force of law. There are several other wat hukums namely sarsubha wat hukum 35 of 1335 fasli dated March 12, 1904, sarsubha wat hukum 28 of 1318 fasli, but it is not necessary to deal with them as they do not refer to this aspect of the matter. By sarsubha wat hukum No. 44 of 1322 fasli, dated 23-5-1913, it was made known that "every inam of whatever type was impartible and was to be continued with eldest son only. If any partition takes place hereafter, Government will not approve of it. Every partition effected prior to this order will not be affected as this order will not have retrospective effect." It is, therefore, seen that by this date not only the alienation of service inams was prohibited but it was made impartible, succession to which was to be governed by the law of primogeniture. Then we get sarsubha wat No. 4 of 1323 fasli issued on 11-6-1913 approved by huzur resolution No. 5 of 1913. This wat is translated thus:

"Prohibiting, mortgaging or alienating in any other form the impartible inams.

Be it known that there is a ban on mortgaging or disposing of in any manner like other service watans the inams which have been declared impartible by the foregoing wat hukum and that all the wat hukum prohibiting such alienation issued so far are applicable to the inams declared impartible by the wat No. 44. This will come into force from date of the Gazette."

The trial court points out that there were certain decisions of the Kolhapur High Court which lay down that alienation of whatever type of inam was prohibited except a sale to the nawawala but they are based on the presumption that these two wat hukum 44 of 1322 and 4 of 1323 are in existence. It was further stated that these wat hukum were omitted by wat hukum 40 of 1917, as can be seen from the list of the non-existing wat hukum given at p. 10 of appendix to Vol. II of the collection of wat hukum. Though it is stated that the wat hukum 40 of 1917 was not available but from the first column it appears that it was not in force in respect of two categories of inams mentioned in it which categories do not include the service inams. There is another Sarsubha wat 4 of 1333 fasli issued on 28-3-24 for granting permission only to nawawala wajirdars, watandars to purchase lands from pot bhaubands. These two wats Nos. 4 of 1323 and 4 of 1333, it is said, vary the absolute prohibition against alienation by permitting patelki-watan service inam to be mortgaged like other service inams, though alienation would be void if it is made in favour of any one other than bhauband and without permission even to bhaubands. It was sought to be contended before the High Court and also before us that though initially under the Bombay Hereditary Offices Act III of 1874, which was made applicable to the State of Kolhapur by notification of 1297 fasli published in the Karvir State Gazette (Kolhapur) on 3-3-1888, Section 5 which prohibited the alienation if not made with the sanction of the government, was substituted by a subsequent amendment by Bombay Act V of 1886. This amended section, however, only prohibited alienations in any form in favour of any person who was not a bhauband beyond the natural lifetime of the watan holder. This amended provision also was applied to the Kolhapur State in the same way as the

main Act was applied. It is, however, urged that the Bombay Watan Act and the amendment were only applied in spirit that is according to the obvious meaning or import unlike other Acts which were applied to the Kolhapur State in their entirety without any limitation. But the High Court of Bombay did not find it necessary to go into the question as to whether the Bombay Act or its amendment applied in letter or spirit, because according to it, the Kolhapur law was also precisely the same as the law prevailing in the Bombay State. We have already set out the various wat hukum and are of the view that the alienations by way of sale at any rate were prohibited; in so far as application of the Bombay Act and its amendment is concerned, we are one with Gajendragadkar, J., as he then was, who, when delivering the judgment of the Full Bench consisting of himself, Chagla, C. J. and Shah, J. as he then was, in *R. Vanappa Akale v. Laxman M. Akale*, 52 Bom LR 839 at p. 841 = (AIR 1951 Bom 258 at p. 259), observed:

"The decision of this question has been made somewhat difficult by reason of the fact that in the State of Kolhapur the Watan Act has been made applicable 'in spirit' and there are a large number of wat-hukums issued in respect of questions relating to inami lands from time to time In dealing with the questions pertaining to the watans the courts in Kolhapur have therefore to consider this mass of wat-hukums and apply them to the facts before them. In doing so they have also to bear in mind the fact that the spirit of the Watan Act had also been made applicable to the State. Mr. Justice Madgavkar who presided over the Supreme Court at Kolhapur for several years strongly criticised the application of the Watan Act in spirit only on the ground that he was unable to understand what such an application of the spirit of the Act really meant. 'Either an Act in any or all of its sections, ap-

plies, or it does not', observed Madgavkar, J. 'To apply it in the spirit but not in the letter is beyond the power of the courts'..... With respect we agree with this criticism made by Mr. Justice Madgavkar."

What the Full Bench was dealing with was the question whether under the wat hukums of the Kolhapur State, the sanadi inam land which was impartible reverts to the State on the death of the holder, and after an examination of all the wat hukums it expressed the view that whatever the restrictions may be upon that land which does not make the property the absolute property of the watandar, that property does not revert to the State but descends to the next heir by the rule of primogeniture. We are not concerned with that aspect of the matter but only with the question whether the alienation in favour of the plaintiff's father was valid, and we think on the construction of the various wat hukums that it was not. We agree with the Full Bench that the Bombay Hereditary Offices Act (Watan Act) did not apply to the Kolhapur State so as to override the specific directions of the wat hukums which had legal and binding force in that State. It may be observed that notification of 3-3-1888 whereby certain laws in force in what was then British India were applied in toto with modifications but the Watan Act is applied only "to go according to the obvious meaning or import". What was perhaps intended was that where there were no specific hukums the general principles of the Watan Act may be applicable. At any rate in this case as there is a specific prohibition from alienating patel-ki-watan and other similar inams we need not rely on the provisions of the Bombay Act.

5. On the other question namely whether the suit is barred by limitation, we are of the view that it is not. The facts as narrated will show that in one case possession was given to the plaintiff's widow after the mortgage was redeemed. But the Collector under a misapprehension effected a forfeiture and took possession but subsequently perhaps realising the mistake, released the property but handed over possession to the wrong person namely the defendant. It is only after that, that a right would accrue to the plaintiff to file a suit for ejectment and for recovery of possession on the ground of his title. There is no validity in the submission made on behalf of the

defendant that the plaintiff was out of possession from 1928 till the date of suit — April 17, 1953. Article 142 has no application because the suit is not against the defendant on the ground that he has been dispossessed by him but against a person who is not entitled to possession. The defendant did not dispossess the plaintiff, and as such Article 142 is not applicable at all. In any case, it is not necessary to go into this question in any great detail, because in the view we have taken upholding the defendant's plea that the said alienation is void the plaintiff's suit must fail.

6. The appeal is accordingly allowed, the judgment and decree of the High Court, set aside and that of the trial court, restored with costs here and below.

Appeal allowed.

AIR 1970 SUPREME COURT 458 (V 57 C 101)

(From: Allahabad)

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.

Ramchandra Shukla, Appellant v. Shree Mahadeoji and others, Respondents.

Civil Appeal No. 1393 of 1967, D/- 15-10-1969.

Hindu Law — Trust — Religious or charitable purpose — Dedication — Essentials — Dedication for purpose of promoting games not as part of education of those participating but for promotion of games simpliciter — Purpose is not charitable — Trust created for maintaining Akhara though idols and Tasweer installed, held, was not a religious Trust. Decision of High Court (All) D/- 5-8-65, Reversed.

A dedication of property for a religious or a charitable purpose can, according to Hindu law, be validly made orally and no writing is necessary to create an endowment except where it is created by a will. It can be made by a gift inter vivos or by a bequest or by a ceremonial or relinquishment. An appropriation of property for specific religious or charitable purposes is all that is necessary for a valid dedication. A trust in the sense in which it is understood in English law is unknown in the Hindu system. Hindu piety found expression in gifts to idols, to religious institutions and for all purposes considered meritorious in the Hindu

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social and religious system. Therefore, although Courts in India have for a long time adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the Statute of Elizabeth, and therefore, all purposes which according to English law are charitable will be charitable under Hindu law, the Hindu concept of charity is so comprehensive that there are other purposes in addition which are recognised as charitable purposes. Hence, what are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu Law. AIR 1957 SC 797 & AIR 1922 PC 123 & AIR 1953 SC 491, Rel. on. (Para 16)

A dedication for the promotion of a particular game or sport is not a charitable trust under the Hindu Law. The decisions lay down a distinction between cases where the object of the dedication was the promotion of games as part of the education of those who participate in them and cases where the object was promotion of games simpliciter, the former only having been upheld on the ground that such promotion or encouragement is part of the educational training and the latter not having been upheld. 1891 AC 531 & 1895-2 Ch 649 & (1932) 1 Ch 133 & 1915 (2) Ch 284 & (1945) 114 LJ Ch 1, Ref.; AIR 1939 PC 208 & AIR 1944 PC 88 & AIR 1959 Cal 296, Dist.

(Paras 20 and 22)

Where a settler, settled some properties for establishment of an Akhara and installed two idols and one Taswir in order to attract wrestlers of both communities viz., Hindus and Muslims.

Held, on construction of the deed, that the trust was not a religious trust in favour of the idols and the Tasweer, the dominant intention of the settler was to set up and maintain an Akhara, the said two idols as also the tasweer of Hazrat Ali having been installed there only to attract wrestlers of the two communities.

(Para 23)

Cases Referred: Chronological Paras

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| (1959) AIR 1959 Cal 296 (V 46)= | |
| ILR (1960) 1 Cal 356, Cricket Association, Bengal v. Commr. of Income-tax, Calcutta | 21, 22 |
| (1957) AIR 1957 SC 797 (V 44)= | |
| 1957 SCR 1122, M. Dasaratharami Reddi v. D. Subba Rao | 16 |
| (1953) AIR 1953 SC 491 (V 40)= | |
| 1954 SCR 277, Saraswathi Ammal v. Rajagopal Ammal | 12, 14 |

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| (1945) 114 LJ Ch 1=1945 Ch 16, | |
| Daley v. Lloyds Bank Ltd. | 20 |
| (1944) AIR 1944 PC 88 (V 31)= | |
| ILR (1945) Bom 153, All India Spinners Association v. Commr. of Income-tax | 21 |
| (1939) AIR 1939 PC 208 (V 26)= | |
| 66 Ind App 241, Trustees of the Tribune Press v. Commr. of Income-tax | 21 |
| (1932) 1932-1 Ch 133=101 LJ Ch 52, In re, Hadden; Public Trustee v. More | 20 |
| (1922) AIR 1922 PC 123 (V 9)= | |
| 48 Ind App 302, Vidya Varuthi v. Balusami Ayyar | 16 |
| (1915) 1915-2 Ch 284=84 LJ Ch 825, In re Mariette; Mariette v. Governing Body of Aldenham School | 20 |
| (1895) 1895-2 Ch 649=64 LJ Ch 695, In re Notage; Jones v. Palmer | 20 |
| (1891) 1891 AC 531=61 LJQB 265, Commrs. for Special Purposes of the Income-tax v. Pemsel | 20 |

The following Judgment of the Court was delivered by

SHELAT, J.— This appeal, by certificate, is directed against the judgment and decree of the High Court of Allahabad D/- 5-8-1965 and relates to a piece of land together with buildings thereupon including an Akhara (wrestling ground). The property is situate in Kanpur and bears at present Municipal No. 26/72, its original No. being 26/30.

2. Sometime prior to 1830, one Mani Ram, well-known during his life-time as a wrestler, purchased a groveland with trees standing thereon. Whether he purchased one such groveland and divided it into two, or purchased two such grovelands and amalgamated them into one is not quite certain. Along with this land he was possessed of other properties adjacent to the said groveland. It appears that being himself a wrestler and fond of that sport Mani Ram purchased the said groveland for setting up and maintaining an Akhara where wrestlers of both Hindu and Muslim communities could come for wrestling. Besides the income from the said groveland, Mani Ram spent large amounts for promoting wrestling and to that end made a number of disciples.

3. He had by his first wife six sons and a seventh son, Mangali Prasad, a wrestler of repute, from his second wife,

Rahas Kaur. By a deed of partition dated June 23, 1830 he divided all his properties into eight shares giving one share to each of his seven sons and retained the 8th share for himself and the said Rahas Kaur. This 8th share included the said groveland on which stood the said Akhara as also certain other structures. The Akhara ground was bounded by a compound wall with an archgate to enter into. It appears that with the object of attracting wrestlers he installed on the archgate an idol of Mahabirji, a Shiv Lingam over a small room which stood next to the said gate, and a tasweer of Hazrat Ali. The two idols and the tasweer were obviously intended to give a religious bias to the Akhara, the first two to attract Hindu wrestlers and the third to attract Muslim wrestlers. The said deed of partition stated with regard to the $\frac{1}{8}$ th share and the said groveland that none of his seven sons would have any interest or right in them as the "one-eighth ($\frac{1}{8}$ th) share and the grove, which is a waqf property and which I, the executant, have taken for myself. I, the executant and my second wedded wife shall remain owner thereof till our lifetime." It would thus appear that even before 1830 Mani Ram had already dedicated the said groveland for the purposes of the said Akhara and that was why he referred to it as waqf property. Mani Ram managed the said groveland in the aforesaid manner using the income thereof for the said Akhara. On his death the property came under the management of his widow, the said Rahas Kaur. On May 12, 1862 Rahas Kaur made a will in which after reciting the partition deed of 1830 she stated as follows:

"He (Mani Ram) dedicated two groves — situate in Philkhana Bazar, which has Asthan of Mahadeoji and Mahabir and Akhara and tasweer of Hazrat Ali — The Akhara and Asthan — up to this day are continuing as heretofore, and Mangli Prasad, my son, is unparalleled in wrestling. In order that it may continue — I execute a will that (paper torn) shall be spent over it as mentioned in the will of my husband. The Akhara and Asthan shall continue as heretofore".

The will then provided that the management of the Akhara and the Asthan should remain with Mangli Prasad and authorised Mangli Prasad to appoint managers after him from the issues of Mani Ram and thus the management should go on from generation to generation.

4. From a deed of lease dated June 28, 1862, executed by one Mst. Teja, it

appears that the said groveland was given on lease to her at the annual rent of Rs. 23 by Mangli Prasad. The deed of lease also described the said groveland as having "Asthan of Mahadeoji and Mahabir and Akhara and tasweer of Hazrat Ali" and as having been dedicated to them.

5. In 1862, one Bansgopal filed suit No. 490 of 1862 against Mangli Prasad and others for partition and for $\frac{1}{3}$ rd share in the said groveland. Mangli Prasad filed a written statement therein explaining how the groveland was purchased by Mani Ram from out of his own funds and how he had dedicated it and referred to the said partition between Mani Ram and his sons. He also described how after Mani Ram's death in 1849, the property was administered first by Rahas Kaur and after her death under the directions of her said will by him. Mangli Prasad in this written statement denied that the plaintiff in that suit had any right or interest in the said groveland, the same having been dedicated by Mani Ram for the purposes aforesaid.

6. It appears that after Mangli Prasad's death his widow, Janki Kaur, entered into possession of the said property. From the judgment in First Appeal No. 279 of 1901 of the High Court of Allahabad dated December 23, 1903 it would appear that Janki Kaur left a will in favour of one Kishan Sarup and on the latter claiming the property Mangli Prasad's daughter, Sheodei Kaur, filed a suit for a declaration of her right of possession to the said property. That judgment has some bearing on the question as to the nature of the property in this appeal as it clearly stated that the groveland in question was an endowed property, and that therefore, Sheodei Kaur could not claim that property by inheritance, but was entitled to the possession thereof as the manager since Mangli Prasad had not appointed any one as such manager. By this judgment the High Court declared that "as regards the two grovelands and Akhara — we declare that the plaintiff is entitled to be the manager of the said property". From the description in the decree of the property declared by the High Court as the endowed property there can remain no room for doubt that the endowed property consisted of the two grovelands and the enclosure known as Baug-Akhara.

7. The property came into possession of Ishwar Narain, the son of the said

Sheodei Kaur, in 1906. In 1914 he applied to the Kanpur Municipality for permission to build a theatre in a part of the Baug-Akhara and in September 1915 he executed a mortgage to secure repayment of a loan of Rs. 6,000/- he had borrowed to complete the said theatre. Though the Akhara and the Asthan continued to be maintained by him, it appears that he treated the endowed property as belonging to him. In or about 1937 the Improvement Trust of Kanpur acquired the whole of the property which consisted of the said two grovelands, Baug-Akhara and the structures standing thereon and the property lying outside and around them. The award of the Collector dated February 19, 1937 shows that for the entire property compensation was calculated at Rs. 94,934/-. Ishwar Narain, thereafter, filed a reference under Section 18 of the Land Acquisition Act. Pending the reference, a compromise was entered into between the Improvement Trust and Ishwar Narain under which in consideration of the latter not pressing the reference the Improvement Trust agreed to sell to him the portion corresponding to the said endowed property for Rs. 25,000/-. In accordance with this compromise, the said land together with the Akhara, the Asthan, the said theatre and certain other structures were conveyed to Ishwar Narain who was paid Rs. 94,934/- less Rs. 25,000/- as compensation for the rest of the acquired property. Ishwar Narain died in 1948 having prior thereto made his will dated November 11, 1947, claiming therein that on the death of his mother, the said Sheodei Kuar, he had become the absolute owner of the said property and bequeathed the said property to Balaji and Ram Chandra, the sons of his sister, Narayani Devi, with directions to them to maintain the said Akhara and the Asthan.

8. The principal question which was agitated before the Trial Court was as to the existence of a valid trust and the nature of possession of Mani Ram during his lifetime and his successors thereafter. To the latter part of the question, the answer of the Trial Court was that possession of the property in question by Mani Ram and those who came into possession after him was that of managers or trustees. As to the first part of the question, the Trial Court held:

"The next part of the issue is about the endowment being valid It is true that Mani Ram Pande was not competent

to make a dedication in favour of Hazrat Ali but he had not done so in this case. The various documents referred above do not prove that the dedication was made in favour of Hazrat Ali or even Mahadeoji and Mahabirji. Wherever there is an allegation of the dedication it is mentioned that the Ahata in question is a dedicated property and there are "Asthana" of Mahadev Ji and tasweer of Hazrat Ali and also an Akhara. It means that the dedication was not made in favour of any juristic person such as Mahadev Ji or Mahabir Ji or even to the Akhara or Hazrat Ali. No dedication even in favour of Akhara could have been made as the Akhara was also not a juristic person. The intention of Mani Ram Pande, as appears from the partition deed, Ex. 6, was that the dedication was in favour of a trustee or manager, the objects of which was to maintain the Akhara and the worshipping of Mahabirji and Hazrat Ali by the wrestlers of the two communities, Hindus and Muslims. The main purpose of dedication was the maintenance of the Akhara which was meant for the wrestlers of both the communities." In this view the Trial Court decreed the suit and directed the appellants to hand over possession and pay Rs. 23,000/- as mesne profits in addition to Rs. 1,100/- a month as further mesne profits for the period pending the suit.

9. In appeal against the judgment and decree of the Trial Court, the High Court took the view that though there was no deed of dedication available the evidence on record was clear that Mani Ram had dedicated the said property, that he and those who succeeded him right upto Ishwar Narain held the properties as trustees or managers, that the said judgment of the High Court of Allahabad of 1903 also held that the said Sheodei Kuar was to hold the property in the capacity of a manager, and lastly, that the dedication was in favour of the two idols of Shri Mahadeoji and Mahabirji. In this connection the High Court expressed itself in the following terms:

"It may be that establishing an Akhara is not a religious or a charitable purpose. But this was not the only object of the trust now in question. There was an Asthan in addition to the Akhara. Dedication of property for the benefit of an idol is recognized in Hindu law as religious object. Mr. V. P. Misra further contended that Mani Ram was not competent to create a trust for the benefit of

Hazrat Ali. On this point, the learned Civil Judge observed that Mani Ram was not competent to make dedication in Hazrat Ali's favour. But Hazrat Ali is not the sole plaintiff in this case. Sri Mahabirji, Sri Mahadeoji and Hazrat Ali have come to Court as co-plaintiffs. If the dedication in Hazrat Ali's favour cannot be recognized, there should be no difficulty in treating the endowment as a trust for the benefit of Mahadeoji and Mahabirji. The decree passed by the Trial Court can well be treated as a decree in favour of Sri Mahadeoji and Sri Mahabirji only."

10. In disputing the correctness of the High Court's judgment and decree, Dr. Agarwala for the appellants raised the following contentions: (1) that the endowment was in respect of the grove and not the groveland, i.e., only of the income from the trees which existed during Mani Ram's lifetime; (2) that on acquisition of the entire property including the Akhara-buag by the Improvement Trust, the trust, in any event, was extinguished and the purchase by Ishwar Narain after the acquisition from the improvement Trust did not and could not revive the trust; (3) that the trust was invalid by reason of one of its objects being the image or tasweer of Hazrat Ali, and (4) that the dominant object of the trust was to establish and maintain in perpetuity the said Akhara, which object in Hindu Law is neither religious nor charitable, and therefore, the trust was not a valid trust.

11. So far as the first and the second contentions are concerned, we have no difficulty in rejecting them. The documents on record as also the evidence as to the conduct of Mani Ram and those who held the property after him clearly show that Mani Ram dedicated the groveland and not merely the trees standing thereon. The purchase of part of the said property after its acquisition was from out of the compensation received by Ishwar Narain and not out of his personal funds, so that if the trust was in law a valid one, the property purchased by him out of the trust funds would be stamped with the trust and he would in that event be holding that property as a trustee or manager and not as an owner.

12. The question, therefore, on which the result of this appeal would turn is whether the trust created by Mani Ram and which he referred to in the said deed of partition was a valid trust recognised in

Hindu law as religious and/or charitable. The principle of law applicable to trusts made by Hindus is succinctly stated by this Court in *Saraswathi Ammal v. Rajagopal Ammal*, 1954 SCR 277= (AIR 1953 SC 491). A Hindu widow there settled certain properties for the following trusts, (1) expenses in connection with the daily pooja of the samadhi where her husband's body was entombed in accordance with his last wishes and the salary of the person conducting the said pooja; (2) Gurupooja and annadhanam to be performed annually at the samadhi on the anniversary day of his death; and (3) any balance left over after meeting the above expenses to be spent for matters connected with education. The contention was that though the first object was not a religious object, the performance of Gurupooja and the feeding at the annual shraddha and the utilisation of the balance, if any, for educational purposes were the main destination of income, and therefore, the main object of the settlement and that accordingly the dedication was valid. This contention was negatived and it was held that notwithstanding that the major portion of the income may have to be spent for Gurupooja and annadhanam in connection with the annual shraddha, the dominant purpose of the dedication was the samadhi kainkarivam, i.e., the worship of and at the tomb. The validity or otherwise of the dedication, therefore, had to be determined on that footing and not as though it was dedication for the performance of the annual shraddha on a substantial scale or for annadhanam as such. It was held that it did not make any difference that the surplus was to be utilised for educational purposes. That surplus was contingent, indefinite as well as dependent on the uncontrolled discretion of the manager as to the scale on which he chose to perform the services at the samadhi. The dominant purpose of the settlement thus being the pooja of and at the samadhi, the validity of the settlement had to be decided on that footing, namely, whether such trust was recognized in Hindu Law. On that question the Court relied on a passage from *Mayne's Hindu Law*, (11th Edn.) at p. 192, which states that what are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu law and Hindu notions. The Court observed that in finding out such purposes, the insistence of English Law on the element of actual or assumed

public benefit would not be the determining factor, but the Hindu notions of what a religious or a charitable purpose is. The Court further held that to the extent that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastraic basis so far as Hindus are concerned. To the argument that new religious practices and beliefs may have since then grown up and obtained recognition, the Court answered that if they are to be accepted as being sufficient for valid perpetual dedication they should have obtained wide recognition and constituted the religious practice of a substantially large class of persons and that the heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and the needs of modern society. In the result, the Court confirmed the High Court's view that the settlement was invalid.

13. There being no deed of endowment, the intention of Mani Ram in settling the property in question has to be principally gathered from the said deed of partition and the said will of Rahas Kaur, the rest of the documents executed by Mangli Prasad and others being useful only in aid of the interpretation of that deed of partition and the said will. There can be no doubt whatsoever that Mani Ram, being an eminent wrestler and fond of that game, purchased out of his own money the said groveland for the purpose of setting up an Akhara thereon. The question then would be whether he settled that property upon trust, and if so, for what trust.

14. As already seen, Mani Ram recorded in the said partition deed the fact of his having partitioned the property into eight shares, his having given one share to each of his seven sons and having retained the eighth share for himself and his second wife and the said groveland as waqf property. The deed, however, does not set out the purpose or purposes for which the said groveland was regarded by him as waqf property. But it does show that he regarded that property as already dedicated. The purposes for which the groveland was so dedicated are to be found in the said will of Rahas Kaur, wherein she has in clear terms stated that Mani Ram had dedicated the groveland "which has Asthan of Mahadeo Ji and Mahabir Ji and

Akhara and tasweer of Hazrat Ali, that the Akhara and the Asthan were upto that date maintained and that they should continue as heretofore. The will thus provides a key to the mind of Mani Ram who, as aforesaid, had purchased the said property and set up thereon the said wrestling arena. Obviously, he was anxious that wrestlers of both Hindu and Muslim communities should take part in that Akhara. It is equally obvious that to attract wrestlers from both the communities he installed in that Akhara the tasweer of Hazrat Ali and the idols of Shri Mahadeo and Mahabir, the two patron deities of wrestling. Once these idols were put up in the Akhara, their worship had to be provided for, for, it is well known amongst Hindus that it is irreligious to let such idols remain unworshipped. It is not possible to know from the evidence as to where Hazrat Ali's tasweer was installed, but it is clear from the evidence that the idol of Mahabirji was located at the top of the archgate which led into the Akhara and the Shiva Lingam was installed over a small room built next to the gate. Clearly, the purpose of installing the two idols and the tasweer was to enable the wrestlers to pay their homage and salutations to the patron deities of the game before entering into the wrestling arena. The dominant object of the dedication was thus the Akhara and the Asthan of God Shiva and Mahabir, spoken of in the will of Rahas Kaur, was only an adjunct to the Akhara. There is evidence, no doubt, to show that pooja and shringar of the two idols were performed. But that apparently was because the idols once installed could not be left unworshipped. On these facts we are inclined to take the view that the dominant object of the dedication was the Akhara and the said idols and the tasweer were installed only to attract persons of both the communities to the Akhara and to provide for them the facility for invoking the divine benefaction before they participated in wrestling. As laid down in *Saraswathi Ammal's case*, 1954 SCR 277=(AIR 1953 SC 491), it is on this footing that the validity or otherwise of the trust has to be considered.

15. It must be made clear at very outset that although the will of Rahas Kaur provided that persons who are to manage the trust were to be in the first instance her son, Mangli Prasad, and later on those appointed by him from amongst the issues of Mani Ram, the trust was obviously not a private but a public trust in

the sense that it was for the benefit of those who are devoted to the sport of wrestling irrespective of whether they are Hindus or Muslims. But the contention was that in spite of the trust being a public trust, it was not one recognised by Hindu Law as being a religious and/or a charitable one. As stated earlier, the fact that the Akhara ground had the two idols installed in it makes no difference as the dominant object of the dedication was the Akhara and not the worship of the idols or the tasweer of Hazrat Ali.

16. A dedication of property for a religious or a charitable purpose can, according to Hindu Law, be validly made orally and no writing is necessary to create an endowment except where it is created by a will. (cf. *Dasaratharami Reddi v. D. Subba Rao*, 1957 SCR 1122 at page 1128=(AIR 1957 SC 797 at p. 800). It can be made by a gift *inter vivos* or by a bequest or by a ceremonial or relinquishment. An appropriation of property for specific religious or charitable purposes is all that is necessary for a valid dedication. As stated by the Privy Council in *Vidyavaruthi v. Balusami Ayyar*, 48 Ind App 302 at p. 311=(AIR 1922 PC 123 at p. 126) a trust in the sense in which it is understood in English law is unknown in the Hindu system. Hindu piety found expression in gifts to idols, to religious institutions and for all purposes considered meritorious in the Hindu social and religious system. Therefore, although Courts in India have for a long time adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the Statute of Elizabeth, and therefore, all purposes which according to English law are charitable will be charitable under Hindu law, the Hindu concept of charity is so comprehensive that there are other purposes in addition which are recognised as charitable purposes. Hence, what are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu law.

17. As observed by Mukherjea in *Hindu Law and Religious and Charitable Trust* (2nd Edn.), p. 11, there is no line of demarcation in the Hindu system between religion and charity. Indeed, charity is regarded as part of religion, for, gifts both for religious and charitable purposes are impelled by the desire to acquire religious merit. According to Pandit Pran-

nath Saraswati these fell under two heads, *Istha* and *Purta*. The former meant sacrifices and sacrificial gifts and the latter meant charities. Among the *Istha* acts are Vedic sacrifices, gifts to the priests at the time of such sacrifices, preservations of Vedas, religious austerity, rectitude, Vaisnavdev sacrifices and hospitality. Among the *Purta* acts are construction and maintenance of temples, tanks, wells, planting of groves, gifts of food, dharamshalas, places for drinking water, relief of the sick, and promotion of education and learning. (cf. Pandit Prannath Saraswati's *Hindu Law of Endowments*, 1897, pp. 26-27). *Istha* and *Purta* are in fact regarded as the common duties of the twice born class. (Cf. Pandit Saraswati, p. 27).

18. Though Pandit Saraswati sought to enumerate from different texts various acts which would fall under either of the two categories of *Istha* and *Purta*, no exhaustive list of charitable purposes can be possible as the expression '*Istha*' and '*Purta*' themselves are elastic and admit no rigid definition. As times advance, more and more categories of acts considered to be beneficial to the public would be recognised depending on the needs and beliefs of the time. (Cf. Mukherjea, p. 74). Neither the Statute of Elizabeth nor the Law relating to Superstitious Uses was applied at any time to India. Consequently, the English decisions based on one or the other of these statutes would not be applicable nor can they be commensurate with the conditions prevailing in India though those decisions might undoubtedly be of some guidance.

19. Is then the trust for the maintenance and up-keep of a wrestling ground a valid charitable trust? The evidence shows that Mani Ram, being personally fond of wrestling had a number of disciples and attracted several wrestlers to the Akhara. But that, according to Rahas Kaur's will, he did out of his own love for this particular sport and by spending large amounts out of his own moneys. The only thing which seems to have been done by his successors was to hold wrestling tournaments and award prizes to the successful ones out of the income of the property and to maintain the Akhara. It may be that people might have come to these tournaments and even practised wrestling but there is no evidence whatsoever that wrestling was taught or its knowledge was imparted to those wishing to know it. At best, there-

fore, it can be said that by maintaining the Akhara and holding therein the tournaments wrestling was sought to be encouraged or fostered. But there is nothing to show that the promotion of a particular game either for entertainment of the public or as encouragement to those who take part in it has ever been recognised as a charitable trust according to Hindu Law. Neither Pandit Prannath Saraswati, nor Mukherjea, nor Mayne suggests in his treatise that a dedication for the promotion of a particular game or sport is charitable trust under the Hindu law.

20. In England it is held not to be so, of course within the scope of the Statute of Elizabeth as interpreted in Commrs. for Special Purposes of the Income-tax v. Pemsel, (1891) AC 531 at p. 583. Thus, In re, Notage; Jones v. Palmer, 1895-2 Ch 649 a gift for encouraging the sport of yacht-racing was not upheld as a charitable trust, though as Lindley, L. J., remarked every healthy sport is good for the nation. In re, Hadden; Public Trustee v. More, 1932-1 Ch 133 while acknowledging the principle laid down in In re Notage, 1895-2 Ch 649 the Court held that a trust providing for recreation grounds and parks for the benefit of working classes was valid on the ground, however, that such uses were intended for the health and welfare of the working classes. So too, in In re Mariette; Mariette v. Governing Body of Aldenham School, 1915-2 Ch 284 where bequests for building squash racket courts or some similar purpose within the school premises and for a prize to the winner in the school athletics were held valid on the ground of its being essential in a school of learning that there should be organised games as part of the daily routine. It is clear from the judgment of Eve, J., that he upheld the bequest on the ground not of promoting athletic games but on the ground that the object of the charity was education in the school and that training in such games would be part of the educational activities of the school. There is, however, one decision of a marginal nature, if we may say so, namely, in Daley v. Llyods Bank Ltd., (1945) 114 LJ Ch 1 where a gift for holding an annual chess tournament limited to boys and youngmen under the age of 21 years residing in a particular locality was upheld. But that was done after a good deal of hesitation and only by basing it on the ground that training of youth in

a game of skill which also required concentration was part of their education.

21. Coming to the cases in India, the decisions in the Trustees of the Tribune Press v. Commr. of Income-tax, 66 Ind App 241 = (AIR 1939 PC 208); All India Spinners Association v. Commr. of Income-tax, ILR (1945) Bom 153=(AIR 1944 PC 88) and Cricket Association Bengal v. Commr. of Income-tax, Calcutta, AIR 1959 Cal 296 were all cases under Section 4 (3) (i) of the Income-tax Act, 1922 and therefore would have no relevance to the present case arising under the Hindu Law.

22. The decisions above referred to thus lay down a distinction between cases where the object of the dedication was the promotions of games as part of the education of those who participate in them and cases where the object was promotion of games simpliciter, the former only having been upheld on the ground that such promotion or encouragement is part of the educational training and the latter not having been upheld. In the case of Cricket Association, Bengal, AIR 1959 Cal 296 though arrangements of cricket tournaments of both domestic and foreign teams were said to promote and foster love for a healthy game, Section 4 (3) (i) was held not to be applicable.

23. On a reading of the relevant documents on record and the oral testimony led by the parties we are not in a position to agree with the High Court that the trust created by Mani Ram was a religious trust in favour of the two idols of Lord Shiva and Mahabirji. As aforesaid, our conclusion is that the dominant intention of the settlor was to set up and maintain an Akhara, the said two idols as also the tasweer of Hazrat Ali having been installed there only to attract wrestlers of the two communities. That being the position, reluctant though we are, particularly in view of the fact that the said Akhara has been maintained for nearly a century, we find it extremely difficult, in the absence of any authority, textual or by way of a precedent, to hold that the dedication in question was for either a religious or charitable purpose as recognised by Hindu Law. For the reasons aforesaid we are constrained to allow the appeal and set aside the judgment and decree passed by the High Court. In the circumstances of the case, however, we consider it just that there should be no order as to costs. Collector

will be at liberty to recover the Court-Fees payable on the plaint from the next friend of the plaintiffs.

Appeal allowed.

AIR 1970 SUPREME COURT 466
(V 57 C 102)

J. C. SHAH AND K. S. HEGDE, JJ.
Delhi Transport Undertaking, Appellant v. Zamindar Motor Transport Co. (P) and another, Respondent.

Civil Appeal No. 1324 of 1966, D/- 8-10-1969.

(A) Motor Vehicles Act (1939), Sections 48 and 57 — Scope — Application for variation of conditions of permit for including new route or area — Provisions of Section 57 (3), (4) and (5) cannot be ignored.

By Section 48 (3) (xxi) it is open to the Regional Transport Authority, after giving notice of not less than one month, (a) to vary the conditions of the permit, and (b) to attach to the permit further conditions. But an application for variation of the conditions of the permit for including a new route or routes or a new area has to be treated as an application for the grant of a new permit under Section 57 (8) of the Act and the State Transport Authority cannot ignore the provisions of Section 57 sub-sections (3), (4) and (5). (Para 11)

(B) Municipalities — Delhi Municipal Corporation Act (66 of 1957), Sections 288, 289 — Scope — Plying vehicles by Corporation over entire area of Union Territory of Delhi — Sections do not dispense with compliance with provisions of Motor Vehicles Act — (Motor Vehicles Act (1939), Section 57).

Sections 288 and 289 of the Delhi Municipal Corporation Act (66 of 1957) do not authorise the Corporation, without recourse to the Motor Vehicles Authorities, to ply its vehicles over the entire Union Territory of Delhi. Section 288 merely authorises the Corporation to take steps from time to time for providing or securing or promoting an efficient, adequate, economical and properly co-ordinated system of road transport services; it does not dispense with compliance with the provisions of the Motor Vehicles Act, 1939. Section 289 merely confers upon the Corporation power to acquire services

operated by others. But in exercising that power, the provisions of the Motor Vehicles Act, insofar as the exercise of the power is required to be made in consonance with the provisions of the Act, is not dispensed with.

(Para 12)

The following Judgment of the Court was delivered by

SHAH, J.: The Delhi Municipal Corporation took over the organisation of the Delhi Transport Authority established under Section 3 of the Delhi Transport Authority Act 13 of 1950, and administered it in the name of Delhi Transport Undertaking—hereinafter called D. T. U. Even though the jurisdiction of the Delhi Municipal Corporation extends only to the municipal area, by Section 288 of Act 66 of 1957 it is authorised to set up transport services for passengers and goods in the entire Union Territory of Delhi and even outside by virtue of Sections 288 and 292 of the Act.

2. The respondent Company held in 1960 permits on three routes— (1) Delhi-Bawana-Narela, (2) Delhi-Bawana-Auchandi and (3) Delhi-Bawana-Kharkhoda. Since May 9, 1956, the Delhi Transport Authority and its successor D. T. U. were holding stage carriage permits valid for certain areas but not including the routes on which the respondent Company held permits to ply its stage carriages. On October 19, 1959 the D. T. U. addressed a letter to the Secretary State Transport Authority, Delhi, stating that it considered "it necessary to approach x x with the request to place the matter before State Transport Authority x x to validate" its road permits to cover the entire Union Territory of Delhi. The State Transport Authority treated this letter as an application for validation of the existing permits so as to cover the entire area of the Union Territory of Delhi. After considering the objections filed by existing operators on the routes outside the Municipal Corporation area, the State Transport Authority passed the following order on February 10, 1960:

"The representatives of the D. T. U. point out that under the Municipal Act they were required to provide efficient and adequate services in the entire territory of Delhi and therefore the area of their permits should be altered accordingly. The authority considered the request of the D. T. U. reasonable. It was decided to alter the permits and make them valid for entire territory of Delhi

but they should be informed that they should not operate new services parallel to the existing services of the private operators without the approval of the State Transport Authority”.

3-4. On June 17, 1961 the D. T. U. issued a circular that it was decided to operate its services on Delhi Bawana route with effect from June 19, 1961, and informed the State Transport Authority of its intention to do so. The respondent Company lodged a protest with the State Transport Authority and asked the Authority to order that the running of the proposed service be stopped, and in the meantime the procedure under the Motor Vehicles Act be complied with, and an opportunity for making representations against the proposals of the D. T. U. be afforded. On June 20, 1961 the State Transport Authority gave notice to the respondent Company that the application made by the D. T. U. for operating services between Delhi-Bawana will be considered by the State Transport Authority in its meeting to be held on June 21, 1961 at 11 a. m. On June 21, 1961 the respondent Company wrote a letter to the Secretary, State Transport Authority intimating that it was not aware of the contents of the application of the D. T. U., that the application had not been published and objections and representations had not been invited, that the “notice of hearing was very short” and that proper opportunity for filing objections should be given after due publication of the application of the D. T. U. On June 21, 1961, the State Transport Authority resolved that:

“The Delhi Transport Undertaking already held permits for Delhi territory and they can ply on any route in the territory under these permits. No fresh permits are necessary. In the meeting held on 10-5-61, the State Transport Authority, while reviewing the requirements of services on various routes, decided that the Delhi Transport Undertaking should be asked to provide service on Delhi-Bawana-Narela route and if they are unable to do so, additional permits may be issued. Since the Delhi Transport Undertaking have started plying 2 buses x x x in public interest, the operation of such service was approved but there should be no overlapping of the timings of the services.”

5. On June 27, 1961, the respondent Company moved a petition in the High Court of Punjab at Delhi for a writ of

prohibition restraining the D. T. U. from plying stage carriages on the three routes in respect of which the respondent Company was holding permits. This petition was dismissed by Pandit, J. holding that the conditions mentioned in the resolution dated February 10, 1960 that the D. T. U. would operate new services parallel to the existing services of the private operators after getting the approval of the State Transport Authority was merely in the nature of an administrative instruction and that the letter dated October 19, 1959 was validly treated as a formal application for grant of a new permit under Section 57 (8) of the Motor Vehicles Act, 1939. In appeal under the Letters Patent the judgment of Pandit, J., was reversed. The High Court held that the D. T. U. had applied to vary the conditions of its permit, by the inclusion of a new route or routes or a new area within the meaning of Section 57 (8) of the Act, and by the resolution dated February 10, 1960, the D. T. U. was not entitled to operate new services without the approval of the State Transport Authority; that such approval could be given after following the procedure prescribed by Sec. 57, sub-sections (3), (4) and (5) and not otherwise; that there was not even substantial compliance with the provisions of Section 46 of the Motor Vehicles Act and Rule 47 of the Delhi Motor Vehicles Rules; and that in dispensing with the requirements of Section 57 the State Transport Authority acted illegally. With special leave, the D. T. U. has appealed to this Court.

6. By Section 45 of the Motor Vehicles Act 1939, every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. By Section 46 an application for a permit in respect of a service of stage carriage or to use a particular motor vehicle as a stage carriage shall, as far as may be, contain the particulars set out in Clauses (a) to (f). Section 47 provides that the Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard to the matters specified in Clauses (a) to (f) of sub-section (1) and shall take into consideration any representation made by persons providing passenger transport facilities along or near the proposed route or area. Sub-section (1) of Section 48 provides that subject to the provisions of

Section 47, a Regional Transport Authority may, on an application made to it under Section 46, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit. By sub-section (2) it is provided that every stage carriage permit shall be expressed to be valid only for a specified route or routes or for a specified area. By sub-section (3) it is provided that the Regional Transport Authority may grant a permit for a stage carriage of a specified description or for one or more particular stage carriages and may, subject to any rules that may be made under the Act, attach to the permit any one or more of the conditions Nos. (i) to (xxiii) set out in that sub-section, and by condition (xxi) the Regional Transport Authority may, after giving notice of not less than one month—(a) vary the conditions of the permit; and (b) attach to the permit further conditions. Sub-sections (2) and (3) of Section 57 provide:

“(2) an application for a stage carriage permit x x x shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates.

(3) On receipt of an application for a stage carriage permit x x x the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which the application and any representations received will be considered.

Provided x x x x x
Under sub-section (4) representations made in writing in connection with an application for grant of a permit, before the appointed date, and a copy whereof is furnished to the applicant, only may be considered. By sub-section (5) the representations made under sub-section (3) must be disposed of at a public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative. Sub-section (8) provides:

“An application to vary the conditions of any permit, other than a temporary

permit, by the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of services above the specified maximum, x x x shall be treated as an application for the grant of a new permit.

Provided x x x x x x x x”

7. Rule 47 of the Delhi Motor Vehicles Rules provides that every application for a permit in respect of a transport vehicle shall be in one of the prescribed forms.

8. The proceedings taken by the State Transport Authority in making the decisions dated February 10, 1960, and June 21, 1961 were informal and also irregular. On October 19, 1959 the D. T. U. requested the Secretary, State Transport Authority, asking it to validate road permits held by the D. T. U. to cover the entire area of the Union Territory of Delhi. Such a request may be made only by an application in the prescribed form. After hearing objections thereto to the State Transport Authority by order dated February 10, 1960, validated the permits for the entire Union Territory of Delhi with a condition that the D. T. U. shall not operate new services parallel to the existing services of private operators without the approval of the State Transport Authority. Against this resolution no appeal was preferred by the respondents. By the resolution the permits were extended to make them valid for the entire territory of Delhi but subject to the condition that the D. T. U. was not to operate new services parallel to the existing services of the private operators. If thereafter it was intended to remove the condition, the prescribed procedure under Section 57 sub-secs. (3), (4) and (5) had to be followed, for, an application to vary the conditions of any permit, by the inclusion of a new route or routes or a new area, is by sub-section (8) required to be treated as an application for the grant of a new permit.

9. By the order dated February 10, 1960 the permits were extended throughout the Union Territory of Delhi, but the D. T. U. still required the permission of the State Transport Authority to ply its stage carriages on routes covered by the permits granted to the respondent Company. Before granting that permission it was necessary to publish the application and to invite and consider objections thereto. The D. T. U. did not even ask for permission of the State Transport

Authority but merely intimated by letter dated June 17, 1967 that it will start service on the Delhi-Bawana route from June 19, 1961. After the D. T. U. started plying its stage carriages, the State Transport Authority gave intimation to the respondent Company and others that the application of the D. T. U. will be considered in its meeting to be held on June 21, 1961. And disregarding the protests raised by the respondent Company and others the State Transport Authority on June 21, 1961 ordered that the D. T. U. should be asked to provide service on Delhi-Bawana-Narela route, and if it was unable to do so, additional permits may be issued. There was no application for grant of permit for plying stage carriages under Section 57; there was no publication of a request by the D. T. U.; representations or objections were not invited; and no opportunity of a hearing to the objectors in the manner contemplated by the Act was given. The proceedings of the State Transport Authority were wholly irregular.

10. Mr. Daphtary appearing on behalf of the D. T. U. contended that the order dated February 10, 1960 which was made after hearing the objections of the respondent Company became final, and since no appeal was preferred, the D. T. U. was competent to extend its services with the approval of the State Transport Authority over the entire Union Territory of Delhi. The order dated June 21, 1961, merely extended the permits to cover the Union Territory of Delhi; it did not authorise the plying of stage carriages on routes already served by private operators. The existing operators were entitled to be heard when the condition in the permits of the D. T. U. was removed.

11. By Section 48 (3) (xxi) it is open to the Regional Transport Authority, after giving notice of not less than one month, (a) to vary the conditions of the permit, and (b) to attach to the permit further conditions. But an application was made by the D. T. U. for variation of the conditions of the permit including a new route or routes or a new area had to be treated as an application for the grant of a new permit under Section 57 (8) of the Act and the State Transport Authority could not ignore the provisions of Section 57 sub-sections (3), (4) and (5).

12. Sections 288 and 289 of the Delhi Municipal Corporation Act 66 of 1957 on which reliance was placed by Mr. Daphtary do not authorise the Corpora-

tion, without recourse to the Motor Vehicles Authorities, to ply its vehicles over the entire Union Territory of Delhi. Section 288 merely authorises the Corporation to take steps from time to time for providing or securing or promoting an efficient, adequate, economical and properly co-ordinated system of road transport services: it does not dispense with compliance with the provisions of the Motor Vehicles Act, 1939. Section 289 enables the Delhi Transport Committee to take steps, amongst others to acquire in accordance with schemes prepared under the Act either compulsorily in accordance with such procedure as may be prescribed by bye-laws or by agreement, the whole or any part of any transport service operated by any other person to the extent to which the activities thereof consist of the operation of road transport services or ancillary services in the Union territory of Delhi or in any extended area, and to do all other things to facilitate the proper carrying on of the business of the Undertaking. But Section 289 merely confers upon the Corporation power to acquire services operated by others. But in exercising that power, the provisions of the Motor Vehicles Act, insofar as the exercise of the power is required to be made in consonance with the provisions of the Act, are not dispensed with.

13. The D. T. U. was conscious of these requirements of the Motor Vehicles Act and had moved by an informal letter the State Transport Authority on October 19, 1959 for extension of its permits. But thereafter even without obtaining the concurrence of the State Transport Authority or its approval proceeded to start the services on the overlapping routes as from June 19, 1961.

14. In our judgment, the order passed by the State Transport Authority dated June 21, 1961 was without jurisdiction and must be set aside. We confirm the order passed by the High Court and dismiss this appeal.

15. The respondent Company sought to defend the appeal by filing an appearance at a very late stage. The Company has not even filed a statement of case. In the circumstances we direct that there will be no order as to costs in this appeal.

Appeal dismissed.

AIR 1970 SUPREME COURT 470
(V 57 C 103)

M. HIDAYATULLAH, C. J., S. M. SIKRI, G. K. MITTER, A. N. RAY AND P. JAGANMOHAN REDDY, JJ.

Rabindra Nath Bose and others, Petitioners v. Union of India and others, Respondents.

Writ Petn. No. 146 of 1967, D/- 9-10-1969.

(A) Constitution of India, Articles 13, 14 and 16 — Article 13 has no retrospective operation — Appointments to posts of Income Tax Officers Class I Grade II and preparation of Seniority Lists of such officers under Seniority Rules of 1949 and 1950 — Question as to violation of Articles 14 and 16.

It is settled that Article 13 of the Constitution has no retrospective effect and therefore, any action taken before the commencement of the Constitution in pursuance of the provisions of any law which was a valid law at the time when such action was taken cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution. AIR 1957 SC 397, Rel. on; AIR 1955 SC 624, Dist. (Para 26)

Held that the petitioners the confirmed Assistant Commissioners of Income-tax, could not, therefore, complain of the breach of Articles 14 and 16 in respect of these acts: (1) appointment of respondents to the posts of Income-tax Officers Class I Grade II Service (2) Seniority List of those Officers as existing on 1-1-1950 and (3) the Seniority Rules of 1949 and 1950 insofar as they had effect upto January 26, 1950. (Para 32)

The fact that the seniority list of the Officers was finally settled after the Constitution came into force, would not enable the petitioners to appeal to Articles 14 and 16; the rules applicable for preparing the seniority List being the Seniority Rules of 1949 and 1950. (Para 32)

(B) Constitution of India, Articles 32, 14, 16 — Inordinate delay — Seniority List of Income Tax Officers Class I Grade II — Changes effected in, on 1-8-1953 as a result of change in 1952 Seniority Rules — Petition filed after fifteen years attacking changes as violative of Arts. 14 and 16 held not maintainable.

LM/LM/F175/69/CWM/D

No relief can be given to petitioners who, without any reasonable explanation, approach Supreme Court under Art. 32 of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been the intention that Supreme Court would go into stale demands after a lapse of years. Though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution makers that Supreme Court should discard all principles and grant relief in petitions filed after inordinate delay. (1969) 1 SCC 110 and AIR 1955 SC 3, Rel. on.

(Para 34)

Where the changes were made in the Seniority List of Income-tax Officers Class I Grade II as a result of change in the 1952 Seniority Rules and the petition attacking the changes was filed fifteen years after the 1952 Rules were promulgated and effect given to them in the seniority list prepared on 1-8-1953, it will be unjust to deprive the officers of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. (Para 35)

The fact that in respect of those matters representations were being received by the Government all the time was not sufficient to explain the delay. There is a limit to the time which can be considered reasonable for making representations. If the Government has turned down one representation, the making of another representation on similar lines will not explain the delay. (Para 36)

Cases Referred: Chronological Paras
(1969) (1969) 1 SCC 110, Trilokchand and Motichand v. M. B. Munshi

33, 34

(1967) AIR 1967 SC 1427 (V 54) =
1967-2 SCR 703, S. G. Jaisinghani
v. Union of India

1, 6, 12,
15, 35, 36

(1965) AIR 1965 SC 502 (V 52) =
1964-8 SCR 252, Sri Jagadguru
Kari Basava Rajendraswami of
Govimutt v. Commr. of Hindu
Religious and Charitable Endow-
ments Hyderabad

29

(1961) AIR 1961 SC 1684 (V 48) =
1962-2 SCR 292, Guru Datta
Sharma v. State of Bihar

30, 31

- (1957) AIR 1957 SC 397 (V 44) =
1957 SCR 233, Pannalal Binjraj
v. Union of India 26
- (1955) AIR 1955 SC 3 (V 42) =
1955 SCR 769, Laxmanappa Hanu-
mantappa Jamkhandi v. Union of
India 83
- (1955) AIR 1955 SC 624 (V 42),
Shanti Swarup v. Union of
India 27, 30, 31
- (1951) AIR 1951 SC 97 (V 38) =
1951 SCR 127, Ramjilal v. I.-T.
Officer, Mohindergarh 83
- (1951) AIR 1951 SC 128 (V 38) =
1951 SCR 228, Keshva Madhava
Menon v. State of Bombay 26

The following Judgment of the Court was delivered by

SIKRI, J.: 16 Officers of the Income-tax Department have filed this petition under Article 32 of the Constitution praying for various reliefs on the ground that their rights under Articles 14 and 16 have been infringed. They are all confirmed Assistant Commissioners of Income-tax and respondents 6 to 39 are also confirmed Assistant Commissioners of Income-tax. Respondents 1 to 5 are the Union of India, Secretary, Ministry of Finance, Central Board of Direct Taxes, Secretary, Ministry of Home Affairs, and the Union Public Service Commission. The practical object of the petition is to gain some seniority so that they can be promoted as Commissioners of Income-tax earlier than the respondents 6-39. The petitioners were all confirmed as Assistant Commissioners in 1959. Apart from respondents 28, 29 and 30, all other respondents were confirmed in earlier years. In brief, the case of the petitioners is this: The Government in breach of the rules governing the service of Income-tax Officers Class I, Grade II, appointed respondents 6 to 39. Their initial appointments were irregular and illegal being outside the quota prescribed by Government for regulating recruitment to the service. Not only were they thus illegally absorbed into service but were also given preferential treatment in the matter of seniority in Class I Grade II itself and for further promotion to higher grades by framing rules which were discriminatory and which made hostile discrimination against Class I direct recruits like the petitioners. It is urged before us that their case is covered by the principle laid down by this Court in the case of *S. G. Jaisinghani v. Union of India*, 1967-2 SCR 703 =

(AIR 1967 SC 1427). These contentions are controverted by the respondents. The learned Attorney General further contends that (1) all acts which have been challenged in this petition happened before the advent of the Constitution and cannot be challenged under Articles 14 and 16 of the Constitution; (2) the petition merits dismissal on the ground that there has been gross delay in bringing the petition; and (3) the relief which has now been claimed would be against the decision in *Jaisinghani's case*, 1967-2 SCR 703 = (AIR 1967 SC 1427) (Supra).

2. In order to appreciate the above contentions and the other points raised before us, it is necessary to set out the relevant facts chronologically.

3. Before September 29, 1944, when the re-organisation scheme was launched, the conditions of service and pay-scales of Income-tax Officers were different and the method of recruitment was also different in different Provinces. By letter dated 23-3-43, it was decided that pending the constitution of Class I and Class II Service of Income-tax Officers, the latter of which will include also officers hitherto called Assistant Income-tax Officers, the existing grade of Assistant Income-tax Officers should be designated as Income-tax Officers, Grade II. There was disparity not only in pay but also in prospects and conditions of service. The Government therefore felt it necessary to re-organise the entire service and to create a Central Service and uniform pay-scales for different constituent grades. The main idea was to create Class I cadre Officers Service and to make selection to it from the existing Class II officers. This re-organisation scheme was formulated in a letter dated 29-9-44 from the Government of India, addressed to all Commissioners of Income-tax. The Central Service Class I was to consist of Commissioners of Income-tax—(No. of posts 8— 7 permanent and 1 temporary). Assistant Commissioners of Income-tax—(No. of posts 378— 360 permanent and 18 temporary).

Income-tax Officers Grade I:

(No. of posts 151— 125 permanent and 26 temporary).

Income-tax Officers Grade II:

(No. of posts 183— 125 permanent and 63 temporary).

Class II was to consist of Income-tax Officers Grade III: (No. of posts 83— 9 permanent and 74 temporary).

4. Regarding Income-tax Officers Grade I (Class I Service) it was stated that these officers will be appointed by selection from Grade II which will come into being under the new scheme and till the re-organisation is complete from the existing Grade I of Income-tax Officers in Class II Service,

xx xxx xxx xx
xx xxx xxx xx
Regarding Income-tax Officers Grade II (Class I Service) — it was provided that—

2 (d) "Recruitment to Grade II will be made partly by promotion and partly by direct recruitment. 80 per cent of the vacancies arising in this Grade will be filled by direct recruitment via the Indian Audit and Accounts and Allied Services Examination. The remaining 20 per cent of vacancies will be filled by promotion on the basis of selection from Grade III (Class II Service) provided that suitable men upto the number required are available for appointment. Any surplus vacancies which cannot be filled by promotion for want of suitable candidates will be added to the quota of vacancies to be filled by direct recruitment via the Indian Audit and Accounts etc. Services Examination.

All direct appointment via the Indian Audit and Accounts and Allied Service Examination to Grade II will, during the period of the war, be subject to such general orders as have already been or may hereafter be issued by the Government of India with a view to safeguarding the interest of 'war service' candidates."

5. It is necessary also to set out Para 8 of the letter which is headed— 'General'—

"The new classification (insofar as it relates to Income-tax Officers, Grades I and II) indicated in paragraph I above will apply to officers who are recruited under the new scheme including those who are selected from the existing Grade I Income-tax Officers, Class II Service. The present Grade I income-tax Officers in Class II Service, who are not thus selected, and the officers who will be appointed to this grade before the introduction of the new scheme, will remain in Class II service. This service of Income-tax Officers will be ultimately abolished as soon as these officers leave their posts either by substantive promotion to Class I Service or by retirement or through other causes and the Class II

Service will essentially consist only of Income-tax Officers, Grade III."

6. We may at this stage consider the question mooted at the Bar whether recruitment to the Service under the scheme was to be confined only to direct recruitment through the Examination and promotion from Grade I Class II service. As we read this scheme, it is quite clear that the intention was not to confine recruitment to the Service through these sources because from Para 3 'General', which we have reproduced above, it is quite evident that selections were to be made also from the existing Grade I Income-tax Officers Class II Service. This method of recruitment did not come within Para 2 (d) of the Scheme set out above as it was neither direct recruitment through combined competitive examination nor promotion from Class II Grade III Service. Therefore, the statement in the counter-affidavit of Mr. M. G. Thomas Ministry of Finance, "Recruitment to Grade II of Class I was to be made partly by direct recruitment (through the combined Competitive Examination as also selection from existing Grade I of Class II Service) and partly by promotion on the basis of selection from Class II (Grade III) Service", is quite correct. It is further stated that, 80 per cent of the vacancies were to be filled by direct recruitment and the remaining 20 per cent were to be filled by promotion by selection from Class II (Grade III) Service." .. It appears that selection from the existing Grade I of Class II Service was treated as a form of direct recruitment within the quota of 80 per cent mentioned above. This constitution of the New Service was by an executive order and there were no statutory rules governing the Service at this stage. On 29-9-1944 the Government wrote to the Federal Public Service Commission to approve of 100 officers considered suitable for selection to the new Class I Service of Income-tax Officers (Grade I). The Government also requested the Commission to recruit for the Class I, Grade II Income-tax Service 10 Officers on the result of the competitive examination that will be held in October 1944. Considering that there were 183 posts, permanent and temporary to be filled in by Income-tax officers Grade II, the number was insignificant. The idea seems to have been to take the officers from existing Grade I of Class II as far as possible as they had experience and the direct recruits would

not be able to cope with the work for some years to come. On 26-5-1945, the Government framed rules for recruitment to the Income-tax Officers (Class I, Grade II) Service. These were conceded to be statutory rules in Jaisinghani's case, 1967-2 SCR 703 = (AIR 1967 SC 1427) (Supra). In the opening paragraph, it was stated that these rules were liable to alteration from year to year. Rules 3 and 4 read as follows:—

3. The services shall be recruited by the following methods:—

(i) By competitive examination held in India in accordance with Part II of these Rules.

(ii) By promotion on the basis of selection from Grade III (Class II Service) in accordance with Part III of these Rules.

4. Subject to the provision of Rule 3, Government shall determine the methods or methods to be employed for the purpose of filling any particular vacancies, or such vacancies as may require to be filled during any particular period, and the number of candidates to be recruited by each method.

It is clear that this Service had already been constituted by an Order. It is remarkable that Rule 3 did not mention the third method of recruitment which was being followed at that time and which it was intended to follow for some time. It seems to us that the intention was that these rules would come into effect fully only when the Service had been completely re-organized, because otherwise we are unable to understand why the third method of recruitment which was being followed, was not mentioned. It may be that at that time sufficient number of men qualified under the other two categories were not available. The Government probably interpreted Rule 4 to mean that the recruitment by the methods mentioned in Rule 3 was not exclusive, and under Rule 4 the Government could decide whether particular vacancies could also be filled by selection from the existing Class II grade I service officers. That this was the understanding both of the Government and the Federal Public Service Commission, seems to be quite clear from the correspondence which has been brought to our notice.

7. On 8th November 1945, the Government wrote to the Federal Public Service Commission that— "In a like manner, it is proposed to continue promotions to the grade II of Class I also for the next two or three years from amongst those

who were in service in the pre-existing Class II, Grade I, on the date of re-organisation even outside the 20 per cent limit fixed for such promotion in the orders regarding re-organisation. The Government feel that this will not interfere with direct recruitment via the examination. It is presumed that the Commission will not have any objection to the proposals in the immediately two preceding paragraphs."

This letter clearly shows that the Government was recruiting officers to grade II of class I from the pre-existing class II grade I, and they meant to continue this for the next two or three years. The Federal Public Service Commission replied on 23-5-46 as follows:—

"With reference to paragraphs 8 and 9 of your letter dated the 8th November, 1945, I am to say that the Commission will have no objection if during the next two or three years the names of a few more officers are put forward for consideration for promotion to grades I and II in Class I where special circumstances seem to justify such a course. They suggest, however, that this should be exceptional"

8. We may mention here that respondents 31 to 39 were appointed as I. T. Os Class I, grade II in 1945, respondents 11 and 25 in 1946, but the original date of appointment of respondent No. 25 is 1-6-47. All the petitioners were either appointed I. T. Os. Class I Grade II in 1946 or 1947. Respondents 6 to 10, 26, 27 and 28 were appointed in 1947.

9. On 3-1-47 the Government forwarded to the Secretary Federal Public Service Commission the names of officers then considered suitable for appointment to Class I, grades I and II. It was further stated that there were a large number of temporary posts in each grade and it may not be fair to limit promotions to the available permanent posts only as that might result in a large number of temporary men who may be eligible for higher scales of pay being kept down.

10. In Feb. 1949, in discussing the draft scheme for regulating the seniority of Income-tax officers, Class I, on an all-India basis, the Government explained that "there are still 51 old Class II, Grade I officers, who have not yet been selected to Class I, as almost all of them have been found unfit at three successive selections. As technically they still continue to hold Class I posts and block promotions of other deserving officers, it is pro-

posed to make a final selection from them and revert those who are not considered fit for retention in Class I to Class II, grade III posts. These persons would be considered later for promotion to Class I posts along with others against the 20% vacancies reserved for departmental candidates." Thus, it appears that it was in 1949 that it was decided that final selections were to be made from the remaining Class II grade I officers by interviewing them to find their fitness for Class I Service.

11. Although the appointments, according to the petitioners, were irregular, they do not challenge the validity of the appointments but what they do challenge is the recognition of the date of appointments for the purpose of seniority. In other words, they say that we may treat an officer having been appointed as Class I, grade II, validly but for the purpose of seniority his appointment should be post-dated to a date when he would have been appointed had the 'quota rule' mentioned in Para 2 (d) of the Scheme dated 29-9-44, been fully implemented.

12. We may at this stage deal with this particular question. It seems to us that apart from the above limited concession, we cannot at this time declare that the appointments were invalid in any respect. Assuming that these appointments were made contrary to statutory Rules, the petitioners are incompetent to challenge the validity of these appointments for various reasons. Firstly these appointments were pre-Constitution appointments and they cannot be challenged in a petition under Article 32 of the Constitution. Secondly, there has been inordinate delay. A suit to challenge the validity of the appointments would be hopelessly time-barred, and the respondents have acquired various rights since their appointments. Thirdly, in Jaisinghani's case, 1967-2 SCR 703 = (AIR 1967 SC 1427) (Supra), this Court said that the order in that case "... will not affect such Class II officers who have been appointed permanently as Assistant Commissioners of Income Tax." We will presently give our reasons in detail for coming to this conclusion. To resume the narrative, the petitioners completed their probationary periods on different dates in 1949 and were confirmed as I. T. Os Class I, Grade II in 1949 and 1950, except petitioner No. 9 Shri D. N. Pande, who was confirmed on 22-12-51. Most of the respondents had already been con-

firmed on various dates in 1946, 1947 and 1948.

13. On 29-4-49 a meeting of the Departmental Promotion Committee took place and the Committee agreed that promotions to Income Tax Officers Class I Service, of officers recruited in 1944 on the results of the I. A. and A. S. and Allied Services examination held in 1943, and on other bases, should be given effect to from the 1st August 1948. This decision affected respondents Nos. 12 to 24, 29 and 30. On 14-6-49 representations were made by direct recruits including petitioners Nos. 5, 6, 8, 10 and 12 and respondent No. 28 (Sheriff who is a petitioner in W. P. No. 242/67 under Article 32), regarding proposed Seniority Rules.

14. On 9-9-1949 Seniority Rules were framed and a seniority list of Class I, Grade II, Income-tax Officers, as on the 1st January 1950, was drawn up and circulated by a letter dated 24-1-50. It appears that the seniority rules of 1949 had in the meantime been revised and a copy thereof was enclosed with the above mentioned letter dated 24-1-1950. It was stated in this letter that Government was prepared to consider any representation that they may have to make in regard to the accuracy of the data contained therein, upto the 28th February 1950, but no representation against the principles for the determination of seniority will be entertained.

15. On 18-10-51, the Government decided on the recommendations of the U. P. S. C. and in modification of para 2 (d) of the Finance Department (Central Revenues) letter dated 29-9-44, that, for a period of five years in the first instance, 66.2/3% of the vacancies in Class I, Grade II, will be filled by direct recruitment via Combined Competitive Examination and the remaining 33.1/3% by promotion on the basis of selection from Grade III (Class II service). This order was held to be statutory by this Court in Jaisinghani's case, 1967-2 SCR 703 = (AIR 1967 SC 1427).

16. On 1-1-52 all the petitioners were promoted as I. T. Os., Class I, Grade I, and confirmed also as such on the same date. In February 1952, a committee met for four days to consider the Rules governing the seniority of Income-tax Officers, Class I, Grade II and representations received against the draft seniority list. They made alterations in the

Seniority rules and in one of these meetings, it was decided:

"As regards the representations made by some of this batch of direct recruits regarding the date of approval by the Union Public Service Commission of the 1948 batch of promotees, the position is that four of them (S. Nos. 67 to 70) were actually promoted on the recommendations of the Departmental Promotion Committee held on 21-7-48. Fifteen others (S. Nos. 72 to 86) were promoted on the recommendations of the Departmental Promotion Committee held on 29-4-1949, but the records show that the meeting was originally convened for 6-9-48 and the agenda etc. had been circulated in advance of this date. The meeting had, however, to be postponed several times due to the personal inconvenience of the Members of the U. P. S. C. and of the Central Board of Revenue. In these special circumstances, it was considered that the proper thing would be to treat the recommendations of this Departmental Promotion Committee as if it had actually been held in September 1948. The result is that both batches of promotees of 1948 will remain senior to the direct recruits from the 1945 Examination who joined in 1946."

17. In the Serial Nos. 72-86 mentioned above, exist the names of the present respondents 12-24 and respondents 29 and 30. It is contended before us that this decision was arbitrary and not warranted by any rules or principles. It is further contended that the decision was made in 1952 and therefore it is liable to be challenged in a petition under Article 32 of the Constitution.

18. On the material on record it is not possible to say that this decision was actually taken in 1952 and not on 29-4-49 or thereabout when the Departmental Promotion Committee met and the list was prepared on 24th January 1950. The fact is that the seniority of the respondents (Srl. Nos. 72 to 86) seems to have been fixed on the basis that the Departmental Promotion Committee meeting took place on 6-9-1948.

19. We may here reproduce the relevant Seniority rules made in 1949, 1950 and 1952:—

Rules regulating Seniority of Class I, Grade II, Income Tax Officers.

Rule 1 (f), 1 (i) and 1 (ii) remain the same in the three years and read thus:—

1 (f): The seniority of direct recruits recruited on the results of the examinations

held by the F. P. S. C. in 1944, and subsequent years shall be reckoned as follows:—

(i) Direct recruits of an earlier examination shall rank above those recruited from a subsequent examination.

(ii) The Direct recruits of any one examination shall rank inter se in accordance with the ranks obtained by them at that examination.

20. There was a change in Rule (iii), and the three different versions are reproduced below:—

As on 9-9-1949:

(iii) The promotees who have been certified by the Commission in any calendar year shall be senior to all direct recruits who complete their probation during that year or after and are confirmed with effect from a date in that year or after.

As on 24-1-1950:

(iii) The promotees who have been certified by the Commission in any calendar year shall be senior to all direct recruits who complete their probation during that year or after and are confirmed with effect from a date in that year or after.

Provided that a person initially recruited as Class II Income-tax Officer, but subsequently appointed to Class I on the results of a competitive examination conducted by the Federal Public Service Commission shall, if he has passed the departmental examination held before his appointment to Class I Service, be deemed to be a promotee for the purpose of seniority.

As on 5-9-1952.

(iii) officers promoted in accordance with the recommendation of the Departmental Promotion Committee before the next meeting of the Departmental Promotion Committee shall be senior to all direct recruits appointed on the results of the examinations held by the Union Public Service Commission during the Calendar year in which the Departmental Promotion Committee met and the three previous years.

.....

21. On 1-8-53, a revised seniority list was issued. In the meantime, the I. R. S. Association objected to the weightage principle and suggested changes in it and also desired a revision of the seniority list to correct the disadvantage due to excess promotions.

22. Various representations were made by individual direct recruits as well as the Indian Revenue Service (Income Tax)

Association. The case of the Government is that these representations were not acceptable because in fact there were no excess promotions during the period 1945-50.

23. In 1955 and 1956, the petitioners were promoted as Assistant Commissioners on different dates. Representations continued to be made in 1954, 1955, 1956, 1958, 1959. Not only were the representations made but an interview with the Finance Minister also took place in 1960. In spite of the Government rejecting the representations, fresh representations continued to be made.

24. On 25-4-62 Jaisinghani filed a Writ Petition in the High Court and the High Court delivered its judgment on 11-3-64. Against this decision Jaisinghani filed an appeal to this Court. A writ petition was filed by Joshi in the Supreme Court and this Court delivered its judgment in Jaisinghani's Appeal and Joshi's Writ Petition on 22-2-67, and the present Writ Petition was filed in July 1967.

25. It seems to us that there is force in the preliminary points raised by the Attorney General, and it is not necessary to decide the various points raised by the petitioners. It is settled law that the Constitution has no retrospective operation.

26. In Pannalal Binraj v. Union of India, 1957 SCR 233 at p. 236 = (AIR 1957 SC 397 at p. 412), Bhagwati, J. speaking for the Court says:

"It is settled that Article 13 of the Constitution has no retrospective effect and if, therefore, any action was taken before the commencement of the Constitution in pursuance of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution. See Keshvan Madhava Menon v. State of Bombay, (AIR 1951 SC 128)."

27. The decision of this Court in Shanti Sarup v. Union of India, AIR 1955 SC 624 is distinguishable. In that case the facts were that the Government of U. P. passed an order purporting to be u/s. 3 (f), U. P. Industrial Disputes Act, 1947, by which they appointed one of the partners of the firm as 'authorised controller' of the undertaking. In 1952 the

Union of India passed an order purporting to be made under Section 3 (4), of Essential Supplies (Temporary Powers) Act, 1946, by which the Central Government appointed the same person, as an authorised controller under the provisions of that section and directed him to run the said undertaking to the exclusion of all the other partners. The petitioner before the court under Article 32 contended that both the orders were illegal and conflicted with the fundamental rights of the petitioner under Art. 13 (1) of the Constitution. The Attorney General appearing for the Central Government conceded before the Court that the impugned orders did not come within the purview of and were not warranted by the provisions of the Acts, under which they purported to have been passed. The only point he took was that the petitioner could not come before the court under Article 32 of the Constitution inasmuch as there was no fundamental right in existence when the first order of the U. P. Government was passed in July 1949 and no fresh act of dispossession had taken place since the Constitution came into force. This Court repelled the contention observing that in the first place, the order against which this petition was primarily directed was the order of the Central Government passed in October 1952 and whether or not the earlier order of the U. P. Government was formally withdrawn, it was this later order upon which the respondent 3 based his right to retain possession of the properties. The order of the Central Government must, therefore, be deemed to have deprived the petitioner of his property within the meaning of Article 31 of the Constitution as construed by this Court. It was further observed:

"But even assuming that the deprivation took place earlier and at a time when the Constitution had not come into force, the order effecting the deprivation which continued from day to day must be held to have come into conflict with the fundamental rights of the petitioner as soon as the Constitution came into force and became void on and from that date under Article 13 (1) of the Constitution."

It is this passage which is strongly relied on by the learned Counsel for the petitioners.

28. In our view this passage has no application to the facts of this case. In a number of subsequent decisions of this

Court the passage has been held to be applicable only to the facts in that case.

29. In *Sri Jaga-guru Kari Basava Rajendraswami of Govimutt v. Commissioner of Hindu Religious and Charitable Endowments, Hyderabad*, 1964-8 SCR 252 = (AIR 1965 SC 502) Gajendragadkar, C. J. observed thus regarding the aforesaid passage:

"With respect, we are not prepared to hold that these observations were intended to lay down an unqualified proposition of law that even if a citizen was deprived of his fundamental rights by a valid scheme framed under a valid law at a time when the Constitution was not in force, the mere fact that such a scheme would continue to operate even after the 26th January 1950, would expose it to the risk of having to face a challenge under Article 19. If the broad and unqualified proposition for which Mr. Sastri contends is accepted as true, then it would virtually make the material provisions of the Constitution in respect of fundamental rights retrospective in operation."

30. In *Guru Datta Sharma v. State of Bihar*, 1962-2 SCR 292 = AIR 1961 SC 1684, Shanti Sarup's case, AIR 1955 SC 624 (Supra) was distinguished in the following words:—

"We are unable to construe these observations as affording any assistance to the appellant we have held that the legislation under which the appellant's rights were extinguished, subject to his claim for compensation, was a valid law. It would therefore follow that the appellant could have no rights which could survive the Constitution so as to enable him to invoke the protection of Part III thereof."

31. In AIR 1961 SC 1684 at p. 1698 Shanti Sarup's case, AIR 1955 SC 624 was again distinguished. Ayyangar, J. speaking for the Court observed:

"We are unable to construe these observations as affording any assistance to the appellant."

We have held that the legislation under which the appellant's rights were extinguished, subject to his claim for compensation, was a valid law. It would, therefore, follow that the appellant could have no rights which could survive the Constitution so as to enable him to invoke the protection of Part III thereof. On this point also we must hold against the appellant."

32. It seems to us that the petitioners cannot complain of the breach of Articles 14 and 16 of the Constitution in respect of acts done before the Constitution came into force. These acts in this case were (1) appointments of the respondents to Income Tax Officers Class I, Grade II Service; (2) Seniority List as existing on 1-1-1950; and (3) the Seniority Rules of 1949 and 1950, in so far as they had effect upto January 26, 1950. It will be recalled that the first seniority list was prepared as on January 1, 1950 and even if the seniority list was finally settled after the Constitution came into force, the Rules to be applied were the Seniority Rules of 1949 and 1950. In other words, if the list had been finally settled on January 1, 1950, it is clear that no appeal could be made to Articles 14 and 16 of the Constitution. The fact that the List was prepared after the Constitution came into force would not enable the petitioners to appeal to Articles 14 and 16. The position is however, different in so far as changes were made in the seniority List as a result of change in the 1952 Seniority Rules. These changes were post-Constitution and if they are hit by Article 14 and Article 16 of the Constitution, the petitioners would have the right to complain of the breach of their fundamental rights under these Articles.

33. But in so far as the attack is based on the 1952 Seniority Rules, it must fail on another ground. The ground being that this petition under Article 32 of the Constitution has been brought about 15 years after the 1952 Rules were promulgated and effect given to them in the Seniority List prepared on August 1, 1953. Learned Counsel for the petitioners says that this Court has no discretion and cannot dismiss the petition under Article 32 on the ground that it has been brought after inordinate delay. We are unable to accept this contention. This Court by majority in *M/s. Trilokchand and Moti Chand's case*, (1969) 1 SCC 110 held that delay can be fatal in certain circumstances. We may mention that in *Laxmanappa Hanumanappa Jamkhandi v. Union of India*, 1955 SCR 769 = (AIR 1955 SC 3), Mahajan, C. J. observed as follows:—

"From the facts stated above it is plain that the proceedings taken under the impugned Act XXX of 1947 concluded so far as the Investigation Commission is concerned in September 1952, more than two years before this petition was presented in this Court. The assessment orders under the Income-tax Act itself

were made against the petitioner in November 1953.

In these circumstances, we are of the opinion that he is entitled to no relief under the provisions of Article 32 of the Constitution. It was held by this Court in *Ramjilal v. Income-tax Officer, Mohindergarh*, AIR 1951 SC 97 that as there is a special provision in Article 265 of the Constitution that no tax shall be levied or collected except by authority of law, Clause (1) of Article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32. In view of this decision it has to be held that the petition under Article 32 is not maintainable in the situation that has arisen and that 'even otherwise in the peculiar circumstances that have arisen, it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court' (emphasis here in 'supplied).

34. The learned counsel for the petitioners strongly urges that the decision of this Court in *Trilokchand and Motichand's case*, (1969) 1 SCC 110 (Supra) needs review. But after carefully considering the matter, we are of the view that no relief should be given to petitioners who without any reasonable explanation, approach this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

35. We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set

aside after the lapse of a number of years. It was on this ground that this Court in *Jaisinghani's case*, 1967-2 SCR 703 = (AIR 1967 SC 1427) observed that the order in that case would not affect Class II officers who have been appointed permanently as Assistant Commissioners. In that case, the Court was only considering the challenge to appointments and promotions made after 1950. In this case we are asked to consider the validity of appointments and promotions made during the periods of 1945 to 1950. If there was adequate reason in that case to leave out Class II officers, who had been appointed permanently Assistant Commissioners, there is much more reason in this case that the officers who are now permanent Assistant Commissioners of Income-tax and who were appointed and promoted to their original posts during 1945 to 1950, should be left alone.

36. Learned Counsel for the petitioners, however, says that there has been no undue delay. He says that the representations were being received by the Government all the time. But there is a limit to the time which can be considered reasonable for making representations. If the Government has turned down one representation, the making of another representation on similar lines would not enable the petitioners to explain the delay. Learned counsel for the petitioners says that the petitioners were under the impression that the Departmental Promotion Committee had held a meeting in 1948 and not on April 29, 1949, and the real true facts came to be known in 1961, when the Government mentioned these facts in their letter dated December 28, 1961. We are unable to accept this explanation. This fact has been mentioned in the minutes of the meeting of the Committee which met in February 1952 and we are unable to believe that the petitioners did not come to know all these facts till 1961. But even assuming that the petitioners came to know all these facts only in December 1961, even then there has been inordinate delay in presenting the present petition. The fact that *Jaisinghani's case*, 1967-2 SCR 703 = (AIR 1967 SC 1427) was pending before the High Court and later in this Court is also no excuse for the delay in presenting the present petition. In the result, the petition fails and is dismissed. There will be no order as to costs.

Petition dismissed.

AIR 1970 SUPREME COURT 479

(V 57 C 104)

(From Allahabad)

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.Sheikh Abdual Sattar, Appellant v.
Union of India, Respondent.Civil Appeal No. 1956 of 1966, D/- 10-
10-1969.

(A) Civil P. C. (1908), Order 8, Rule 3
— Law of pleadings — Certain para in
plaint not admitted — Failure to speci-
fically deal with facts alleged therein in
corresponding para of written statement
— Facts however, dealt with in additional
pleading — Effect.

According to the law of pleadings, the
defendant is bound to deal specifically
with each allegation of fact, the truth of
which is not admitted. If certain para
in the plaint is merely not admitted but
the facts therein are not specifically dealt
with, it cannot be said that they are
denied. Where the truth of the facts al-
leged in the plaint, though not specifically
dealt with in the corresponding para of
the written statement were dealt with in
the additional pleadings, held, the allega-
tions in the plaint must be considered to
have been traversed. (Para 9)

(B) Contract Act (1872), Section 10 —
Construction of contract — Contract for
supply of meat to military authorities —
One of conditions of contract providing
for enhanced rate subject to approval by
Tribunal as described under that condi-
tion — Application by contractor for en-
hanced rate on ground of rise in market
rate — Recommendation by C. R. I. A.,
Supply Corps for enhancement of rate —
Reference by authorities to Controller of
Military Accounts — Held, on evidence
on record that condition of contract for
enhanced rate was complied with —
C. R. I. A. S. C. was proper sanctioning
authority — Contractor could not be de-
prived of claim to enhanced rate merely
because authorities chose to consult Con-
troller of Military Accounts, who did not
figure in relevant condition — Decision
of Allahabad H. C., Reversed.

(Para 13)

The following Judgment of the Court
was delivered by

DUA, J.: The appellant in this appeal
with certificate from the judgment and
decree of the Allahabad High Court, had
in February 1944 submitted a tender for
the supply of meat to the army authorities

at Allahabad and Banaras. This tender
was accepted in March 1944 for the sup-
ply of meat for one year from April 1,
1944 to March 31, 1945. The formal ac-
ceptance was conveyed on May 18, 1944.
The controversy centres round the condi-
tion contained in para 51 of the special
conditions for the meat supply. This
condition reads as under:

"51. (a) No enhancement of rates will
be considered in the case of contracts
concluded for periods of 3 or 6 months.

(b) In the case of annual contracts, re-
vision of rates i. e. increases or decreases,
will be provided for, but no revision will
be considered or allowed within six
months of the commencement of the con-
tract.

(c) Rates for annual contracts will be
subject to review, according to the rise
or fall of market rates by referees ap-
pointed by Government, the reviewing
Tribunal for contracts to consist of the
Deputy Commissioner or his representa-
tive, the C. R. I. A. S. C. or his repre-
sentative and the local purchase officer
(Military). The three members will con-
stitute a quorum.

The contractor will attend to present
his case, but will not be a member of
the Tribunal.

The final recommendation in all cases
reviewed, shall rest with the officer sanc-
tioning the contract."

2. On September 4, 1944 the appellant
wrote a letter to C. R. I. A. S. C. (Com-
mander Royal Indian Army Supply Corps)
Lucknow, requesting for increase of rates.
In October, 1944 he sent a reminder pray-
ing for immediate increase of the existing
rates as contemplated by condition 51(b).
In December, 1944 a Tribunal was con-
stituted at Allahabad for the purpose of
reviewing the contract rates of the supply
of meat at Allahabad. After considering
the matter from the various aspects
brought to the notice of the Tribunal,
recommendation was made for enhancing
the rates as contained in Ex. G. On
April 24, 1945 the appellant applied for
the refund of the security amount of
Rs. 18,100 paid by him along with the
tender. Along with this application a
'No Demand Certificate' was given by
the appellant. The appellant thereafter
sent several reminders to C. R. I. A. S. C.
regarding enhancement of the contract
rates. On January 2, 1946 the appellant
inquired from C. R. I. A. S. C., Lucknow
as to when the question of enhancement

of rate would be finally settled (Ex. 15). In reply to this inquiry on January 9, 1946 the headquarters at Lucknow informed the appellant that his case had been held up at the headquarters pending inquiry from the civil authorities about the market rates (Ex. 19). A copy of this letter was also sent to the O. C. I. S. S. D., Banaras, with the following note:

"Reference your No. 0709-C of 9th December, 1945. Please obtain the Civil Market rates personally in consultation with the Civil Authorities and arrange to hold tribunal with reference to this office No. 8601-ST of 3rd July, 1945. The proceedings of tribunal together with the documents referred to in this office No. 8601-ST. 13th of April, 1944 should immediately be forwarded to this H. Q. for submission to higher authorities."

After some further correspondence between the appellant and the headquarters at Lucknow on March 26, 1946, the latter wrote to O. C. I. S. S. D., Allahabad that the prayer for the revision of contract rates for the supply of meat by the appellant at Allahabad had been rejected by the higher authorities (Ex. 25). On April 7, 1946 the appellant wrote a letter to the headquarters at Lucknow requesting them to supply him the reasons for the rejection of his claim by the higher authorities. On April 15, 1946 the appellant was asked to attend the meeting of the Tribunal on April 29, 1946 for representing his case. This letter was received from the O. C. I. S. S. D., Banaras. On April 17, 1946 the appellant was informed by the headquarters, Lucknow that he should take up the matter direct with the headquarters Central Command. In the meantime on March 30, 1946 a notice was issued by the B. R. I. G. on behalf of the Major General Incharge Administration Central Command, notifying, inter alia that no fresh claim for revision of R. I. A. S. C. contract rates or for the reopening of cases on which decision had already been made would be entertained after May 15, 1946 in regard to contracts for the period ending March 31, 1945 (Ex. 73). On May 6, 1946 the appellant wrote to C. R. I. A. S. C. at Lucknow for the enhancement of rates. On May 10, 1946 the appellant served a notice through his lawyer on the headquarters demanding revision of the department's decision rejecting his claim for enhancement failing which legal action was threatened. A copy of this

notice was also sent to C. R. I. A. S. C. at Lucknow with reference to their letters dated March 26, 1946 and April 17, 1946 (Ex. 29). On May 14, 1946 the Tribunal at Banaras also recommended enhancement of rates (Ex. H). On June 10, 1946 the appellant wrote a letter to the Controller of Military Accounts, Central Command, Meerut, stating that his 'No Demand Certificate' accompanying his request for the refund of security money had been inadvertently furnished and should be treated as cancelled because the matter regarding enhancement of rates was under consideration with the authorities. It was added that the appellant would submit a 'No Demand Certificate' for refund of the security money as soon as his claim for enhancement of rates was settled. On June 21, 1946 the appellant sent an express telegram to B. R. I. A. S. C. Command, Agra requesting for expeditious payment of his dues without resorting to litigation. On June 22, 1946 B. R. I. A. S. C., Central Command wrote to the appellant's lawyer in answer to the letter dated May 10, 1946 and telegram June 21, 1946, stating that the claim was being investigated and the decision arrived at would be communicated to him in due course (Ex. 32). Thereafter repeated inquiries were made by the appellant about the probable date of the settlement of his claim but every time it was said that the matter was still under consideration and that the decision would be communicated in due course. It is unnecessary to refer to the correspondence in detail. The last reply on these lines was sent to the appellant on December 13, 1947 (Ex. 50). After serving another reminder on March 15, 1948 the appellant sent a statutory notice under Section 80, Civil P. C. on May 3, 1948 and instituted the present suit in November, 1948, claiming a decree for Rs. 1,15,735/6/8 with future interest. This amount included enhanced rates for the supply of meat and security deposit and interest thereon. The claim in regard to enhanced rates was resisted by the respondent. It was pleaded in the written statement, inter alia, that the final recommendation in regard to enhanced rates rested with the officer sanctioning the contract, who was stated in the additional pleadings to be the Commander Lucknow District, and that the said officer had declined to sanction enhanced rates. The appellant's right to the refund of the security money was conceded but it was pleaded that he could receive that money

only on furnishing a 'No Demand Certificate' as required by the agreement.

3. The following issues were settled at the trial:

1. Whether there was a rise in the market rates of goods supplied by the plaintiff as alleged by him?

2. If so, was plaintiff entitled to enhancement in the contractual rates in terms of the tender and agreement?

3. What is the effect of the reference to the Tribunal?

4. Were the old rates mentioned in the tender abandoned?

5. Is the suit not maintainable as pleaded in paragraph 24 of the written statement?

6. What is the effect of the revocation by the plaintiff of the 'No Demand Certificate'?

7. (a) Is the claim excessive as pleaded?

(b) Is the plaintiff not entitled to any interest?

8. To what relief if any is the plaintiff entitled?

9. Is the plaintiff's suit barred by time?

4. On issues Nos. 1 and 2 the trial Court came to the conclusion that there was an appreciable rise in the market rates of meat, beef, mutton and live animals and the appellant was entitled to enhanced rates from October 1, 1944 in accordance with the terms of the contract. In arriving at this conclusion the court placed reliance, inter alia, on the proceedings of the Tribunals (Exs. G and H) and on a letter written by B. R. I. A. S. C. (whom the court considered to be the final authority on the subject) to the Controller of Military Accounts which contained a proposal to increase the rates (Ex. 57). The appellant's plea that the 'No Demand Certificate' had been sent by him under misapprehension was also accepted. Issues Nos. 3 and 4 were considered unnecessary. Under issue No. 7 it was observed that there was no dispute between the parties in regard to the different kinds of meat supplied by the appellant during the second half of the year of supply and the recommendations of the B. R. I. A. S. C. were considered to be fair and proper for calculating the enhanced rates. The appellant was thus held entitled to Rs. 64353/10/- on account of the supplies at Allahabad and to Rs. 9858/10/2 in respect of the supplies at Banaras. Adding to this amount the security money and interest at 3% per

annum the suit was decreed for Rs. 88214/6/3.

5. On appeal the High Court agreed with the trial Court that the market rates of meat during the year of supply were higher than the contract rates. It also accepted the appellant's case that the two tribunals had recommended payment at enhanced rates but it disagreed with the trial Court on the question of approval by the sanctioning authority. This is how the High Court expressed itself on this point:

"According to Ex. "C" the plaintiff's tender was accepted by Major-General Hammond, who was commander, Lucknow District. According to Ex. 57, some officer of the rank of a Brigadier or a Lieutenant Colonel was inclined to sanction enhanced rates. It is not clear whether in terms of paragraph 51 of exhibit 'D' Major-General Hammond or some other officer of Eastern Command was entitled to sanction enhanced rates. But from an examination of the various documents produced by the parties it appears that the officer sanctioning the contract did not definitely approve of the recommendations by the two tribunals."

6. The decision on the plea of limitation and on the appellant's right to the security deposit was upheld. The appeal was accordingly allowed in part and the appellant's suit in regard to enhanced rates dismissed.

7. In this Court the sole controversy centres round the appellant's claim to the enhanced rates. The question which therefore requires determination by this Court is whether the special condition No. 51 (c), reproduced earlier in this judgment, has been fulfilled. In order to properly appreciate and appraise the material on the record we may first turn to the pleadings. According to para 1 of the plaint the service corp described as (B. R. I. A. S. C.), Eastern Command, Ranchi had on behalf of the defendant entered into the contract in question with the appellant. This para was admitted in the written statement. Para 13 of the plaint contained the following averment:

"That in spite of the findings of the aforesaid Tribunal nothing has so far been done by the authorities concerned even though the plaintiff has been sending representations after representations to them. Neither on the occasion of the first Tribunal's findings nor on the oc-

casion of the second Tribunal's findings was any final recommendation made by the officer sanctioning the contract in accordance with the last para of Clause 51 of the special conditions attached to the tender form as quoted in paragraph 2 above. The officer sanctioning the contract was the B. R. I. A. S. C., Eastern Command, Ranchi."

8. In reply in para 13 of the written statement it was pleaded as under:

"That para 13 of the plaint as it stands is not admitted."

9. Now according to the law of pleadings the defendant was bound to deal specifically with each allegation of fact, the truth of which was not admitted. The allegation that B. R. I. A. S. C., Eastern Command, Ranchi was the officer sanctioning the contract was not specifically dealt with and was therefore not specifically denied. If its truth was not admitted then it should also have been stated in this para as to who, according to the defendant, was the officer sanctioning the contract. Had the matter rested here the question of taking the appellant's allegation that B. R. I. A. S. C., Eastern Command was the sanctioning officer to have been admitted, would have required consideration. But we find that in para 26 of the additional pleadings in the written statement it was pleaded that the Commander, Lucknow District was the officer sanctioning the contract and in para 27 it was added that the said officer had not sanctioned enhancement of contract rates. The appellant's plea in question would therefore have to be considered to have been traversed though we cannot complement the respondent or its law officer entrusted with the task of drafting the written statement for the manner in which it was drafted.

10. We now turn to the evidence on this point. From the printed document described as acceptance of tender (Ex. C) it is not possible for us to know with certainty as to who was the officer sanctioning the contract. The original is not available on the record in this Court, with the result that we do not have the advantage of having a look at it. The appellant's counsel suggested that it was B. R. I. A. S. C., whereas, according to the respondent's counsel it was Major General A. V. Hammond, D. S. O. I. A.

11. Let us see whether oral evidence throws any light on it. Moti Ram Dingra, Subedar in the army appeared as

witness for the defendant. He was Superintendent, Contract Section in the office of C. A. S. C., U. P. Area, Lucknow. In cross-examination he stated as follows:

"A Tribunal is only a recommending authority and not a sanctioning authority. Lucknow is the headquarter of the U. P. Area. The area commander used to be called District Commander previously. The C. R. I. A. S. C. is the administration officer of the Royal Indian Army Service Corps. The area officer at Lucknow is the Commander U. P. Area. Ranchi is the headquarter of Eastern Command. The Commander, Eastern Command is called the army Commander. The B. R. I. A. S. C. is under the army Commander and deals with R. I. A. S. C. matters. The final recommending authority for the enhancement of rates is the Area Commander, Lucknow. He is the sanctioning authority for the enhancement of rates and also of the contract itself upto the amount of rupees three lakhs. For contracts of over three lakhs he recommends the enhancement to the B. R. I. A. S. C. and it is he who sanctions the contract. Before sanctioning enhancement of rates in respect of contracts valued at over three lakhs he takes the advice of the Controller of Military Accounts. I cannot say if the contract of Abdul Sattar was over three lakhs, but as it was sanctioned by the Commander of Lucknow District it should be within the value of Rs. 3,00,000. The matter of enhancement of rates of Abdul Sattar was referred to the B. R. I. A. S. C."

12. The witness thereafter expressed ignorance as to whether in the instant case the B. R. I. A. S. C. took advice of the C. M. A. or sought the opinion of the Legal Remembrancer. He also admitted in his cross-examination that his statement that the appellant's claim had been rejected was based only on a letter produced in this case and that he had no other source of information. According to his testimony the matter of enhancement of rates was referred to the B. R. I. A. S. C. who was the higher authority than the Area Commander, Lucknow. Our attention was not drawn on behalf of the respondent to any other evidence on the record which would indicate that the B. R. I. A. S. C. was not the authority sanctioning the contract. We, therefore, hold in disagreement with the High Court that B. R. I. A. S. C. is the authority sanctioning the contract.

13. Now on the present record there can be little doubt that the B. R. I. A. S. C. had recommended the enhancement of rates in respect of the appellant's contract. If, therefore, he is the sanctioning authority, then the appellant can safely be held entitled to the enhanced rates. Turning to the plain language of the special condition 51 we find that in case of annual contracts, after six months from their commencement there has to be a provision for revision, which means increase or decrease, according to the rise or fall in the market rates. It is not disputed and it was also found by the High Court, that in the present case the market rates did rise and were indeed so found by the reviewing Tribunal as well. The reviewing Tribunal entrusted with the duty of inquiring into the question of rise or fall of market rates having found the rates to have risen, it would be for the respondents to show by convincing evidence as to who was the officer sanctioning the contract and for what reasons he had disagreed with the conclusions of the reviewing Tribunal. The appellant could not be deprived of his right to claim the enhanced rates merely because the respondent chose to consult the Controller of Military Accounts who does not figure in special condition No. 51: nor can the appellant be made to suffer by reason of the respondent's omission to enlighten the Court by precise evidence clearly showing as to which Officer other than B. R. I. A. S. C. is the sanctioning authority and for what reasons that officer declined to accept the recommendation of the reviewing Tribunal. Our attention was not drawn to any material on the record nor was any principle of law cited on the basis of which the appellant could justifiably be deprived of his right. The High Court was thus in error in allowing the appeal of the Union of India in respect of the appellant's claim to enhanced rates.

14. Considerable arguments were addressed at the bar of this Court on the question whether the sanctioning authority was a referee or an umpire and whether his decision was subject to review by the Court in the present proceedings. On the view that we have taken that question does not arise for decision as there is no dispute in regard to actual amounts, if the appellant is held entitled to claim enhanced rates. We accordingly allow the appeal with costs and setting aside the judgment and decree of the

High Court restore the decree of the trial Court. The respondent is allowed three months' time to pay the decretal amount.

Appeal allowed.

AIR 1970 SUPREME COURT 483
(V 57 C 105)

(From: Madhya Pradesh)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Nathu Prasad, Appellant v. Ranchhod Prasad and others, Respondents.

Civil Appeal No. 2111 of 1966, D/- 6-10-1969.

Tenancy Laws — Madhya Pradesh Land Revenue Code (Act 20 of 1959), Section 185 (1) (ii) (b) — Madhya Bharat Ryotwari Sub-lessee Protection Act (29 of 1955), Sections 3 and 2 (b) — "Ryotwari sub-lessee", meaning of — Person inducted as a sub-lessee contrary to provisions of M. B. Act 66 of 1950 — His possession not protected by Act 29 of 1955 — Such a person is not a "Ryotwari sub-lessee" as defined in Act 29 of 1955 and hence cannot acquire status of occupancy tenant under Section 185 (1) (ii) (b) of M. P. Land Revenue Code — (Madhya Bharat Land Revenue and Tenancy Act Smt. 2007 (66 of 1950), Sections 73, 78 — Second Appeal No. 254 of 1962, D/- 9-7-1965 (M. P.), Reversed; 1963 MPLJ 314, Overruled.

A person inducted as a sub-lessee, but who by express provision contained in Section 73 read with Section 78 of Act 66 of 1950 is declared a trespasser, does not acquire the status of an occupancy tenant under Section 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code. M. B. Ryotwari Sub-lessee Protection Act (29 of 1955) which was repealed by M. P. Land Revenue Code conferred protection only upon a ryotwari sub-lessee, and a ryotwari sub-lessee was defined in that Act as meaning a person in whose favour the land was settled. Section 3 of Act 29 of 1955 excluded from the protection granted by the Act, amongst others, a sub-lessee deemed to be a trespasser under Section 78 of Act 66 of 1950. Hence a person, the lease in whose favour was declared void by virtue of Act 66 of 1950,

* (Second Appeal No. 254 of 1962, D/- 9-7-1965—M. P.)

could not claim the status of a sub-lessee.
(Para 5)

A person inducted as a sub-lessee contrary to the provisions of Section 73 of Act 66 of 1950 did not therefore acquire any right under a contract of sub-letting, and his possession was not protected under Act 29 of 1955. Such a person is not a ryotwari sub-lessee as defined in Act 29 of 1955 and it is only on "Ryotwari sub-lessee" as defined in that Act that the right of occupancy tenant is conferred by Section 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code. Second Appeal No. 254 of 1962, D/- 9-7-1965 (M. P.), Reversed; 1963 MPLJ 314, Overruled. (Para 5)

Cases Referred: Chronological Paras
(1963) 1963 MPLJ 314 = 1963 Jab
LJ 318, Rao Nihalkaran v. Ram-
chandra I, 6

The following Judgment of the Court was delivered by

SHAH, J.: Of Khasra Nos. 33 and 34 of Maheshwar, District Khargaon, Madhya Pradesh, Nathu Prasad—hereinafter called 'the plaintiff'—is the recorded pattadar tenant. On May 20, 1955 he granted a sub-lease of the land, for a period of five years, to Ranchhod Prasad and Onkar Prasad — hereinafter collectively called 'the defendants'. On June 30, 1960 the plaintiff commenced an action in the Court of the Civil Judge, Maheshwar against the defendants claiming that the sub-lease being in contravention of Section 73 of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950 the defendants were trespassers in the land. The defendants contended that the lease was valid; and since the plaintiff had received consideration, he was estopped from setting up the plea of invalidity of the lease. The Trial Court decreed the action, holding that the defendants were trespassers and could not acquire Bhumi-swami rights claimed by them. The District Court agreed with the Trial Court. In second appeal the High Court of Madhya Pradesh allowed the appeal and dismissed the plaintiff's action. In the view of the High Court the defendants had acquired rights as occupancy tenants under Section 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code. In so holding the High Court relied upon the judgment of the Madhya Pradesh High Court, Rao Nihalkaran v. Ramchandra, 1963 MPLJ 314. With special leave, the plaintiff has appealed to this Court.

2. Section 73 of the Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 (Act No. 66 of 1950) provides:

"No Pakka tenant shall sub-let for any period whatsoever any land comprised in his holdings except in the cases provided for in Section 74.

Explanation:— x x x x"
Section 74 deals with sub-letting by disabled persons. Since the plaintiff is not a disabled person, the section need not be read. Section 75 provides:

"A sub-lease of the whole or any part of the holding of a Pakka tenant effected properly and legally prior to the commencement of this Act shall terminate after the expiry of the period of sub-lease or 4 years after the commencement of this Act, whichever period is less."

Section 76 provides:

"(1) If the sub-lessee does not hand over possession of the land sub-let to him after the sub-lease ceases to be in force under Sections 74 and 75 to the lessor or his legal heir x x x, he shall be deemed to be a trespasser and shall be liable to ejectment in accordance with the provisions of this Act.

(2) x x x x"
Section 78 provides:

"(1) Any person who in contravention of the provisions of this Act, obtains possession of any land by virtue of a bequest, gift, sale, mortgage or sub-lease, or of any agreement purporting to be a bequest, gift, sale, mortgage or sub-lease shall be deemed to be a trespasser and shall be liable to ejectment in accordance with the provisions of Section 58.

x x x x x x"
3. The Madhya Bharat Legislature enacted the Madhya Bharat Ryotwari Sub-lessee Protection Act, 1955 (Act 29 of 1955). The Act came into force on October 19, 1955. The Act was enacted to provide for stay of proceedings under Section 76 (1) for the ejectment of sub-lessees of ryotwari land after the termination of sub-leases according to S. 75 of the Madhya Bharat Land Revenue and Tenancy Act Samvat 2007. "Ryotwari sub-lessee" was defined in Clause (b) of Section 2 as meaning "a person to whom a pakka tenant of any Ryotwari land has sub-let on sub-lease any part of his Ryotwari land." Section 3 of Act 29 of 1955 provides:

"Notwithstanding anything contained in Sec. 76 of the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007,

during the continuance of this Act but subject to the provisions contained in Section 4 below, no Ryotwari sub-lessee other than a sub-lessee under Section 74 of the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007, and a sub-lessee deemed to be a trespasser under Section 78 of the said Land Revenue and Tenancy Act, shall be ejected from his land."

Section 3 clearly grants protection during the continuance of the Act to sub-lessees. But sub-lessees under Section 74 of the Madhya Bharat Land Revenue and Tenancy Act and a sub-lessee deemed to be a trespasser under Section 78 of that Act are outside that protection.

4. The Madhya Pradesh Land Revenue Code (Act 20 of 1959) was enacted by the State Legislature and was brought into force in the whole of the State of Madhya Pradesh. By that Code, Act 29 of 1955 was repealed. The expression "tenant" was defined in Section 2 (y) as meaning "a person holding land from a Bhumiswami as an occupancy tenant under Chapter XIV." Section 185, insofar as it is relevant, provides:

"(1) Every person who at the coming into force of this Code holds—

(ii) In the Madhya Bharat region—

(a) any Inam land as a tenant, or as a sub-tenant or as an ordinary tenant; or

Explanation:— x x x

(b) any land as ryotwari sub-lessee as defined in the Madhya Bharat Ryotwari Sub-lessee Protection Act, 1955 (29 of 1955); or

x x x x x
shall be called an occupancy tenant and shall have all the rights and be subject to all the liabilities conferred or imposed upon an occupancy tenant by or under this Code."

By Section 185 of the Madhya Pradesh Land Revenue Code a person who is holding land as a ryotwari sub-lessee under Act 29 of 1955 is deemed to be an occupancy tenant and is entitled to all the rights and is subject to all the liabilities conferred or imposed upon an occupancy tenant by or under the Madhya Pradesh Land Revenue Code.

5. A person inducted as a sub-lessee, but who by express provision contained in Section 73 read with Section 78 of Act 66 of 1950 is declared a trespasser, does not acquire the status of an occupancy tenant under Section 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code.

Act 29 of 1955 conferred protection only upon a ryotwari sub-lessee, and a ryotwari sub-lessee was defined in that Act as meaning a person in whose favour the land was settled. A person, the lease in whose favour was declared void by virtue of Act 66 of 1950, could not claim the status of a sub-lessee. That is so enacted in Section 3 which excludes from the protection granted by Act 29 of 1955, amongst others, a sub-lessee deemed to be a trespasser under Section 78 of Act 66 of 1950. A person inducted as a sub-lessee contrary to the provisions of Section 73 of Act 66 of 1950 did not therefore acquire any right under a contract of sub-letting, and his possession was not protected under Act 29 of 1955. Such a person is not a ryotwari sub-lessee as defined in the Madhya Bharat Ryotwari Sub-lessee Protection Act 29 of 1955, and it is only on "Ryotwari sub-lessee" as defined in that Act that the right of occupancy tenant is conferred by Section 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code.

6. Krishnan, J., regarded himself bound by the following observation made by a Division Bench of the Madhya Pradesh High Court in Rao Nihalkaran's case, 1963 MPLJ 314:

"By Section 3 of this Act (Act 29 of 1955) a bar was created to the ejectment of these sub-lessees whose continuance had become precarious under the existing law. The bar was to operate during the continuance of that Act which was for a definite duration notwithstanding anything contained in Sections 76 and 78 of the Madhya Bharat Land Revenue and Tenancy Act barring exceptions contained in Section 74 of that Act."

The observation that protection was given to sub-lessees, notwithstanding anything contained in Section 78 was apparently made through oversight; it is contrary to the express provisions of the Act.

7. The High Court was, in our judgment, in error in holding that the defendants had acquired the status of occupancy tenants by virtue of S. 185 (1) (ii) (b) of the Madhya Pradesh Land Revenue Code (Act 20 of 1959).

8. The appeal is allowed. The order passed by the High Court is set aside and the decree passed by the District Court is restored. There will be no order as to costs in this Court and in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 486

(V 57 C 106)

(From: Madras)*

J. C. SHAH, V. RAMASWAMI, A. N. GROVER, JJ.

Commissioner of Income Tax, Madras, Appellant v. M. K. K. R. Muthukaruppan Chettiar, Respondent.

Civil Appeals Nos. 1664-1665 of 1968, D/- 6-9-1969.

Income-tax Act (1922), Sections 22 (2), (3) and 34 — Assessee filing returns in his individual capacity in response to notice under Section 22 (2) and (3) — Income-tax Officer issuing notice under Section 34 without disposing of returns — Notice under Section 34 and consequent assessments are invalid.

K and his son M formed a Hindu undivided family and assessed as such till the end of assessment year 1948-49. In the assessment year 1949-50 there was a claim for partition between K and M but it was rejected by the Income Tax Officer and an appeal against that order was pending. For the assessment years 1950-51, 1951-52 and 1952-53 M submitted returns of his income in his individual capacity in response to notice under S. 22 (2) and (3), Income-tax Act 1922. By his order dated June 18, 1953 the Income-tax Officer closed the assessments as no assessments and added that since there was no separate income, the pending proceedings would be closed as N. A. and for Income-tax year 1953-54 the file would be removed and clubbed with the family file. By the same order he also issued notice under Section 34. On 12-12-1954 the claim for partition was accepted in appeal. Thereafter the assessee M filed two sets of returns for the aforesaid three years, once on February 23, 1955 and again on March 30, 1956. Those returns were submitted by the assessee in response to the notice under Section 34 issued on March 2, 1957 and the assessee was assessed accordingly:

Held that the order of the Income-tax Officer dated June 18, 1953 was not an order to terminate the proceedings and the result, therefore was that the original returns submitted by the assessee under Section 22 (2) and (3) had not been properly and legally proceeded with. Hence notices under Section 34 could not be issued against M in his individual capacity and the assessments made pursuant

to the notice under Section 34 were therefore invalid for the three years 1950-51, 1951-52 and 1952-53. AIR 1959 SC 1154 and (1969) 72 ITR 403 (SC), Applied.

(Paras 4, 5)

Cases Referred: Chronological Paras (1969) 72 ITR 403 (SC), A. M. K. M.

Kruppan Chettiar v. Commr. of I. T.

(1967) 66 ITR 586 (SC), N. Kt.

Shivlingam Chettiar v. Commr., I. T.

(1965) AIR 1965 SC 342 (V 52) = 52 ITR 335, I. T. Officer v. Murli-dhar Bhagwandas

(1959) AIR 1959 SC 1154 (V 46) = 36 ITR 569, Commr., I. T. v. RANCHHODDAS KARSONDAS

The following Judgment of the Court was delivered by

RAMASWAMI, J.: Karuppan Chettiar his son Muthukaruppan and the latter's minor sons all together formed a Hindu undivided family which was assessed as such till the end of the assessment year 1948-49. In the course of assessment proceedings for 1949-50 the family claimed on February 7, 1951 that the several businesses of the family had been partitioned between Karuppan Chettiar on the one hand and Muthukaruppan Chettiar and his sons forming a separate family on the other. Following up this claim the returns in response to the notice under Section 22 (2) of the Income-tax Act, 1922 (hereinafter called the Act) issued to the family for the assessment years 1950-51, 1951-52 and 1952-53 were made by Karuppan Chettiar in his individual capacity showing the income from the several sources that fell to his share. The Income-tax Officer rejected the claim of partition and assessed the Hindu undivided family for the aforesaid three years treating Karuppan Chettiar's returns as the proper returns for the family. An appeal was made by the assessee to the Appellate Assistant Commissioner in which complete partition as required by Section 25A of the Act was accepted by the Appellate Assistant Commissioner by his order dated December 18, 1954. In keeping with this order he also cancelled the assessments of the family for the aforesaid years. In the course of his order he observed:

"I therefore hold that there is no asset left in the hands of the H. U. F. which can be brought to tax and that the H. U. F. is no longer in existence. As

such the present assessment requires to be annulled and the income considered in this assessment requires to be considered in the hands of the separating coparceners. I therefore annul these assessments."

Assessment year	Return under Section (voluntary)	Date of return
1950-51	22(3)	8-2-1951
1951-52	22(2)	5-2-1952
1952-53	22(2)	2-12-1952

The Income-tax Officer closed the assessments as 'no assessments' by his notes in the order sheet dated June 18, 1953 reproduced below:

"The assessee is a member of the family of A. M. K. M. K. Karuppan Chettiar, assessed in F.1005-A. I have held in the family file in my order for income tax year 1949-50 that there have been no division between father and son. This being the case, there is no source of income to be separately assessed in the assessee's hands. The return of income in this file relates to the alleged share of income consequent on partition. Since partition has not been accepted, this file has only to be clubbed with the father's file. If, for any reasons, it is ultimately held on appeal that a separate assessment should be made, it will no doubt be possible to take action under provision of Section 34 as now amended. Since there is no separate income, the pending proceedings will be closed as N. A. and for Income-tax year 1953-54 the file will be removed and clubbed with the family file F.1005-A".

The Income-tax Officer in giving effect to the aforesaid order of partition under Section 25-A of the Act and cancelling consequentially the family assessments, simultaneously issued notices under Section 34 on March 2, 1957 for the three assessment years 1950-51, 1951-52 and 1952-53 to the assessee family after obtaining the previous approval of the Commissioner. In response to the notice the assessee submitted its returns on April 9, 1957 for the three assessment years under protest. On the basis of these returns the Income-tax Officer assessed the assessee by his order of the same date for all the three years, ignoring the protest. The assessee appealed to the Appellate Assistant Commissioner but the appeal was dismissed. The assessee took the matter in appeal to the Appellate Tribunal but was unsuccessful. The Appellate

2. Meanwhile Muthukaruppan and his minor sons forming the family, the assessee in this case, filed returns for the Tamil years Virothi, Vikruthi and Kara as the 'previous years' for assessment years 1950-51, 1951-52 and 1952-53 as follows:

Tribunal stated a case to the High Court under Section 66 (1) of the Income-tax Act on the following question of law:

"Whether the aforesaid assessments for years 1950-51, 1951-52 and 1952-53 are valid?"

The High Court by its judgment dated September 16, 1964 recorded an answer in the affirmative. In the view of the High Court, the order passed by the Appellate Assistant Commissioner and the direction given by him lifted the bar of limitation prescribed by Section 34 (3) of the Act for making the assessment.

3. It is not necessary to decide whether the observations made by the Appellate Assistant Commissioner in his order declining to assess the income of the Hindu undivided family operated to lift the bar of limitation as regards the assessment of income of the separated members by the application of the principle of the judgments of this Court in Income-tax Officer v. Murlidhar Bhagwanadas, 52 ITR 335 = (AIR 1965 SC 342) and N. Kt. Sivalingam Chettiar v. Commissioner of Income-tax, (1967) 66 ITR 586 (SC). In our opinion the orders passed by the Income-tax authorities and confirmed by the Tribunal suffer from a fundamental defect. As we have already stated, Karuppan Chettiar submitted returns of his income in his individual capacity for the years 1950-51, 1951-52 and 1952-53 in response to the notice issued under Section 22 (2) of the Act. By his order dated June 18, 1953 the Income-tax Officer closed the assessments as 'no assessments' and added that since there was no separate income, the pending proceedings would be closed as N. A. and for income-tax year 1953-54 the file would be removed and clubbed with the family file F. 1005-A. Thereafter the assessee filed two sets of returns for the aforesaid three years, once on February 23, 1955 and again on March 30, 1956. These returns were submitted by the assessee in response to the notice issued on March 2,

1957. It is manifest that in these circumstances notice under Section 34 of the Act cannot be issued to Muthu Karuppan Chettiar and his minor sons unless the returns which had already been filed by that family were disposed of.

4. It was held by this Court in Commissioner of Income-tax v. Ranchhoddas Karsondas, 36 ITR 569 = (AIR 1959 SC 1154) that the return in answer to the general notice under Section 22 (1) of the Act can, under Section 22 (3), be filed at any time before assessment and for this there is no limit of time. When in respect of any year a return has been voluntarily submitted before assessment, the Income-tax Officer cannot ignore the return and the notice of reassessment and consequent assessment under Section 34 ignoring the return are invalid. In the present case we are of opinion that the order of the Income-tax Officer dated June 18, 1953 is not an order to terminate the proceedings and the result, therefore, is that the original returns submitted by the assessee under Section 22 (2) and (3) have not been properly and legally proceeded with. In the case before us the order of the Income-tax Officer dated June 18, 1953 should be interpreted in the light of circumstances in which that order was passed. So interpreted it appears to us that the Income-tax Officer did not intend to conclude the proceedings before him. It follows, therefore, that there is no disposal of the voluntary returns made by the respondent for the assessment years 1950-51, 1951-52 and 1952-53. It is manifest that the assessment proceedings under Section 34 (1) of the Act for the aforesaid three years are invalid.

5. In the Estate of the late A. M. K. M. Karuppan Chettiar v. Commissioner of Income-tax, (1969) 72 ITR 403 (SC) it was held by this Court that notices under Section 34 could not be issued against Karuppan Chettiar in his individual capacity unless the returns which had been filed by him are also disposed of and the assessments made pursuant to the notice under Section 34 were therefore invalid for the three years 1950-51, 1951-52 and 1952-53. The principle of this case governs the present case also as the material facts are not different.

6. For these reasons we hold that these appeals fail and must be dismissed with costs. There will be one set of hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 488
(V 57 C 107)

(From Allahabad: 1966 All LJ 507)

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.

Works Manager, Central Rly. Workshop, Jhansi, Appellant v. Vishwanath and others, Respondents.

Civil Appeal No. 1644 of 1966, D/- 9-10-1969.

(A) Civil P. C. (1908), Order 22, Rr. 2, 4 — Joint petition under Payment of Wages Act by respondents — Order in their favour by one judgment. — Appeal to Supreme Court — All respondents made parties — One of them dying during pendency of appeal but his name continuing to appear in array of respondents — Legal representative not brought on record — Appeal held did not abate. Civil Appeal No. 1444 of 1966, D/- 24-9-1968 (SC), Foll. (Para 4)

(B) Constitution of India, Article 136 — Finding of fact — Nature of work done by persons in railway workshop — Finding on, is finding of fact and binding on High Court in revision against the decision of the Court of Appeal under S. 17, Payment of Wages Act and also not open to reassessment before Supreme Court on special leave to appeal — (Civil P. C. (1908), Section 115). (Para 6)

(C) Factories Act (1948), Section 2 (1) — 'Worker' — Persons doing clerical duties but otherwise falling within definition of "worker" — They are workers.

Respondents who were time-keepers prepared paysheets of workshop staff, maintained leave account, disposed of settlement cases, maintained records for statistical purposes, maintained attendance of staff, job card particulars of the various jobs under operation and time sheets of the staff working on various shops dealing with the production of Railway spare-parts and repairs etc. Some head time-keepers were entrusted with the task of supervising the work of other respondents.

Held that the definition of "worker" in the Factories Act, does not exclude employees who are entrusted solely with clerical duties, if they otherwise fall within the definition of the word "worker". Keeping in view the duties and functions of the respondents, the respondents fell within the definition of the word "worker".

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Held further that deletion of the word "whatsoever" after "any other kind of work" from the definition as it appeared in Act 25 of 1934 does not seem to make much difference because that word was redundant. (1863) 122 ER 554 and (1865) 144 ER 436, Distinguished; AIR 1967 SC 1364, Ref. (Para 11)

(D) Factories Act (1948), Preamble — Factories Act is a social enactment to achieve social reform and must receive liberal construction to achieve legislative purpose without doing violence to language. (Para 11)

Cases Referred: Chronological Paras

(1968) Civil Appeal No. 1444 of 1966, D/- 24-9-1968 (SC), Indian Oxygen Ltd. v. Ram Adhar Singh 4

(1967) AIR 1967 SC 1364 (V 54) = 1967-3 SCR 92, Nagpur Electric Light and Power Co. Ltd. v. Regional Director Employees State Insurance Corporation 8

(1865) 144 ER 436 = 18 CB (NS) 243, Frederick Hayes Whympers v. John Jones Harney 7

(1863) 122 ER 554 = 33 LJMC 30, Heydon v. Taylor 7

The following Judgment of the Court was delivered by

DUA, J.: This appeal by special leave is directed against the order of a learned Single Judge of the Allahabad High Court affirming on revision under Section 115 Civil P. C. the order of the learned Additional District Judge, Jhansi, who had allowed the respondents' appeal from the order of the learned City Magistrate, Jhansi, made on an application presented by the respondents under Section 15 of the Payment of Wages Act IV of 1936. The City Magistrate was the "authority" appointed under Section 15 and the District Court was the court of appeal under Section 17 of the said Act. The respondents through the Assistant Secretary of the National Railway Mazdoor Union Work Shop Branch, Jhansi had asserted in their application under Section 15 that they were workers within the meaning of Section 2 (1) of the Factories Act (63 of 1948) and complained that they were denied wages for overtime work done by them on the erroneous ground that they were not workers within the aforesaid provision. The learned Magistrate held that the respondents had been entrusted with purely clerical duties and they were not connected in any manner with the manufacturing process. On this conclusion their application was dismissed.

2. On appeal the learned Additional District Judge disagreed with this view and came to the conclusion that the work done by the respondents was incidental to or connected with the manufacturing process. It was observed in the order that some of the respondents were entrusted with the duty of checking the time of work of each worker in the workshop, a few others were time-keepers and the remaining respondents prepared account sheets on the basis of the time sheets and did other work incidental to the running of the work-shop including payment of wages to the staff of the workshop and the office. The High Court on revision, as already observed, affirmed the order of the learned Additional District Judge.

3. On appeal in this Court the short question we are called upon to decide is whether the respondents, who are time-keepers fall within the purview of the definition of "worker" as contained in Section 2 (1) of the Factories Act.

4. The respondents have raised a preliminary objection that the appeal is incompetent on the ground that respondent No. 29 (T. A. Kolalkar) had died after the order of the High Court but his name continued to appear in the array of respondents. As his legal representatives had not been brought on the record, the appeal against him is incompetent and since there was a joint application on behalf of all the respondents which was dealt with and decided by a common order by the learned Magistrate, the appeal against the other respondents must also be held to be incompetent. The impugned order having become final as against the deceased T. A. Kolalkar, the present appeal against other respondents should, according to the argument, be held to be incompetent because the reversal of the impugned order as against them would give rise to conflicting decisions on the point. Recently this Court disallowed a similar objection in Indian Oxygen Ltd. v. Shri Ram Adhar Singh, Civil Appeal No 1444 of 1966 D/- 24-9-1968 (SC) and when the attention of the respondents' learned counsel was drawn to that decision, the objection was not seriously pressed.

5. We now turn to the merits of the appeal. The word "worker" is defined in Section 2 (1) of the Factories Act to mean "a person employed directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or

premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process." This definition seems to us to be fairly wide because it takes within its sweep not only persons employed in any manufacturing process but also in cleaning any part of the machinery or premises used for a manufacturing process and goes far beyond the direct connection with the manufacturing process by extending it to other kinds of work which may either be incidental to or connected with not only the manufacturing process itself but also the subject of the manufacturing process. The word "manufacturing process" is defined in Section 2 (k) of the Factories Act in fairly wide language. It means any process for:

"(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water or sewage, or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;"

6. Now the conclusion of the learned Additional District Judge on the nature of work of the respondents, which, in our opinion, being one of fact, must be held to be binding on the High Court on revision and also not open to reassessment on the merits in this Court on special leave to appeal from the order of the High Court on revision, is that, the time-keepers prepare the pay sheets of the workshop staff, maintain leave account, dispose of settlement cases and maintain records for statistical purposes. Fourteen of the respondents, according to this conclusion, are time-keepers who maintain attendance of the staff, job card particulars of the various jobs under operation and time sheets of the staff working on various shops dealing with the production of Railway spare-parts and repairs etc. Four of the respondents are head time-keepers entrusted with the task of supervising the work of other respondents. The question arises if on this conclusion it can

be held that as a matter of law the respondents fall outside the definition of "worker" as contemplated by Section 2 (1) of the Factories Act and that the High Court erred in dismissing the revision.

7. The appellant's learned counsel has submitted that the expression "incidental to" or "connected with" connotes a direct connection with the manufacturing process and therefore if the duties assigned to the respondents have no such direct connection with the manufacturing process then they cannot fall within the purview of the word "worker." In support of his submission he has referred to some law dictionaries. In Law Lexicon in British India by Ramanathan Iyer "incidental power" is stated to be, power that is directly and immediately appropriate to the existence of the specific power granted and not one that has a slight or remote relation to it. The word "incidental" in the expression "incidental labour" as used in Mechanic's Lien Statutes allowing liens for work and labour performed in the construction, repairs etc. of a building etc. is stated in this Law Lexicon to mean labour directly done for and connected with or actually incorporated in the building or improvement: service indirectly or remotely associated with the construction work is not covered by this expression. Reference has next been made by the counsel to the Law Dictionary by Ballentine where also the expression "incidental power" is stated in the same terms. In Stroud's Judicial Dictionary the meaning of the words "incident" and "incidental" as used in various English statutes have been noticed. We do not think they can be of much assistance to us. The decision in *Haydon v. Taylor*, (1863) 122 ER 554 noticed in this book at first sight appeared to us to be of some relevance, but on going through it, we do not find it to be of much help in construing the statutory provisions with which we are concerned. Similarly the decision in *Frederick Hayes Whympers v. John Jones Harney*, (1865) 144 ER 436 seems to be of little guidance.

8. On behalf of the respondents our attention has been drawn to a decision of this Court in *Nagpur Electric Light and Power Co. Ltd. v. Regional Director Employees State Insurance Corporation*, 1967-3 SCR 92=(AIR 1967 SC 1364). This decision deals with the Employees' State Insurance Act and on a comparison of the definition of the word "employee" as

contained in Section 2 (9) of that Act with the definition of the word "worker" in Section 2 (1) of the Factories Act, it is observed that the former definition is wider than the latter. It is further added that the benefit of the Factories Act does not extend to field workers working outside the factory whereas the benefit of the Employees' State Insurance Act extends *inter alia* to the employees mentioned in Section 2 (9) (i) whether working inside the factory or establishment or elsewhere. Reliance has, however, been placed on behalf of the respondents on the observations at page 99 of the report (of SCR) = (at p. 1368 of AIR) where reference is made to the clerks entrusted with the duty of time-keeping and it is observed that all these employees are employed in connection with the work of the factory. A person doing non-manual work has been held in this case to be included in the word "employee" within the meaning of Section 2 (9) (i) if employed in connection with the work of the factory. The ratio of this decision which is concerned with the construction of different statutory language intended to serve a different object and purpose is of no direct assistance in construing the definition of the word "worker" as used in the Factories Act.

9. The respondents' counsel has then submitted that the previous history of the Act throws helpful light on the legislative intendment and in this connection he has referred to the definition of the word "worker" in the Factories Act XXV of 1934. The word "worker" in Section 2 (h) of that Act was defined to mean:

"a person employed, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on."

10. It is argued that the deletion of the words conveying exclusion of persons solely employed in a clerical capacity in a place where no manufacturing process is carried on suggests that the present definition of "worker" is wide enough to take within its fold even those persons who are employed solely in clerical capacity if otherwise they fall within the definition.

The appellant's counsel has, on his part, by reference to the definition in the Act of 1934, argued that the deletion of the word "whatsoever" after "any other kind of work" is indicative of the legislative intention to restrict the scope of "any other kind of work" in the current Act.

11. The Factories Act was enacted to consolidate and amend the law regulating labour in factories. It is probably true that all legislation in a Welfare State is enacted with the object of promoting general welfare; but certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social reforms. The enactments with which we are concerned, in our view, belong to this category and, therefore, demand an interpretation liberal enough to achieve the legislative purpose, without doing violence to the language. The definition of "worker" in the Factories Act, therefore, does not seem to us to exclude those employees who are entrusted solely with clerical duties, if they otherwise fall within the definition of the word "worker". Keeping in view the duties and functions of the respondents as found by the learned Additional District Judge, we are unable to find anything legally wrong with the view taken by the High Court that they fall within the definition of the word "worker". Deletion of the word "whatsoever" on which the appellant's counsel has placed reliance does not seem to make much difference because that word was, in our view, redundant.

12. We have not been persuaded to hold that the High Court was in error in affirming the decision of the learned Additional District Judge. In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 491
(V 57 C 108)

(From Patna: AIR 1969 Pat 355)

J. C. SHAH AND K. S. HEGDE, JJ.

The Patna Electric Supply Co. Ltd.,
Petitioner v. The Patna Municipal Corporation and others, Respondents.

Civil Appeal No. 418 of 1969, D/- 9-10-1969.

Electricity Act (1910), Sec. 51 — Scope
— Demand by Municipal Corporation of

LM/LM/F172/69/SSG/M.

fee for lands occupied by Electric Supply Company for fixing poles on corporation area — Dispute between company and corporation cannot be referred to arbitration under Sec. 15 of Telegraph Act — AIR 1969 Pat 355, Reversed — (Telegraph Act (1885) Secs. 15, 3 (6)).

Section 51 of Electricity Act merely empowers the State Government to confer on the licensee certain powers which can be exercised by a telegraph authority under the Telegraph Act. It does not by reference incorporate into the Electricity Act all the provisions of the Telegraph Act. (Para 5)

Merely because some of the powers conferred under the Telegraph Act on the telegraph authority could be conferred on a licensee under the Electricity Act, it does not follow that all the rights and liabilities of a licensee under the Electricity Act are governed by the provisions of the Telegraph Act. (Para 6)

Section 15 of Telegraph Act can be called into aid for the determination of any dispute, the dispute must arise between the Telegraph authority and a local authority. A licensee under the Indian Electricity Act cannot be considered as a Telegraph authority, an expression defined in Section 3 (6) of the Telegraph Act. Further that the disputes that can be referred to arbitration under that provision are only those referred to in that section and no other. (Para 8)

Hence, dispute between licensee, a Electric Supply Company and a Municipal Corporation regarding demand by latter of fee for lands occupied by former company for fixing electric poles on corporation area cannot be referred to arbitration under Sec. 15 of Telegraph Act. AIR 1969 Pat 355, Reversed. (Para 9)

The following Judgment of the Court was delivered by

HEGDE, J.— This appeal has been brought on the strength of the certificate granted by the High Court of Patna. The appellant moved that High Court under Article 226 of the Constitution to issue a writ in the nature of a writ of Mandamus calling upon the respondents to show cause why the demands made on behalf of the 1st respondent Corporation and the notices issued on its behalf Annexures (H) and (K) be not quashed and cancelled and the respondents restrained from making similar demands in future. The High Court did not enter into the merits of the application. It rejected the application on the sole ground that the proper remedy

available to the petitioner was to move the Central Government under Section 15 of the Indian Telegraph Act, 1885.

2. The petitioner is a company incorporated under the Indian Companies Act. It holds a licence to supply electricity within the limits of Patna Municipal Corporation. For the purpose of transmission of electric energy, it had to place overhead lines. In that connection it erected several electric poles over the lands belonging to the Municipal Corporation. On December 8, 1967, the Administrator of the Municipal Corporation demanded from the appellant-petitioner fee for the lands occupied by it for fixing electric poles in the Corporation area. In that connection it called upon the petitioner to intimate the total number of electric poles erected within the limits of the Corporation and also the area occupied by each pole. The petitioner protested against that demand as per its letter dated December 26, 1967. It denied any liability to pay rent in respect of the poles fixed. On the same day namely December 26, 1967, the Administrator issued an order imposing a ground rent of Rs. 1/50 paise per pole per month and forwarded a bill for Rs. 51,300/- in respect of the rent alleged to be due for the month of December 1967. Therein it held out a threat that if the rent demanded is not paid, coercive processes under Sections 205 and 206 of the Patna Municipal Corporation Act would be taken against the petitioner. The petitioner again repudiated its liability to pay any rent as per its letter of December 30, 1967 and requested the Administrator to let the petitioner know the legal basis on which the rent is demanded. As per its letter of January 24, 1968, the Deputy Administrator of the Corporation informed the petitioner that the levy was made in pursuance of the power conferred on the Corporation under Section 262 of the Patna Municipal Corporation Act. By the letter dated January 18, 1968, the Resident Engineer of the petitioner company informed the Corporation that it had no power to levy the rent in question under the aforementioned Sec. 262. But the Administrator again asserted the Corporation's right to act under that provision as per his letter dated January 30, 1968. On February 5, 1968, the Assistant Administrator claimed a sum of Rs. 1, 53, 900/- as arrears of rent. On March 7, 1968, another bill for Rs. 51,300/- as arrears of rent for the month of March,

1968, was forwarded to the petitioner company by the Administrator. Being apprehensive that coercive steps will be taken against the petitioner-company, it moved the High Court under Article 226 of the Constitution for the reliefs mentioned earlier.

3. The petition was opposed by the Corporation on various grounds but the High Court did not examine any one of those grounds. On the other hand it rejected the application on the sole ground that the only method prescribed by law for resolving the controversy between the petitioner-company and the Corporation was that provided by Section 15 of the Indian Telegraph Act, 1885.

4. In our opinion the High Court has misread the provisions of the Indian Electricity Act, 1910 and the Indian Telegraph Act, 1885. The High Court purported to have based its decision on Section 51 of the Indian Electricity Act. That section reads thus:

"Notwithstanding anything in Secs. 12 to 16 (both inclusive) and Sections 18 and 19, the (State Government) may, by order in writing, for the placing of (electric supply-lines, appliances and apparatus for the transmission of energy or for the purpose of telephonic or telegraphic communications necessary for the proper-co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying energy to the public under this Act), subject to such conditions and restrictions (if any) as the (State Government) may think fit to impose, and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph authority possesses under that Act, with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained by the Government or to be so established or maintained."

5. Under notification No. 64/Elec. dated 11th August, 1966, the State Government conferred upon the petitioner powers for placing of electric supply-lines appliances and apparatus for the transmission and distribution of the energy by it within the area of its supply which the telegraph authority possesses under Sections 10 to 18 and 19A of the Indian Telegraph Act with respect to placing of telegraph lines and posts. Section 51 merely empowers the State Government to confer on the licensee certain powers which can be exercised by a telegraph

authority under the Indian Telegraph Act. It does not by reference incorporate into the Indian Electricity Act all the provisions of the Indian Telegraph Act.

6. Merely because some of the powers conferred under the Indian Telegraph Act on the telegraph authority could be conferred on a licensee under the Indian Electricity Act, it does not follow that all the rights and liabilities of a licensee under the Indian Electricity Act are governed by the provisions of the Indian Telegraph Act.

7. Section 15 of the Indian Telegraph Act reads thus:

"(1) If any dispute arises between the telegraph authority and a local authority in consequence of the local authority refusing the permission referred to in Section 10, clause (c), or prescribing any condition under Section 12, or in consequence of the telegraph authority omitting to comply with a requisition made under Section 13, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by such officer as the (Central Government) may appoint either generally or specially in this behalf.

(2) An appeal from the determination of the officer so appointed shall lie to the (Central Government) and the order of the (Central Government) shall be final."

8. Before this provision can be called into aid for the determination of any dispute, the dispute must arise between the Telegraph authority and a Local authority. A licensee under the Indian Electricity Act cannot be considered as a Telegraph authority, an expression defined in Section 3 (6) of the Telegraph Act. Further that the disputes that can be referred to arbitration under that provision are only those referred to in that section and no other.

9. In our opinion the High Court erred in rejecting the petition on the ground that the dispute in question should be referred to arbitration under Section 15 of the Indian Telegraph Act.

10. Mr. S. V. Gupte, learned Counsel for the Corporation did not support the reasons given by the High Court in support of its judgment. On the other hand he contended that on the basis of the averments made in the application, the relief asked for by the petitioner could not have been granted and therefore the High Court was right in rejecting the same. The High Court has not consider-

ed this question. Hence we do not propose to go into the same.

11. In the result this appeal is allowed, the order of the High Court is set aside and the case remitted to the High Court for disposal according to law. The petitioner-appellant is entitled to his costs of this appeal from the 1st respondent.

Appeal allowed.

AIR 1970 SUPREME COURT 494 (V 57 C 109)

(From Madras: 1969 Mad LW (Cr) 98)

J. M. SHELAT, V. BHARGAVA, C. A.
VAIDIALINGAM, K. S. HEGDE,
A. N. GROVER, JJ.

M/s. Rayala Corporation (P) Ltd., and another, Appellants v. The Director of Enforcement, New Delhi, Respondent; Advocate-General, Tamil Nadu, Intervener.

Criminal Appeals Nos. 18 and 19 of 1969, D/- 2-5-1969 and 23-7-1969.

(A) Foreign Exchange Regulation Act (1947), Sections 23 (1) (b), 23 (1) (a) and 23-D — Vires — Provision of Section 23 (1) (b) does not violate Article 14 of the Constitution.

It cannot be said that the provisions of Section 23 (1) (b) of the Foreign Exchange Regulation Act violate Article 14 of the Constitution by providing for a punishment heavier and severer than the penalty provided for the same acts under Section 23 (1) (a) of the Act. This is because the effect of Section 23-D of the Act is that the choice in respect of the proceeding to be taken under Section 23 (1) (a) or Section 23 (1) (b) has not been left to the unguided and arbitrary discretion of the Director of Enforcement, but is governed by principles indicated by that section. Parliament, by Foreign Exchange Regulation (Amendment) Act 39 of 1957, amended Section 23 (1) and, at the same time, also introduced Sec. 23-D in the Act. These two Sections 23 (1) and 23-D (1) must be read together, so that the procedure laid down in Section 23-D (1) is to be followed in all cases in which proceedings are intended to be taken under Section 23 (1). The effect of this interpretation is that, whenever there is any contravention of any section or rule mentioned in Section 23 (1), the Director of Enforcement must first proceed under the principal clause of Section 23-D (1)

and initiate proceedings for adjudication of penalty. He cannot at that stage, at his discretion, choose to file a complaint in a Court for prosecution of the person concerned for the offence under Sec. 23 (1) (b). The Director of Enforcement can only file a complaint by acting in accordance with the proviso to Section 23-D (1), which clearly lays down that the complaint is only to be filed in those cases where, at any stage of the inquiry the Director of Enforcement comes to the opinion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. Until this requirement is satisfied, he cannot make a complaint to the Court for prosecution of the person concerned under Section 23 (1) (b). The choice of the proceeding to be taken against the person, who is liable for action for contravention under Section 23 (1), is thus, not left entirely to the discretion of the Director of Enforcement, but the criterion for making the choice is laid down in the proviso to Section 23-D (1). Thus, whenever, there is a contravention by any person which is made punishable under either clause (a) or clause (b) of Section 23 (1), the Director of Enforcement must first initiate proceedings under the principal clause of Section 23-D (1) and he is empowered to file a complaint in Court only when he finds that he is required to do so in accordance with the proviso. It is by resorting to the proviso only that he can place that person in greater jeopardy of being liable to a more severe punishment under Section 23 (1) (b) of the Act. AIR 1962 SC 1764, Rel. on.

(Paras 5, 6, 7 & 8)

(B) Foreign Exchange Regulation Act (1947), Sections 4 (1), 5 (1), 9, 23-D (1) and proviso, and 23 (3) — Contravention of Sections 4 (1), 5 (1) and 9 — Enquiry under Section 23-D (1) instituted by issue of show cause notice — Complaint made to the Court without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty — Complaint, held was filed without complying with the proviso and was invalid. 1969 Mad LW (Cr) 98, Reversed.

(Para 12)

(C) Defence of India Rules (1962), Rules 132-A (2) and 132-A (4) — Violation of Rule 132-A (2) — Prosecution launched on 17-3-1968 after Rule 132-A (2) was omitted by Defence of India Amendment Rules 1965 — Prosecution is illegal. 1969 Mad LW (Cr) 98, Reversed.

The language contained in clause 2 of the Defence of India (Amendment) Rules, 1965 whereby Rule 132-A (2) was omitted can only afford protection to action already taken while Rule 132-A (2) was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after Rule 132-A (2) had ceased to exist. On this interpretation, the complaint made for the offence under R. 132-A (4) of the D. I. Rules after 1st April 1965, when Rule 132-A (2) was omitted, has to be held invalid. 1969 Mad LW (Cr) 98, Reversed, AIR 1951 SC 301, Rel. on; AIR 1951 All 703, Approved; 1947 AC 362, AIR 1959 Madh Pra 93 & AIR 1947 FC 38, Dist. (Paras 12 and 16)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1764 (V 49)=
 (1963) 2 SCR 297, Shanti Prasad Jain v. Director of Enforcement 8
 (1959) AIR 1959 Madh Pra 93 (V 46) = 1959 Cri LJ 325, State of Madhya Pradesh v. Hiralal Sutwala 15
 (1952) AIR 1952 SC 75 (V 39)= 1952-3 SCR 284= 1952 Cri LJ 510, State of W. B. v. Anwar Ali 8
 (1951) AIR 1951 SC 301 (V 38)= 1951 SCR 621= 52 Cri LJ 1103, S. Krishnan v. State of Madras 13
 (1951) AIR 1951 All 703 (V 38)= 52 Cri LJ 1094, Jugmendar Das v. State 13, 16
 (1947) AIR 1947 FC 38 (V 34)= 1947 FCR 141= 48 Cri LJ 886, J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. King-Emperor 16
 (1947) 1947 AC 362= 1947-1 All ER 205, Wicks v. Director of Public Prosecutions 14, 16

Mr. A. K. Sen, Senior Advocate, (M/s. N. C. Raghavachari, W. S. Sitaram and R. Gopalakrishnan, Advocates with him), for Appellants; Mr. S. T. Desai, Senior Advocate (M/s. B. D. Sharma and S. P. Nayar, Advocates, with him), for Respondent; Mr. P. R. Gokulakrishnan, Advocate-General of Tamil Nadu (Mr. A. V. Rangam Advocate with him), for Intervener.

ORDER OF THE COURT

BHARGAVA, J. (On behalf of Shelat, Vaidialingam, Hegde and Grover, JJ.):— (2-5-1969):— We have come to the finding that this was a fit case where the High Court of Madras should have allowed the applications under Section

561-A of the Code of Criminal Procedure and should have quashed the proceedings taken on the basis of the complaint dated 17th March, 1968. Consequently, the appeals are allowed. The order of the High Court is set aside and the proceedings are quashed. The detailed reasons will follow.

[The Judgment of the Court (giving the detailed reasons for the above order) was delivered by]

BHARGAVA, J.: (23-7-1969)— These appeals, by certificate, challenging a common Order of the High Court of Madras dismissing applications under Section 561-A of the Code of Criminal Procedure presented by the appellants in the two appeals for quashing proceedings being taken against them in the Court of the Chief Presidency Magistrate, Madras, on the basis of a complaint filed on 17th March, 1968 by the respondent the Director of Enforcement, New Delhi. The Rayala Corporation Private Ltd., appellant in Criminal Appeal No. 18 of 1969, was accused No. 1 in the complaint, while one M. R. Pratap, Managing Director of accused No. 1, appellant in Criminal Appeal No. 19/1969 was accused No. 2. The circumstances under which the complaint was filed may be briefly stated.

2. The premises of accused No. 1 were raided by the Enforcement Directorate on the 20th and 21st December, 1966 and certain records were seized from the control of the Manager. Some enquiries were made subsequently and, thereafter, on the 25-8-1967, a notice was issued by the respondent to the two accused to show cause why adjudication proceedings should not be instituted against them for violation of Secs. 4 and 9 of the Foreign Exchange Regulation Act VII of 1947 (hereinafter referred to as "the Act") on the allegation that a total sum of 2,44,713.70 Swedish Kronars had been deposited in a Bank account in Sweden in the name of accused No. 2 at the instance of accused No. 1 which had acquired the foreign exchange and had failed to surrender it to an authorised dealer as required under the provisions of the Act. They were called upon to show cause in writing within 14 days of the receipt of the notice. Thereafter, some correspondence went on between the respondent and the two accused and, later, on 4th November, 1967, another notice was issued by the respondent ad-

dressed to accused No. 2 alone stating that accused No. 2 had acquired a sum of Sw. Krs. 88,913.09 during the period 1963 to 1965 in Stockholm, was holding that sum in a bank account, and did not offer or cause it to be offered to the Reserve Bank of India on behalf of the Central Government, so that he had contravened the provisions of Section 4 (1) and Section 9 of the Act, and affording to him an opportunity under Section 23 (3) of the Act of showing, within 15 days from the receipt of the notice that he had permission or special exemption from the Reserve Bank of India in his favour for acquiring this amount of foreign exchange and for not surrendering the amount in accordance with law. A similar show cause notice was issued to accused No. 1 in respect of the same amount on 20th January, 1968, mentioning the deposit in favour of accused No. 2 and failure of accused No. 1 to surrender the amount, and giving an opportunity to accused No. 1 to produce the permission or special exemption from the Reserve Bank of India. On the 16th March, 1968, another notice was issued addressed to both the accused to show cause in writing within 14 days of the receipt of the notice why adjudication proceedings as contemplated in Section 23-D of the Act should not be held against them in respect of a sum of Sw. Krs. 1,55,801.41 which were held in a bank account in Stockholm in the name of accused No. 2 and in respect of which both the accused had contravened the provisions of Sections 4 (3), 4 (1), 5 (1) (e) and 9 of the Act. The notice mentioned that it was being issued in supersession of the first show cause notice dated 25th August, 1967, and added that it had since been decided to launch a prosecution in respect of Sw. Krs. 88,913.09. The latter amount was the amount in respect of which the two notices of 4th November, 1967 and 20th January, 1968 were issued to the two accused, while this notice of 16th March, 1968 for adjudication proceedings related to the balance of the amount arrived at by deducting this sum from the original total sum of Sw. Krs. 2,44,713.70. The next day, on 17th March, 1968, a complaint was filed against both the accused in the Court of the Chief Presidency Magistrate, Madras, for contravention of the provisions of Sections 4 (1), 5 (1) (e) and 9 of the Act punishable under Section 23 (1) (b) of the Act. In addition, the complaint also charged both the accused

with violation of Rule 132-A (2) of the Defence of India Rules (hereinafter referred to as "the D. I. Rs.") which was punishable under Rule 132-A (4) of the said Rules. Thereupon, both the accused moved High Court for quashing the proceedings sought to be taken against them on the basis of this complaint. Those applications having been dismissed, the appellants have come up in these appeals challenging the order of the High Court dismissing their applications and praying for quashing of the proceedings being taken on the basis of that complaint.

3. In these appeals, Mr. A. K. Sen, appearing on behalf of the appellants has raised three points. In respect of the prosecution for violation of Sections 4 (1), 5 (1) (e) and 9 of the Act punishable under Section 23 (1) (b) of the Act the principal ground raised is that Sec. 23 (1) (b) of the Act is ultra vires Article 14 of the Constitution inasmuch as it provides for a punishment heavier and severer than the punishment or penalty provided for the same acts under Section 23 (1) (a) of the Act. In the alternative, the second point taken is that, even if Section 23 (1) (b) is not void, the complaint in respect of the offences punishable under that section has not been filed properly in accordance with the proviso to Section 23-D (1) of the Act, so that proceedings cannot be competently taken on the basis of that complaint. The third point raised relates to the charge of violation of Rule 132-A (2) of the D. I. Rs. punishable under Rule 132-A (4) of those Rules, and is to the effect that Rule 132-A of the D. I. Rs. was omitted by a notification of the Ministry of Home Affairs dated 30th March, 1965 and, consequently, a prosecution in respect of an offence punishable under that Rule could not be instituted on 17th March, 1968 when that Rule had ceased to exist. On these three grounds, the order quashing the proceedings being taken on the complaint in respect of all the offences mentioned in it has been sought in these appeals.

4. To appreciate the first point raised before us and to deal with it properly, we may reproduce below the provisions of Section 23 and Section 23-D (1) of the Act:—

"23. Penalty and procedure.— (1) If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10, sub-section (2) of Section 12, Section 18, Section 18-A or Section 18-B or of any

rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A) If any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1B) Any Court trying a contravention under sub-section (1) or sub-section (1A) and the authority adjudging any contravention under clause (a) of sub-section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or any other money or property, in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.—For the purposes of the sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits.

(2) Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), it shall be lawful for any magistrate of the first class, specially empowered in this behalf by the State Government, and for any presidency magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(a) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(aa) of any offence punishable under sub-section (2) of Section 191,—

(i) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(ii) where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement, or;

(b) of any offence punishable under sub-section (1A) of this section or Section 23-F, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

(4) Nothing in the first proviso to Section 188 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), shall apply to any offence punishable under this section."

* * * *

23D. Power to adjudicate. —(1) For the purpose of adjudging under clause (a) of sub-section (1) of Section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of the said Section 23:

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the Court".

A plain reading of Section 23 (1) of the Act shows that under this sub-section

provision is made for action being taken against any person who contravenes the provisions of Sections 4, 5, 9, 10, 12 (2), 18, 18A or 18B or of any rule, direction or order made thereunder; and clauses (a) and (b) indicate the two different proceedings that can be taken for such contravention. Under clause (a), the person is liable to a penalty only, and that penalty cannot exceed three times the value of the foreign exchange in respect of which the contravention has taken place, or Rs. 5,000, whichever is more. This penalty can be imposed by an adjudication made by the Director of Enforcement in the manner provided in Sec. 23D of the Act. The alternative punishment that is provided in clause (b) is to be imposed upon conviction by a Court when the Court can sentence the person to imprisonment for a term which may extend to two years, or with fine, or with both. Clearly, the punishment provided under Section 23 (1) (b) is severer and heavier than the penalty to which the person is made liable if proceedings are taken under Sec. 23 (1) (a) instead of prosecuting him in a Court under Section 23 (1) (b). The argument of Mr. Sen is that this section lays down no principles at all for determining when the person concerned should be proceeded against under Section 23 (1) (a) and when under Section 23 (1) (b), and it would appear that it is left to the arbitrary discretion of the Director of Enforcement to decide which proceedings should be taken. The liability of a person for more or less severe punishment for the same act at the sole discretion and arbitrary choice of the Director of Enforcement, it is urged, denies equality before law guaranteed under Article 14 of the Constitution.

5. The submission made would have carried great force with us but for our view that the effect of Section 23D of the Act is that the choice in respect of the proceeding to be taken under Section 23 (1) (a) or Section 23 (1) (b) has not been left to the unguided and arbitrary discretion of the Director of Enforcement, but is governed by principles indicated by that section. In this connection, it is pertinent to note that Section 23 (1) of the Act as originally enacted in 1947 did not provide for alternative punishment for the same contravention and contained only one single provision under which any person contravening any of the provisions of the Act or of any rule, direction or order made there-

under was punishable with imprisonment for a term which could extend to two years or with fine or with both, with the additional clause that any Court trying any such contravention might, if it thought fit and in addition to any sentence which it might impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated. No question of the applicability of Article 14 of the Constitution could, therefore, arise while the provision stood as originally enacted.

6. Parliament, by Foreign Exchange Regulation (Amendment) Act XXXIX of 1957, amended Section 23 (1) and, at the same time, also introduced Section 23-D in the Act. It was by this amendment that two alternative proceedings for the same contravention were provided in Section 23 (1). In thus introducing two different proceedings, Parliament put in the forefront proceedings for penalty to be taken by the Director of Enforcement by taking up adjudication, while the punishment to be awarded by the Court, upon conviction, was mentioned as the second type of proceeding that could be resorted to. Section 23D (1) is also divisible into two parts. The first part lays down what the Director of Enforcement has to do in order to adjudge penalty under Section 23 (1) (a), and the second part, contained in the proviso, gives the power to the Director of Enforcement to file a complaint instead of imposing a penalty himself. In our opinion, these two Sections 23 (1) and 23D (1) must be read together, so that the procedure laid down in Sec. 23D (1) is to be followed in all cases in which proceedings are intended to be taken under Sec. 23 (1). The effect of this interpretation is that, whenever there is any contravention of any section or rule mentioned in Section 23 (1), the Director of Enforcement must first proceed under the principal clause of Section 23D (1) and initiate proceedings for adjudication of penalty. He cannot at that stage, at his discretion, choose to file a complaint in a Court for prosecution of the person concerned for the offence under Section 23 (1) (b). The Director of Enforcement can only file a complaint by acting in accordance with the proviso to Section 23D (1), which clearly lays down that the complaint is only to be filed in those cases where, at any stage of the inquiry, the Director

of Enforcement comes to the opinion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. Until this requirement is satisfied, he cannot make a complaint to the Court for prosecution of the person concerned under Section 23 (1) (b). The choice of the proceeding to be taken against the person, who is liable for action for contravention under Section 23 (1), is, thus, not left entirely to the discretion of the Director of Enforcement, but the criterion for making the choice is laid down in the proviso to Section 23D (1). It cannot possibly be contended, and no attempt was made by Mr. Sen to contend, that, if we accept this interpretation that the right of the Director of Enforcement to make a complaint to the Court for the offence under Section 23 (1) (b) can be exercised only in those cases where, in accordance with the proviso, he comes to the opinion that the penalty which he is empowered to impose would not be adequate, the validity of Section 23 (1) (b) of the Act can still be challenged.

7. In this connection, it was urged before us that the language of the principal clause of Section 23D (1) taken together with the language of the proviso does not justify an interpretation that a complaint for an offence under Section 23 (1) (b) cannot be made by the Director of Enforcement except in accordance with the proviso, particularly because the principal clause of Section 23D (1) merely lays down the procedure that has to be adopted by the Director of Enforcement when proceeding under Section 23 (1) (a), and contains no words indicating that such a proceeding must invariably be resorted to by him whenever he gets information of a contravention mentioned in Section 23 (1). The language does not contain any words creating a bar to his proceeding to file a complaint straightway instead of taking proceedings for adjudication under Section 23D (1). It is true that neither in Section 23 (1) itself nor in Section 23D (1) has the Legislature used specific words excluding the filing of a complaint before proceedings for adjudication are taken under Section 23D (1). If any such words had been used, no such controversy could have been raised as has been put forward before us in these appeals. We have, however, to gather the intention of the Legislature from the enactment as a whole. In this connec-

tion, significance attaches to the fact that Section 23D (1) was introduced simultaneously with the provision made for alternative proceedings under Section 23 (1) in its clauses (a) and (b). It appears to be obvious that the Legislature adopted this course so as to ensure that all proceedings under Section 23 (1) are taken in the manner laid down in Section 23D (1). Parliament must be credited with the knowledge that, if provision is made for two alternative punishments for the same act one differing from the other without any limitations, such a provision would be void under Article 14 of the Constitution; and that is the reason why Parliament simultaneously introduced the procedure to be adopted under Section 23D (1) in the course of which the Director of Enforcement is to decide whether a complaint is to be made in Court and under what circumstances he can do so. We have also to keep in view the general principle of interpretation that, if a particular interpretation will enure to the validity of a law, that interpretation must be preferred. In these circumstances, we have no hesitation in holding that, whenever there is a contravention by any person which is made punishable under either clause (a) or clause (b) of Section 23 (1), the Director of Enforcement must first initiate proceedings under the principal clause of Section 23D (1) and he is empowered to file a complaint in Court only when he finds that he is required to do so in accordance with the proviso. It is by resorting to the proviso only that he can place that person in greater jeopardy of being liable to a more severe punishment under Section 23 (1) (b) of the Act.

8. The view we have taken is in line with the decision of this Court in *Shanti Prasad Jain v. The Director of Enforcement*, (1963) 2 SCR 297 = (AIR 1962 SC 1764) where this Court considered the validity of Section 23 (1) (a), and Section 23D which were challenged on the ground of two alternative procedures being applicable for awarding punishment for the same act. The Court noticed the position in the following words:—

“It will be seen that when there is a contravention of Section 4 (1), action with respect to it is to be taken in the first instance by the Director of Enforcement. He may either adjudge the matter himself in accordance with Section 23 (1) (a), or he may send it on to a Court if he considers that a more severe penalty than

he can impose is called for. Now, the contention of the appellant is that when the case is transferred to a Court, it will be tried in accordance with the procedure prescribed by the Criminal Procedure Code, but that when the Director himself tries it, he will follow the procedure prescribed therefor under the Rules framed under the Act, and that when the law provides for the same offence being tried under two procedures, which are substantially different, and it is left to the discretion of an executive officer whether the trial should take place under the one or the other of them, there is clear discrimination, and Article 14 is contravened. Therefore, Section 23 (1) (a) must, it is argued, be struck down as unconstitutional and the imposition of fine on the appellant under that section set aside as illegal."

The Court then distinguished the provisions of the Act with the law considered in the case of *State of West Bengal v. Anwar Ali*, (1952) 3 SCR 284= (AIR 1952 SC 75) and held:—

"Section 23D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a Court, and that too only when he considers that a more severe punishment than what he is authorised to impose should be awarded."

On this view about the effect of Section 23D, the Court gave the decision that the power conferred on the Director of Enforcement under Section 23D to transfer cases to a Court is not unguided and arbitrary, and does not offend Article 14 of the Constitution; and Section 23 (1) (a) cannot be assailed as unconstitutional. In that case, the argument was that Section 23 (1) (a) should be struck down, because the procedure prescribed by it permitted proceedings to be taken by the Director of Enforcement himself which procedure did not confer the same rights on the defence as the procedure prescribed for trial if the Director of Enforcement filed a complaint for the offence under Section 23 (1) (b). In the case before us, it is Section 23 (1) (b) which is challenged and on a slightly different ground that it provides for a higher punishment than that provided by Section 23 (1) (a). The answer to both the questions is found in the view taken by us in the present case as well as by this Court in the case of *Shanti Prasad Jain*, (1963) 2 SCR 297= (AIR 1962 SC 1764) (supra) that the Director of Enforcement,

though he has power to try the case under Section 23 (1) (a), can only send the case to the Court if he considers that a more severe punishment than what he is authorised to impose should be awarded. The Court in that case also thus accepted the principle that Section 23D limits entirely the procedure the Director of Enforcement has to observe when deciding whether the punishment should be under Section 23 (1) (a) or under Section 23 (1) (b).

9. However, we consider that, in this case, there is considerable force in the second point urged by Mr. Sen on behalf of the appellants that the respondent, in filing the complaint on 17th March, 1968, did not act in accordance with the requirements of the proviso to Section 23D (1). We have held above that the proviso to Section 23D (1) lays down the only manner in which the Director of Enforcement can make a complaint and this provision has been laid down as a safeguard to ensure that a person, who is being proceeded against for a contravention under Section 23 (1), is not put in danger of higher and severer punishment at the choice and sweet-will of the Director of Enforcement. When such a safeguard is provided by legislature, it is necessary that the authority, which takes the step of instituting against that person proceedings in which severer punishment can be awarded, complies strictly with all the conditions laid down by law to be satisfied by him before instituting that proceeding. In the present case, therefore, we have to see whether the requirements of the proviso to Section 23D (1) were satisfied at the stage when the respondent filed the impugned complaint on 17th March, 1968.

10. The proviso to Section 23D (1) lays down that the complaint may be made at any stage of the enquiry but only if, having regard to the circumstances of the case, the Director of Enforcement finds that the penalty which he is empowered to impose would not be adequate. It was urged by Mr. Sen that, in this case, the complaint was not filed as a result of the enquiry under the principal clause of Section 23D (1) at all and, in any case, there was no material before the respondent on which he could have formed the opinion that the penalty which he was empowered to impose would not be adequate in respect of the sum of Sw. Krs. 88,913.09 which, it was alleged, had been acquired by the two accused during the

period 1963 to 1965 and kept in deposit against law. Arguments at some length were advanced before us on the question as to what should be the stage of the enquiry at which the Director of Enforcement should form his opinion and will be entitled to file the complaint in Court. It appears to us that it is not necessary in this case to go into that question. It is true that the enquiry in this case under Section 23D (1) had been instituted by the issue of the show cause notice dated 25th August, 1967, that being the notice mentioned in Rule 3 (1) of the Adjudication Proceedings and Appeal Rules, 1957. On the record, however, it does not appear that, even after the issue of that notice, any such material came before the respondent which could be relevant for forming an opinion that the penalty which he was empowered to impose for the contravention in respect of the sum of Sw. Krs. 88,913.09 would not be adequate. The respondent, in the case of accused No. 2, appears to have formed a prima facie opinion that a complaint should be made against him in Court when he issued the notice on 4th November, 1967 under the proviso to Section 23 (3) of the Act, and a similar opinion in respect of accused No. 1 when he issued the notice on 20th January, 1968 under the same proviso. There is, however, no information on the record to indicate that, by the time these notices were issued, any material had appeared before the respondent in the course of the enquiry initiated by him through the notice dated 25th August, 1967, which could lead to the opinion being formed by the respondent that he will not be in a position to impose adequate penalty by continuing the adjudication proceedings. Even subsequently, when one of the accused replied to the notice, there does not appear to have been brought before the respondent any such relevant material.

11. Mr. S. T. Desai on behalf of the respondent drew our attention to para. 3 (E) of the petition presented by accused No. 1 for certificate under Article 132 (1) and Article 134 (1) (c) of the Constitution in this case which contains the following pleading :—

“In this case, having issued show cause notice dated 25th August, 1967 in respect of the subject matter of the pending prosecution and having taken various acts, taking statements, taking recorded statements, investigations, the respondent did not hold an enquiry for the purpose of

his forming an opinion that the accused is guilty of violations and that the penalty is not adequate and as such, the prosecution filed in C. C. 8756 of 68 is liable to be quashed on this ground.”

Relying on this pleading, Mr. Desai urged that it amounts to an admission by accused No. 1 that, during enquiry, various statements were taken and recorded and investigations made, so that we should not hold that there was no material on the basis of which the respondent could have formed the opinion that it was a fit case for making a complaint. The pleading does not show that any statements were taken or recorded during the course of the enquiry held under S. 23D (1) of the Act in the manner laid down by the Adjudication Proceedings and Appeal Rules 1957. Under these Rules, after a notice is issued, the Director of Enforcement is required to consider the cause shown by such person in response to the notice and, if he is of the opinion that adjudication proceedings should be held, he has to fix a date for the appearance of that person either personally or through his lawyer or other authorised representative. Subsequently, he has to explain to the person proceeded against or his lawyer or authorised representative the offence alleged to have been committed by such person indicating the provisions of the Act or of the Rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place, and then he has to give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry. It is on the conclusion of such an inquiry that the Director can impose a penalty under Section 23 (1) (a). In the present case, there is no material at all to show that any proceedings were taken in the manner indicated by the Rules referred to above. There does not appear to have been any cause shown by either of the two accused, or consideration of such cause by the respondent to decide whether adjudication proceedings should be held. It is true that there is some material to indicate that, after the issue of notice dated 25th August, 1967, some investigations were carried on by the respondent; but those investigations would not be part of the inquiry which had to be held in accordance with Adjudication Proceedings and Appeal Rules, 1957. It appears that, at one stage, before the

complaint was filed, a writ petition was moved under Article 226 of the Constitution in the High Court of Madras praying for the quashing of the notice dated 25th August, 1967. The order made by the High Court on one of the interim applications in connection with that notice shows that, while that writ petition was pending, some investigations were permitted by the Court, but further penal proceedings in pursuance of that notice were restrained. This clearly indicates that whatever statements were recorded by the respondent as mentioned in the petition of accused No. 1 referred to above must have been in the course of investigation and not in the course of the inquiry under Section 23D (1) of the Act. The record before us, therefore, does not show that any material at all was available to the respondent in the course of the enquiry under Section 23D (1) on the basis of which he could have formed an opinion that it was a fit case for making a complaint on the ground that he would not be able to impose adequate penalty. The complaint has, therefore, to be held to have been filed without satisfying the requirements and conditions of the proviso to Section 23D (1) of the Act and is in violation of the safeguard provided by the Legislature for such contingencies. The complaint, insofar as it related to the contravention by the accused of provisions of Sections 4 (1), 5 (1) (e) and 9 of the Act punishable under Section 23 (1) (b) is concerned, is invalid and proceedings being taken in pursuance of it must be quashed.

12. There remains for consideration the question whether proceedings could be validly continued on the complaint in respect of the charge under Rule 132-A (4) of the D. I. Rs. against the two accused. The two relevant clauses of Rule 132-A are as follows:

"132A. (2) No person other than an authorised dealer shall buy or otherwise acquire or borrow from, or sell or otherwise transfer or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange.

* * * *

(4) If any person contravenes any of the provisions of this rule, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both; and any Court trying such contravention may direct that the foreign exchange in respect of which the Court is satisfied that this rule has been

contravened, shall be forfeited to the Central Government."

The charge in the complaint against the two accused was that they had acquired foreign exchange to the extent of Sw. Krs. 88,913.09 in violation of the prohibition contained in Rule 132A (2) during the period when this Rule was in force, so that they became liable to punishment under Rule 132A (4). Rule 132-A as a whole ceased to be in existence as a result of the notification issued by the Ministry of Home Affairs on 30th March, 1965, by which the Defence of India (Amendment) Rules, 1965 were promulgated. Clause 2 of these Amendment Rules reads as under:—

"In the Defence of India Rules, 1962, Rule 132A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things done or omitted to be done under that rule."

The argument of Mr. Sen was that, even if there was a contravention of Rule 132A (2) by the accused when that Rule was in force, the act of contravention cannot be held to be a "thing done or omitted to be done under that rule", so that, after that rule has been omitted, no prosecution in respect of that contravention can be instituted. He conceded the possibility that, if a prosecution had already been started while Rule 132A was in force, that prosecution might have been competently continued. Once the Rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period that the rule was in force. We are inclined to agree with the submission of Mr. Sen that the language contained in clause 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. On this interpretation, the complaint made for the offence under Rule 132A (4) of the D. I. Rs., after 1st April, 1965 when the rule was omitted, has to be held invalid.

13. This view of ours is in line with the general principle enunciated by this Court in the case of *S. Krishnan v. State of Madras*, 1951 SCR 621=(AIR 1951 SC 301) relating to temporary enactments, in the following words:—

"The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires."

Mention may also be made to a decision of a learned Single Judge of the Allahabad High Court in *Seth Jugmendar Das v. State*, AIR 1951 All 703 where a similar view was taken when considering the effect of the repeal of the Defence of India Act, 1939, and the Ordinance No. XII of 1946 which had amended Section 1 (4) of that Act.

14. On the other hand, Mr. Desai on behalf of the respondent relied on a decision of the Privy Council in *Wicks v. Director of Public Prosecutions*, 1947 AC 362. In that case, the appellant, whose case came up before the Privy Council, was convicted for contravention of Regulation 2A of the Defence (General) Regulations framed under the Emergency Powers (Defence) Act, 1939 as applied to British subjects abroad by section 3 (1) (b) of the said Act. It was held that, at the date when the acts, which were the subject-matter of the charge, were committed, the regulation in question was in force, so that, if the appellant had been prosecuted immediately afterwards, the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on February 24, 1946. The trial of the accused took place only in May 1946, and he was convicted and sentenced to four years' penal servitude on May 28. In these circumstances, the question raised in the appeal was: "Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation has expired?" The Privy Council took notice of sub-section (3) of Section II of the Emergency Powers (Defence) Act, 1939 which laid down that "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". It was argued before the Privy Council that the phrase "things previously done" does not cover offences previously committed. This argument was rejected by Viscount Simon on behalf of the Privy Council and it was held that the appellant in that case could be convicted in respect of the

offence which he had committed when the regulation was in force. That case, however, is distinguishable from the case before us inasmuch as, in that case, the saving provision laid down that the operation of that Act itself was not to be affected by the expiry as respects things previously done or omitted to be done. The Act could, therefore, be held to be in operation in respect of acts already committed, so that the conviction could be validly made even after the expiry of the Act in respect of an offence committed before the expiry. In the case before us the operation of Rule 132A of the D. I. Rs. has not been continued after its omission. The language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. The offence alleged against the accused in the present case is in respect of acts done by them which cannot be held to be acts under that rule. The difference in the language thus makes it clear that the principle enunciated by the Privy Council in the case cited above cannot apply to the notification with which we are concerned.

15. Reference was next to a decision of the Madhya Pradesh High Court in *State of Madhya Pradesh v. Hiralal Sutwala*, AIR 1959 Madh Pra 93, but, there again, the accused was sought to be prosecuted for an offence punishable under an Act on the repeal of which Section 6 of the General Clauses Act had been made applicable. In the case before us, Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132A of the D. I. Rs. for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule. If Section 6 of the General Clauses Act had been applied, no doubt this complaint against the two accused for the offence punishable under R. 132A of the D. I. Rs. could have been instituted even after the repeal of that rule.

16. The last case relied upon is *J. K. Gas Plant Manufacturing Co., (Rampur) Ltd. v. King Emperor*, 1947 FCR 141= (AIR 1947 FC 38). In that case, the Federal Court had to deal with the effect of sub-section (4) of Section 1 of the Defence of India Act, 1939 and the Ord-

nance No. XII of 1946 which were also considered by the Allahabad High Court in the case of Seth Jugmender Das (supra). After quoting the amended sub-section (4) of Section 1 of the Defence of India Act, the Court held:—

“The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of Section 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of the temporary statute is that “unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate.”

The Court cited with approval the decision in the case of 1947 AC 362 (supra), and held that, in view of Section 1 (4) of the Defence of India Act, 1939, as amended by Ordinance No. XII of 1946, the prosecution for a conviction for an offence committed when the Defence of India Act was in force, was valid even after the Defence of India Act had ceased to be in force. That case is, however, distinguishable from the case before us in two respects. In that case, the prosecution had been started before the Defence of India Act ceased to be in force and, secondly, the language introduced in the amended sub-sec. (4) of Section 1 of the Act had the effect of making applicable the principles laid down in Section 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. As we have indicated earlier, the notification of the Ministry of Home Affairs omitting Rule 132-A of the D. I. Rs. did not make any such provision similar to that contained in Section 6 of the General Clauses Act. Consequently, it is clear that, after the omission of Rule 132A of the D. I. Rs., no prosecution could be instituted even in respect of an act which was an offence when that Rule was in force.

17. In this connection, Mr. Desai pointed out to us that, simultaneously with the omission of R. 132-A of the D. I. Rs., Section 4 (1) of the Act was amended so

as to bring the prohibition contained in Rule 132A (2) under Section 4 (1) of the Act. He urged that, from this simultaneous action taken, it should be presumed that there was no intention of the Legislature that acts, which were offences punishable under R. 132A of the D. I. Rs., should go unpunished after the omission of that rule. It, however, appears that when Section 4 (1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132A of the D. I. Rs., would continue to remain punishable as an offence of contravention of Section 4 (1) of the Act, nor was any provision made permitting operation of Rule 132A itself so as to permit institution of prosecutions in respect of such offences. The consequence is that the present complaint is incompetent even in respect of the offence under Rule 132A (4). This is the reason why we hold that this was an appropriate case where the High Court should have allowed the applications under Section 561-A of the Code of Criminal Procedure and should have quashed the proceedings on this complaint.

18. Consequently, as already directed by our short Order dated 2nd May, 1969, the appeals are allowed, the order of the High Court rejecting the applications under Section 561A of the Code of Criminal Procedure is set aside, and the proceedings for the prosecution of the appellants are quashed.

Appeals allowed.

AIR 1970 SUPREME COURT 504
(V 57 C 110)

(From: Kerala)*

J. C. SHAH, Ag. C. J. AND
G. K. MITTER, J.

M. C. Chacko, Appellant v. The State Bank of Travancore, Respondent.

Civil Appeal No. 652 of 1966, D/- 23-7-1969.

(A) Transfer of Property Act (1882), Section 100 — Creation of charge on immovable property — No particular form of words needed — Document must disclose intention to create charge — Family arrangement providing for discharge of personal debt of donor out of share of

* (A. S. No. 502 of 1961, D/- 23-11-1964 —Ker.)

LM/AN/D887/69/DVT/D

another did not create a charge on property in favour of the creditor — A. S. No. 502 of 1961, D/- 23-11-1964 (Ker), Reversed.

For creating a charge on immovable property no particular form of words is needed: by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him. (Para 7)

Bank A had on overdraft account with Bank B. Father of the Manager of Bank A had executed from time to time letters of guarantee in favour of the Bank B agreeing to pay amounts due by Bank A under the overdraft arrangement. On filing suit by Bank B against Bank A, its Manager and his father.

Held on interpretation of the clauses of the letter of guarantee, that it was not intended to create a charge on properties to which the letters of guarantee related, in favour of the Bank A for the amount which may fall due under the letter of guarantee. The letter of guarantee created merely a personal obligation. The recitals of the deed did not evidence any intention of the father to create a charge in favour of Bank A, they merely set out an arrangement between the father and the members of his family that the liability under the letter of guarantee, if and when it arises, will be satisfied by his son out of the property allotted to him under the deed. The covenant was intended to confer a right of indemnity upon other members of the family, if the Bank B enforced the liability against them, and created no charge in favour of the Bank. The father had no intention to create a charge or to encumber any of the properties for the debt which may become due to the Bank. A. S. No. 502 of 1961, D/- 23-11-1964 (Ker.), Reversed; AIR 1932 Mad 457, Approved.

(Paras 7, 8)

(B) Contract Act (1872), Section 2 (d) — Suit by strangers to contract — When maintainable — Specific Relief Act (1877), Section 23.

A person not a party to a contract, cannot, subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the con-

tract or where the contract is a part of the family arrangement may enforce the covenant. (Case law discussed.)

(Para 9)

Where a Bank in whose favour letter of guarantee was executed, does not claim that it was a beneficiary under the terms of contract and the Bank was not a party, the Bank could not enforce the charge created by the letter of guarantee on the property of the executioner, even if there was an intention to create a charge.

(Para 10)

Cases Referred: Chronological Paras

(1932) AIR 1932 Mad 457 (V 19) =	ILR 55 Mad 436, Akella Suryanarayana Rao v. Dwarapudi Basiviraddi	8
(1928) AIR 1928 Cal 518 (V 15) =	ILR 55 Cal 1315, Krishna Lal Sadhu v. Pramila Bala Dosi	9
(1915) 1915 AC 847 = 113 LT 386,	Dunlop Pneumatic Tyre Co. v. Selfridge and Co.	9
(1911) 39 Ind App 7 = ILR 34 All 63,	Jamna Das v. Ram Autar	9
(1910) 37 Ind App 152 = ILR 32 All 410,	Khwaja Muhammad Khan v. Husaini Begam	9

Mr. S. V. Gupte, Senior Advocate (M/s. Anantha Krishna Iyer, S. Balakrishnan and R. Thiagarajan, Advocates, with him), for Appellant; Mr. H. R. Gokhale, Senior Advocate (J. S. Arora, Advocate and Mr. K. Baldev Mehta, Advocate, for M/s. Anand, Dasgupta and Sagar with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, Actg. C. J.: The High Land Bank Kottayam of which the appellant M. C. Chacko was the Manager, had an overdraft account with the Kottayam Bank. K. C. Chacko, father of the appellant, had executed from time to time letters of guarantee in favour of the Kottayam Bank agreeing to pay the amounts due by the High Land Bank under the overdraft arrangement. By the last letter of guarantee dated 22nd January 1953 K. C. Chacko agreed to hold himself liable for the amounts due by the High Land Bank to the Kottayam Bank on the overdraft arrangement subject to a limit of Rupees 20,000.

2. The Kottayam Bank Ltd. filed a suit in the court of the Subordinate Judge of Kottayam against the High Land Bank for a decree for the amount due in the account. To this suit were also implead-

ed K. C. Chacko, the guarantor, M. C. Chacko Manager of the High Land Bank, and M. C. Joseph, Kuriakose Annamma and Chinamma, the last three being the son, daughter and wife respectively of K. C. Chacko. Against the High Land Bank the claim was made on the footing of the overdraft account: against K. C. Chacko on the letter of guarantee and against M. C. Chacko, his brother, his sister and his mother as universal donees of the property of K. C. Chacko under a deed dated June 21, 1951 under which, it was claimed a charge was created on the properties to which the deed related and against M. C. Chacko, also on the claim that he had personally agreed to pay the amount due by the High Land Bank. During the pendency of the suit, K. C. Chacko died and the suit was prosecuted against his widow, daughter and sons who were described also as his legal representatives.

3. The trial court decreed the suit against the High Land Bank and also against M. C. Chacko, limited to the property received by him from his father under the deed dated June 21, 1951. The claim of the Kottayam Bank to enforce the liability under the letter of guarantee personally against K. C. Chacko was held barred by the law of limitation and on that account not enforceable against his heirs and legal representatives. The Court also rejected the claim that M. C. Chacko had personally agreed to pay the amount due under the overdraft arrangement.

4. In appeal to the High Court by M. C. Chacko the decree passed by the trial court was confirmed and the cross-objections filed by the State Bank of Travancore with which the Kottayam Bank was merged claiming that M. C. Chacko was personally liable were dismissed. This appeal with special leave is preferred by M. C. Chacko against the decree of the High Court.

5. Two questions arise in this appeal: (1) whether under Ex. D-1 a charge is created in favour of the Kottayam Bank to satisfy the debt arising under the letter of guarantee and (2) whether the charge assuming that a charge arises is enforceable by the Bank when it was not a party to the deed Ex. D-1.

6. Ex. D-1 is called a deed of partition; in truth it is a deed whereby K. C. Chacko gave the properties described in the Schedule A to M. C. Chacko and other properties described in Schs. B to F

to M. C. Chacko: M. C. Joseph, Annamma and Chinamma. In paragraph 17 it is recited:

"I have no debts whatsoever. If in pursuance of the letter given by me to the Kottayam Bank at the request of my eldest son, Chacko, for the purpose of the High Land Bank Ltd., Kottayam, of which he is the Managing Director, any amount is due and payable to the Kottayam Bank, that amount is to be paid from the High Land Bank by my son, Chacko. If the same is not so done and any amount becomes payable (by me) as per my letter, for that my eldest son, Chacko and the properties in Schedule A alone will be answerable for that amount."

The other paragraphs which deal with the properties in Schedule A may also be referred to. Paragraph 10 of the deed recited:

"The donees of the properties included in A, B and C schedules are, as from this date, to be in possession of their respective properties and to get mutation of registry in their names, pay land revenue and enjoy the income save that from coconut trees."

By paragraph 12 it was declared that notwithstanding the deed of partition, K. C. Chacko will take the income from the coconut trees standing on the properties included in Schedules A, B, C and F till his death and that the donees of the properties will take and enjoy the income from the coconut trees in their respective properties after his death. In paragraph 13 it was recited that:

"As it is decided that Chinamma.... should receive and have for her maintenance the rent of the building in Item 7 in the A schedule, as well as the rent of the building in Item 18 of the B schedule, she is to be in possession of these buildings as from this date and is to let them out and enjoy the rent. The respective donees will have possession and enjoyment after her death. Chinamma is to have full rights and liberty to reside in any of the houses included in A, B or C schedule and so long as she so resides in any of the houses, the donee of the respective house is to meet all her expenses. The rent collected by Chinamma from the buildings given possession of to her is to be utilised by her for her private expenses as she pleases."

In our judgment the various covenants in the deed were intended to incorporate an arrangement binding between the members of the family for satisfaction of

the debt, if any, arising under the letter of guarantee.

7. We are unable to agree with the High Court that by Cl. 17 of the deed it was intended to create a charge in favour of the Kottayam Bank for the amount which may fall due under the letter of guarantee. The letter of guarantee created merely a personal obligation. The deed Ex. D-1 was executed before the last letter of guarantee dated January 22, 1953. By Cl. 17 of Ex. D-1 it is merely directed that the liability if any arising under the letter of guarantee, shall be satisfied by M. C. Chacko and not by the donor, his son M. C. Joseph, his daughter Annamma and his wife Chinamma. The reason for the provision in the deed is clear. M. C. Chacko was the Managing Director of the High Land Bank Ltd. and it was at the instance of M. C. Chacko that the letters of guarantee were executed by the donor. For creating a charge on immovable property no particular form of words is needed: by adequate words intention may be expressed to make property or a fund belonging to a person charged for payment of a debt mentioned in the deed. But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund belonging to a person was intended to be made liable to satisfy the debt due by him. The recitals in Clause 17 of the deed do not evidence any intention of the donor to create a charge in favour of the Kottayam Bank, they merely set out an arrangement between the donor and the members of his family that the liability under the letter of guarantee, if and when it arises, will be satisfied by M. C. Chacko out of the property allotted to him under the deed.

8. The debt which M. C. Chacko was directed by the deed to satisfy was not in any sense a "family debt". It was a debt of K. C. Chacko; and K. C. Chacko was personally liable to pay that debt. After his death his sons, his daughter and his widow would be liable to satisfy the debt out of his estate in their hands. From the recitals in the deed Ext. D-1 an intention to convert a personal debt into a secured debt in favour of the Bank, a third person, cannot be inferred. In *Akella Suryanarayana Rao v. Dwarapudi Basiviraddi*, ILR 55 Mad 436 = (AIR 1932 Mad 457) the Madras High Court in construing a deed of partition of joint family property pursuant to a compro-

mise decree, held that properties allotted to certain branches to which were also "allotted certain debts" with a stipulation that until the debts were fully discharged the properties allotted to the shares of the respective persons shall be liable in the first instance, were not subject to a charge in favour of the creditors. The Court held that the covenant in the partition deed resulted in a contract of indemnity, and not a charge. In the present case also the covenant that M. C. Chacko will either personally or out of the properties given to him satisfy the debt is intended to confer a right of indemnity upon other members of the family, if the Kottayam Bank enforced the liability against them, and created no charge in favour of the Bank. Clauses 12 and 13 of the deed support that view. By Clause 12 the right to the coconut trees standing in the properties included in Schedules A, B, C and F is reserved to K. C. Chacko. Similarly Chinamma, wife of K. C. Chacko, is permitted during her lifetime to occupy the houses in the properties described in the three schedules and to recover the income and to utilize the same for herself. It is clear that K. C. Chacko had no intention to create a charge or to encumber any of the properties for the debt which may become due to the Bank.

9. The Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In *Krishna Lal Sadhu v. Pramila Bala Dosi*, ILR 55 Cal 1815 = (AIR 1928 Cal 518) Rankin, C. J. observed:

"Clause (d) of Section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English Law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee.'"

AIR 1970 SUPREME COURT 508
(V 57 C 111)

(From: Madras)*

J. C. SHAH AND G. K. MITTER, JJ.

T. G. Venkataraman etc., Appellants v. The State of Madras and another, etc., Respondents.

Civil Appeals Nos. 281, 284, 363, 383 to 393 and 513 to 567 of 1969, D/- 17-7-1969.

Sales Tax — Madras General Sales Tax Act (1 of 1959), Sections 59 (1), 17 (1) — Notifications under — Imposing tax on sale of "Cane jaggery" and exempting that of "palm jaggery" from liability to tax — No unlawful discrimination practised — Imposition of tax on sale of cane jaggery did not affect freedom of trade within Article 301 of Constitution — Act held not open to challenge on plea of colourable exercise of power — Constitution of India, Articles 14, 301, 246.

Turnover from sale of jaggery—cane or palm—was subject to tax under S. 3 (1) of the Madras Act 9 of 1939 at three pies per rupee. Transactions of sale of "palm jaggery" were exempt partially from sales tax from 28-2-1955 and wholly from 1-4-1956, and transactions of sale of "cane jaggery" were exempt from 1-4-1958. On 1-4-1959 transactions of sale of "sugar including jaggery and gur" were exempt from liability to pay tax under the Madras General Sales Tax Act 1 of 1959. The exemption applied to all transactions of sale of "cane jaggery" and "palm jaggery". In consequence of the two notifications dated 30-12-1967 under Section 59 (1) and Section 17 (1) of Madras Act 1 of 1959 turnover from transactions of sale of "cane jaggery" and was till then exempt from tax became liable to tax under Section 3 of the Madras Act 1 of 1959 whereas sale of "palm jaggery" remained exempt from liability to pay sales tax. The notification under Section 59 (1) issued in exercise of executive authority received legislative sanction by Madras Act 2 of 1968. The dealers carrying on business in cane jaggery filed writ petitions in High Court challenging levy of tax thereon. The petitions were rejected. On appeals to Supreme Court:—

Held (1) that "cane jaggery" and "palm jaggery" not being commodities of the

* (Writ Petns. Nos. 1669 etc. of 1968, D/- 6-12-1968—Mad.)

Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: *Dunlop Pneumatic Tyre Co. v. Selfridge and Co.*, 1915 AC 847. It has however been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case *Khwaja Muhammad Khan v. Husaini Begam*, (1910) 37 Ind App 152. In a later case *Jamna Das v. Ram Autar*, (1911) 39 Ind App 7 the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

10. Even if it be granted that there was an intention to create a charge, the Kottayam Bank not being a party to the deed enforce the charge only if it was a beneficiary under the terms of the contract, and it is not claimed that the Bank was a beneficiary under the deed Ex. D-1. The suit against M. C. Chacko must therefore be dismissed.

11. The decree passed by the High Court is modified and it is declared that M. C. Chacko is not personally liable for the debt due under the letter of guarantee executed by K. C. Chacko, nor are the properties in Schedule A allotted to M. C. Chacko under the deed dated June 21, 1951 liable to satisfy the debt due to the Kottayam Bank under the letter of guarantee.

12. Having regard to the circumstances of the case and specially that a concession that persons not parties to a contract may enforce the benefit reserved to them under the contract, was made before the High Court, we direct that the parties to this appeal will bear their respective costs throughout.

Order accordingly.

same class in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery", no unlawful discrimination denying the guarantee of equal protection was practised.

(Para 14)

(2) that the tax imposed on transactions of sale of "cane jaggery" did not affect the freedom of trade within the meaning of Article 301. AIR 1969 SC 147, Foll.

(Para 15)

(3) that it could not be contended that the Act which imposes tax on "cane jaggery" and the notification which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature had the power to impose the tax, its authority was not open to challenge on a plea of colourable exercise of power. AIR 1953 SC 375, Foll.

(Para 16)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 1094 (V 56) =
C. As. Nos. 2436 and 2437 of
1966, D/- 26-2-1969, N. Venu-
gopala Ravi Verma Rajah v.
Union of India 13

(1969) AIR 1969 SC 147 (V 56) =
1968-3 SCR 734, State of Madras
v. N. K. Nataraja Mudali 15

(1955) AIR 1955 SC 661 (V 42) =
1955-2 SCR 603, Bengal Immunity
Co. v. State of Bihar 5

(1953) AIR 1953 SC 375 (V 40) =
1954 SCR 1, K. C. Gajapati
Narayan Deo v. State of Orissa 16

In C. As. Nos. 281 and 363 of 1969:—
M/s. M. S. Sethu and A. V. V. Nair,
Advocates, for Appellants.

In C. A. No. 284 of 1969:—
M/s. M. S. Sethu and P. Parameshwara
Rao, Advocates, for Appellant.

In C. A. No. 383 of 1969:—

Mr. H. R. Gokhale, Senior Advocate
(Mr. K. Jayaram, Advocate with him), for
Appellant.

In C. As. Nos. 384 to 393 and 513 to
567 of 1969:—

M/s. K. Jayaram and T. S. Vishwanatha
Rao, Advocates, for Appellants.

In C. A. No. 281 of 1969:—

Mr. S. V. Gupte, Senior Advocate (M/s.
S. Mohan and A. V. Rangan, Advocates
with him), for Respondent;

In C. As. Nos. 284, 363, 383 to 393 and
513 to 567 of 1969:—

M/s. S. Mohan and A. V. Rangan,
Advocates, for Respondents.

The following Judgment of the Court
was delivered by

SHAH, J.: At the conclusion of the
hearing of these appeals on April 23, 1969,
we announced that "the appeals are dis-
missed with costs; reasons in support of
the order will be delivered thereafter".
We proceed to record the reasons in sup-
port of the order.

2. The appellants carry on business as
dealers in "cane jaggery" in the State of
Tamil Nadu. As a result of certain legis-
lative and executive measures, transac-
tions of sale in "cane jaggery" were made
liable as from January 1, 1968 to tax
under the Madras General Sales Tax Act,
1959, and transactions of sale in "palm
jaggery" remained exempt from sales tax.
The appellants filed petitions in the High
Court of Madras challenging the validity
of the levy of tax on "cane jaggery", on
three grounds:

(1) that the levy of tax on turnover
from sale of "cane jaggery" was discrim-
inatory and violated the equality clause
of the Constitution;

(2) that the levy of tax imposes a res-
triction on trade and commerce contrary
to the provisions of Part XIII of the Con-
stitution; and

(3) there is excessive delegation of legis-
lative authority to the executive and on
that account the levy of tax pursuant to
an order made in exercise of the powers
under Section 59 of the Madras General
Sales Tax Act 1 of 1959 on "cane jaggery"
is invalid.

The High Court rejected all the conten-
tions.

3. Counsel for the appellants have in
these appeals urged the first two grounds
and have in addition submitted that in
levying tax on turnover from sale of
"cane jaggery" legislative power has been
colourably exercised. The argument that
there was excessive delegation to the exe-
cutive of the legislative power was aban-
doned before the Court, because the
State of Madras has enacted Act II of
1968 authorising levy of tax on sale of
jaggery by amending Sch. III to Madras
Act 1 of 1959.

4. Turnover from sale of jaggery—
cane or palm—was subject to tax under
S. 3 (1) of the Madras Act IX of 1939
at three pies per rupee. By G. O. 651
dated February 28, 1955 and G. O. 2780
dated September 7, 1955 all sales of
"palm jaggery" effected through Co-ope-
rative Societies and the Palm Gur Fede-
ration were exempted from tax. By an-

other G. O. No. 1605 dated April 19, 1956, all transactions of sale in "palm jaggery" were exempted from sales tax with effect from April 1, 1956. Transactions of sale in "cane jaggery" therefore continued to remain liable to tax whereas sales of "palm jaggery" enjoyed the benefit of exemption from tax.

5. After the judgment of this Court in *Bengal Immunity Co. Ltd. v. State of Bihar*, 1955-2 SCR 603 = (AIR 1955 SC 661) the Parliament amended Article 286 and Entry 54 in List II of the Seventh Schedule and added a new Entry 92A in List I in the Seventh Schedule by the Constitution (Sixth Amendment) Act. In exercise of the power under Entry 92A, List I the Parliament enacted the Central Sales Tax Act 74 of 1956. By Ch. IV of that Act the power reserved under the amended Article 286, Clause (3) was exercised by the Parliament, and certain classes of goods were declared to be of "Special importance in inter-State trade or commerce". By Section 15 certain modifications were declared in State Acts relating to the levy of taxes on sales and purchases of declared goods. However in the list of goods of "special importance in inter-State trade or commerce" gur or jaggery was when the Act was enacted, not included.

6. The Parliament then enacted the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act 58 of 1957). Section 3 of that Act authorised the levy and collection of additional duties in respect of several classes of goods including "sugar". By Section 4 it was provided that during each financial year, there shall be paid out of the Consolidated Fund of India to the States in accordance with the provisions of the second schedule, such sums, representing a part of the net proceeds of the additional duties levied and collected during that financial year, as are specified in that Schedule. It was enacted by the proviso to Clause (2) of the Schedule that if during that financial year is levied and collected in any State specified in the Table a tax on the sale or purchase of sugar by or under any law of that State, no sums shall be payable to that State under sub-clause (ii) or sub-clause (iii) of clause (b) in respect of that financial year, unless the Central Government by special order otherwise directs. The expression 'sugar' was defined in Section 2 (c) as having the same meaning as it has in the First Schedule to the Central Excises and

Salt Act, 1944. The Governor of Madras issued Ordinance 1 of 1957 directing that transactions of sale of "cane jaggery" be liable to a single point tax at 5 per cent, with effect from April 1, 1957. By virtue of the Central Sales Tax Act, 1956, as amended by Act 31 of 1958 "sugar" as defined in Item No. 8 of the First Schedule to the Central Excises and Salt Act 1944 was declared a commodity essential to the life of the community and tax could thereafter be levied on "sugar" at the rate of 2 per cent only. But in view of the definition contained in the Central Excises and Salt Act, 1944, there was some doubt whether the expression 'sugar' included gur. The State of Madras being apparently of the opinion that "palm jaggery" and "cane jaggery" were subject to the provisions of the Additional Excise Act 58 of 1957, issued on April 15, 1958, G. O. No. 1457 exempting all sales of "cane jaggery" from tax with effect from April 1, 1958. Transactions of sale of "Palm jaggery" were therefore exempt partially from sales tax from February 28, 1955 and wholly from April 1, 1956, and transactions of sale of "cane jaggery" were exempt from tax from April 1, 1958.

7. The State Legislature enacted the Madras General Sales Tax Act 1 of 1959 with effect from April 1, 1959. By Section 3 every dealer whose total turnover was not less than Rs. 10,000 became liable to pay tax for each year at the rate of 2 per cent of his taxable turnover. By Section 8 it was provided that subject to such restrictions and conditions as may be prescribed, a dealer who deals in goods specified in the Third Schedule shall not be liable to pay any tax under the Act in respect of such goods. Item 5 in the Third Schedule was "sugar including jaggery and gur". Section 17 of that Act authorised the State Government by notification to exempt or to make reduction in rate in respect of any tax payable under the Act on the sale or purchase of any specified goods or class of goods at all points or specified points in respect of sales by successive dealers or by any specified class of dealers in respect of the whole or any part of their turnover. By Section 59 (1) of the Act the State Government was authorised by notification, to alter, add or cancel any of the Schedules.

8. On April 1, 1959 transactions of sale of "sugar including jaggery and gur" were exempt from liability to pay tax under the Madras General Sales Tax Act

1 of 1959. The exemption applied to all transactions of sale of "cane jaggery" and "palm jaggery". On September 10, 1965 the Government of India advised the State Government that "Jaggery" was not included in the expression 'sugar' in the Additional Duties of Excise Act 58 of 1957. The State of Madras in exercise of the power under sub-section (1) of Section 59 of the Madras General Sales Tax Act, issued G. O. 2261 dated December 30, 1967, that:

"In the said (Third) Schedule in Item 5, for the word 'including' the words 'but not including' shall be substituted." The State simultaneously issued another notification that—

"In exercise of powers conferred by Section 17 (1) of the Madras General Sales Tax Act, 1959, the Governor of Madras granted exemption in respect of tax payable under the Act on all sales of palm jaggery."

In consequence of the two notifications turnover from transactions of sale of "cane jaggery" which was till then exempt from tax became liable to tax under Section 3 of the Madras Act 1 of 1959 whereas sale of "palm jaggery" remained exempt from liability to pay sales tax.

9. In support of the plea that the State had practised unlawful discrimination between sales of "palm jaggery" and "cane jaggery" it was urged that "cane jaggery" and "palm jaggery" which were identical commodities and were treated similarly under the successive Sales Tax Acts of the State for many years past were without any rational nexus with the object sought to be served by the Madras General Sales Tax Act, 1959, differently treated and on that account the notification issued under Section 59 sub-sec. (1) which modifies the Third Schedule is ultra vires.

10. It may be recalled that the notification under Section 59 (1) which was issued in exercise of executive authority has received legislative sanction by Madras Act 2 of 1968. Amendment in the Third Schedule now flows from the exercise of legislative authority and not executive authority.

11. Since Section 8 read with the Third Schedule as amended by Madras Act 2 of 1968 exempts only "sugar" from liability to tax sales of jaggery, cane and palm, now fall within the charging section. But the Government of Madras have in exercise of power under Sec. 17

of Act 1 of 1959 exempted transactions of sale of "palm jaggery" from tax. It is true that between April 1, 1958 and October 31, 1967 transactions of sale of "cane jaggery" and "palm jaggery" were exempt from liability to pay sales tax under the Madras General Sales Tax Acts of 1939 and 1959, but it cannot be inferred therefrom that the legislature treated "palm jaggery" and "cane jaggery" as the "same commodity". For nearly three years before April 1, 1958 sales of "palm jaggery" were exempt from tax but sales of "cane jaggery" were not.

12. The evidence on the record clearly shows that "cane jaggery" and "palm jaggery" are commercially different commodities. "Cane jaggery" is produced from the juice of sugarcane; "palm jaggery" is produced from the juice of the palm tree. Mr. Raghupathy, Deputy Secretary to the Government of Madras (Commercial Taxes) has stated in his affidavit that "palm jaggery" industry comes under the purview of Khadi and Village Industries Board and is one of the cottage industries which gives employment mainly to poor tappers. The tappers, according to Mr. Raghupathy, collect "neera" from palm and other trees and prepare jaggery by the traditional method of boiling "neera" in their huts and produce jaggery without the aid of any machinery. Production of "palm jaggery" in the State compared to "cane jaggery" is small. The price of "palm jaggery" and "cane jaggery" differ widely and apparently "palm jaggery" and "cane jaggery" are consumed by different sections of the community. It is clear that the method of production of "palm jaggery" and "cane jaggery" are different; they reach the consumers through different channels of distribution; the prices at which they are sold differ and they are consumed by different sections of the community.

13. In a recent judgment *N. Venugopala Ravi Varma Rajah v. Union of India*, C. As. Nos. 2436 and 2437 of 1966, D/- 26-2-1969 = (reported in AIR 1969 SC 1094) this Court observed:

".....tax laws are aimed at dealing with complex problems of infinite variety necessitating adjustment of several disparate elements. The Courts accordingly admit, subject to adherence to the fundamental principles of the doctrine of equality, a larger play to legislative discretion in the matter of classification. The power to classify may be exercised so as to adjust the system of taxation in all proper

and reasonable ways: the Legislature may select persons, properties, transactions and objects and apply different methods and even rates for tax, if the Legislature does so reasonably. * * * If the classification is rational, the Legislature is free to choose objects of taxation, impose different rates, exempt classes of property from taxation, subject different classes of property to tax in different ways and adopt different modes of assessment. A taxing statute may contravene Art. 14 of the Constitution if it seeks to impose on the same class of property, persons, transactions or occupations similarly situate incidence of taxation, which leads to obvious inequality."

It was also said by the Court that:

"It is for the Legislature to determine the objects on which tax shall be levied, and the rates thereof. The Courts will not strike down an Act as denying the equal protection merely because other objects could have been, but are not, taxed by the Legislature."

14. We are accordingly of the view that "cane jaggery" and "palm jaggery" are not commodities of the same class, and in any event in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery", no unlawful discrimination denying the guarantee of equal protection was practised.

15. No serious argument was advanced in support of the plea that the freedom of trade and commerce guaranteed by Part XIII of the Constitution is infringed by the imposition of tax on "cane jaggery". Freedom of trade, commerce and intercourse guaranteed by Art. 301 of the Constitution is protected against taxing statutes as well as other statutes, but by imposition of tax on transactions of sale of "cane jaggery" no restriction on the freedom of trade or commerce or in the course of trade with or within the State is imposed. The tax imposed on transactions of sale of "cane jaggery" does not affect the freedom of trade within the meaning of Article 301. As observed by this Court in *State of Madras v. N. K. Nataraja Mudali*, AIR 1969 SC 147 "a tax may in certain cases directly and immediately restrict or hamper the free flow of trade, but every imposition of tax does not do so."

16. There is no substance in the contention that the Act which imposes tax on "cane jaggery" and the notification

which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature has the power to impose the tax, its authority is not open to challenge on a plea of colourable exercise of power: *K. C. Gajapati Narayan Deo v. State of Orissa*, 1954 SCR 1 = (AIR 1953 SC 375).

17. There will be one hearing fee.
Appeals dismissed.

AIR 1970 SUPREME COURT 512 (V 57 C 112)

(From: Labour Court, Meerut)*

J. M. SHELAT AND C. A.
VAIDIALINGAM, JJ.

Agra Electric Supply Co. Ltd., Appellant v. Sri Alladin and others, Respondents.

Civil Appeal No. 2483 of 1968, D/- 12-8-1969.

(A) Industrial Employment (Standing Orders) Act (1946), Sections 5 and 3 — *Agra Electric Supply Co. Ltd.*, Standing Orders, Order 32 — Object of Act is to have uniform standing orders — Standing Orders after certification bind all employees presently employed as well those employed thereafter.

The object of the Act is to have uniform standing orders providing for the matters enumerated in the Schedule to the Act and it is not intended that there should be different conditions of service for those who are employed before and those employed after the standing orders came into force. Once the Standing Orders come into force, they bind all those presently in the employment of the concerned establishment as well those who are appointed thereafter. Thus the retirement of employees under Order 32 which fixed the age of superannuation at 55 years is valid although the employees were appointed long before the standing orders were certified. AIR 1959 SC 1279, Dist.; AIR 1966 SC 808, Applied; (1964) 2 Lab LJ 146 (SC), Disting; Award of 24-7-1968 of Labour Court, Meerut in Case No. 92 of 1966, Reversed.

(Para 7)

The obligation imposed on the employer to have standing orders certified, the duty of the certifying authority to adjudi-

* (Award D/- 24-7-1968, Labour Court, Meerut in Case No. 92 of 1966)

LM/AN/D647/69/MVJ/M

cate upon their fairness and reasonableness, the notice to be given to the union and in its absence to the representatives of the workmen, the right conferred on them to raise objections, the opportunity given to them of being heard before they are certified, the right of appeal and the right to apply for modifications given to workmen individually, the obligation on the employer to have them published in such a manner that they become easily known to the workmen, all these provisions abundantly show that once the standing orders are certified and come into operation, they become binding on the employer and all the workmen presently employed as also those employed thereafter in the establishment conducted by that employer. It cannot possibly be that such standing orders would bind only those who are employed after they come into force and not those who were employed previously but are still in employment when they come into force. The right of being heard given to the union or, where there is no union, to the representatives of the workmen, the right of appeal and the right to apply for modification given to workmen individually clearly indicate that they were provided for because the standing orders, as they emerge after certification, are intended to be binding on all workmen in the employment of the establishment at the date when they come into force and those employed thereafter.

(Para 6)

(B) Constitution of India, Article 136 — Agra Electric Supply Co. Ltd., Standing Orders, Orders 2 (c) and 14 — Termination of service of probationer — It can be only for misconduct — Labour Court finding that particular termination was punitive and not simple termination of service — Decision will not be interfered with.

It is a well settled principle of industrial adjudication that even if an impugned order is worded in the language of a simple termination of service, industrial tribunals can look into the facts and circumstances of the case to ascertain if it was passed in colourable exercise of the power of the management to terminate the service of an employee and find out whether it was in fact passed with a view to punish him.

(Para 14)

Standing Order 2 (c) provides that a probationer is an employee who is provisionally employed to fill a permanent vacancy in a post and who has not completed the period of probation thereunder.

It also lays down that the normal period of probation shall be 6 months but the resident engineer has the discretion to extend that period, the maximum period of probation being 12 months in all. Ordinarily, this would mean that a probationer's service cannot be terminated except for some misconduct until the expiry of the probation period. (Para 14)

Where the Labour Court comes to a finding on the evidence before it that the real reason for passing the order of termination was not the alleged unsatisfactory work on the part of the workman but his having unauthorisedly used the motor-cycle and causing damage to it, that the order was punitive and not a simple termination of service and was therefore in colourable exercise of the power of termination the finding is clearly one of fact and meant that the Labour Court rejected the evidence led by the management that the work of the concerned workman was found unsatisfactory. It is impossible to say from the evidence before the Labour Court that that finding was perverse or such as could not be reasonably arrived at so as to be interfered with in appeal by special leave.

(Para 15)

(C) Civil P. C. (1908), Section 11 — Award of Labour Court holding that Standing Orders of a Company were not applicable to persons employed prior to certification of Standing Orders — Decision based on Supreme Court Judgment — Decision becoming final since special leave to appeal was refused — Subsequent decision of Supreme Court holding that Standing Orders were applicable after certification to employees who were employed prior to such certification — Decision of Labour Court does not act as res judicata.

(Para 10)

- Cases Referred : Chronological Paras
- (1969) AIR 1969 SC 513 (V 56)=
 - 1969-1 Lab LJ 734, Shahdara (Delhi) Saharanpur Light Railway Co., Ltd. v. Shahdara Saharanpur Railway Workers' Union 5, 10
 - (1966) AIR 1966 SC 808 (V 53)=
 - 1966-2 SCR 498, Salem Erode Electricity Distribution Co. Ltd. v. Salem Erode Electricity Distribution Co. Ltd., Employees' Union 7, 10
 - (1964) AIR 1964 SC 728 (V 51)=
 - 1964-5 SCR 344, Workmen v. Balmer Lawrie & Co. 10
 - (1964) 1964-2 Lab LJ 146=(1964) 8 Fac LR 458 (SC), Workmen of Kettlewell Bullen & Co. Ltd. v. Kettlewell Bullen & Co. Ltd. 8, 9, 10

- (1960) AIR 1960 SC 875 (V 47)=
1960-3 SCR 350, M/s. New India
Motors (P) Ltd. v. K. T. Morris 10
(1959) AIR 1959 SC 1279 (V 46)=
1960-1 SCR 348, Guest, Keen, Wil-
liams Pvt. Ltd. v. P. J. Sterling
7, 8, 9, 10
(1957) AIR 1957 SC 532 (V 44)=
1957 SCR 754, Newspapers Ltd.
v. State Industrial Tribunal 10

Mr. S. V. Gupte, Senior Advocate (M/s. D. N. Mukherjee and M. L. Car, Advocates, with him), for Appellant; M/s. S. Mohan Kumaramangalam and M. K. Ramamurthi, Senior Advocates (Mr. Vineet Kumar, Mrs. Shyamla Pappu and Mr. J. Ramamurthy, Advocates, with them), for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.— In this appeal, by special leave, two questions arise: (1) whether standing orders govern the employees appointed before they are certified under the Industrial Employment (Standing Orders) Act, 20 of 1946 and (2) whether the appellant-company was entitled to terminate the service of a workman appointed as a probationer before the expiry of the period of probation except on the ground of misconduct.

2. The first question relates to 3 workmen, Alladin, Ram Prasad and Noorul Zaman, who were employed in 1929, 1935 and 1937 respectively, long before the company's standing orders were certified and brought into force in 1951 and who were superannuated under standing order 32 of the said standing orders. Prior to 1951 there were no rules or conditions of service prescribing the age of superannuation. Standing order 32 for the first time laid down 55 years as the age of superannuation. Relying on standing order 32 the company served on the three workmen notices dated December 19, 1964, November 20, 1963 and January 27, 1964, who had by then attained the age of 58, 64 and 59 years, by which the company retired them with effect from January 1, 1965, December 20, 1963 and March 1, 1964 respectively. The Labour Court, to which the dispute arising from the compulsory retirement was referred, held that the company's standing orders having been certified long after these workmen were employed and the conditions of their employment not having provided any age of retirement, the company could not apply standing order 32 to them, and therefore, the orders of

superannuation were bad, and directed their reinstatement and payment to them of their wages from the date of retirement till the date when they would be reinstated.

3. Thus, the question involved in this appeal is whether the company could retire by applying standing O. 32 to these three workmen, who admittedly had long passed the age of superannuation provided thereunder. Counsel for the company argued that once the standing orders are certified and come into operation, they would, subject to their modification as provided under the Act, bind all workmen, irrespective of whether they were employed before or after they came into force, and that therefore, the Labour Court was in error in holding to the contrary and ordering their reinstatement. Mr. Kumaramangalam, on the other hand, argued (1) that the company's action amounted to applying standing order 32 retrospectively, that that was not warranted, for, if the standing orders were intended to be so applied, they would have so expressly provided, and (2) that in a previous reference, being Ref. 91 of 1964, between the appellant-company and its workmen, this very Labour Court had decided that these standing orders did not apply to workmen previously employed, that an appeal was sought to be filed in this Court against that order but no special leave was granted, and therefore, that order became final. Consequently, the company was not entitled to re-agitate the same question, as it was precluded from doing so by principles analogous to the principle of *res judicata*.

4. The question as to whether standing orders were retrospective in their application can obviously arise only if they do not in law bind workmen previously employed. Such a question can hardly arise if the provisions of the Act show, as contended by counsel for the company, that once they are certified and come into force, they bind both the employer and all the workmen presently employed.

5. As observed in *Shahdara (Delhi) Saharanpur Light Railway Company Ltd. v. Shahdara Saharanpur Railway Worker's Union*, 1969-1 Lab LJ 734= (AIR 1969 SC 513) the Act is a beneficent piece of legislation, its object being to require, as its preamble and its long title lay down, employers in industrial establishments to define with sufficient precision the conditions of employment of workmen employed under them and to make

them known to such workmen. Before the passing of the Act, there was nothing in law to prevent an employer having different contracts of employment with workmen employed by him with different and varying conditions of service. Such a state of affairs led to confusion and made possible discriminatory treatment between employees and employees though all of them were appointed in the same premises and for the same or similar work. Such a position is clearly incompatible with the principles of collective bargaining and renders their effectiveness difficult, if not impossible. To do away with such diversity and bargaining with each individual workman, the legislature provided by Section 3 of the Act that every employer of an industrial establishment must, within 6 months from the date of the Act becoming applicable to his industrial establishment, submit to the certifying authority under the Act draft standing orders prepared by him for adoption in his industrial establishment providing therein for all matters set out in the Schedule to the Act, and where model standing orders are prescribed to have such draft standing orders in conformity with them. The draft standing orders are to be accompanied by particulars of workmen employed in the establishment as also the name of the union, if any, to which they belong. This requirement clearly means particulars of the workmen in employment at the date of the submission of the draft standing orders for certification and not those only who would be employed in future after certification. Under Section 4, such draft orders are certifiable if they provide for all matters set out in the Schedule, are otherwise in conformity with the Act and are adjudicated as fair and reasonable by the certifying officer or the appellate authority. Section 5 requires the certifying officer to forward a copy of the draft standing orders to the union or in its absence to workmen in the prescribed manner with a notice requiring objections, if any from the workmen. After giving the employer and the union or the workmen's representatives an opportunity of being heard, the certifying officer has to decide whether or not any modification or addition to the draft submitted by the employer is necessary and then certify the draft standing orders and send copies thereof and of his order in that behalf to the employer, the union or the representatives of the workmen. Section 6 confers the right of appeal to any person

aggrieved by such order to the appellate authority, who, by his order, can either confirm or amend the standing orders. Under Section 7 such standing orders are to come into operation on the expiry of 30 days from the date on which their authenticated copies are sent by the certifying officer to the parties where no appeal against these orders is filed or where such appeal is filed on expiry of 7 days from the date on which copies of the appellate authority's orders are sent as required by Section 6 (2). Section 9 requires the employer to post the standing orders as finally certified on boards maintained for that purpose at or near the entrance through which the majority of workmen enter the industrial establishment and in all departments thereof. Section 10 confers the right to an employer or any of the workmen to apply for modification after expiry of 6 months from the date on which they or the last modification thereof came into operation. The Schedule to the Act sets out matters which the standing orders must provide for. These matters are classification of workmen, shift working, periods and hours of work, holidays, pay days, wage rates, conditions and procedure for applying for grant of leave, closing and re-opening of sections of the industrial establishment, temporary stoppage of work, liabilities and rights of the employer and the workmen arising therefrom, termination of employment, disciplinary action, penalties etc.

6. The obligation imposed on the employer to have standing order certified, the duty of the certifying authority to adjudicate upon their fairness and reasonableness, the notice to be given to the union and in its absence to the representatives of the workmen, the right conferred on them to raise objections, the opportunity given to them of being heard before they are certified, the right of appeal and the right to apply for modifications given to workmen individually, the obligation on the employer to have them published in such a manner that they become easily known to the workmen, all these provisions abundantly show that once the standing orders are certified and come into operation, they become binding on the employer and all the workmen presently employed as also those employed thereafter in the establishment conducted by that employer. It cannot possibly be that such standing orders would bind only those who are employed after they come into force and not those who

were employed previously but are still in employment when they come into force. The right of being heard given to the union or, where there is no union, to the representatives of the workmen, the right of appeal and the right to apply for modification given to workmen individually clearly indicate that they were provided for because the standing orders, as they emerge after certification, are intended to be binding on all workmen in the employment of the establishment at the date when they come into force and those employed thereafter. Surely, the union or, in its absence, the representatives of workmen, who are given the right to raise objections either to the draft standing orders proposed by the employer or to the fairness and reasonableness of their provisions, could not have been intended to speak for workmen to be employed thereafter and not those whom they presently represent. Besides, if the standing orders were to bind only those who are subsequently employed, the result would be that there would be different conditions of employment for different classes of workmen, one set of conditions for those who are previously employed and another for those employed subsequently, and where they are modified, even several sets of conditions of service depending upon whether a workman was employed before the standing orders are certified or after, whether he was employed before or after a modification is made to any one of them and would bind only a few who are recruited after and not the bulk of them, who though in employment were recruited previously. Such a result could never have been intended by the legislature, for, that would render the conditions of service of workmen as indefinite and diversified, as before the enactment of the Act. Why does Section 3 (3) of the Act require the employer to give particulars of the workmen employed by him at the date of his submission of the draft standing orders unless the object of making him furnish the particulars was to have uniformity of conditions of service and to make the standing orders binding on all those presently employed. That is why the Act also insists among other things that after they are certified they must be made known to all workmen by posting them at or near the entrance through which they pass and in the language known to the majority of them.

7. In *Guest, Keen, Williams Pvt. Ltd. v. P. J. Sterling*, 1960-1 SCR 348= (AIR

1959 SC 1279) a view apparently contrary to the one above stated was said to have been taken since it was held there that it was unfair in that particular case to fix the age of superannuation of previous employees by a subsequent standing order, which should apply in that matter to future entrants. In that view the Court fixed 60 years as the age of retirement for such previous employees although the standing order had provided 55 years as the age of superannuation. In *Salem Erode Electricity Distribution Company Ltd. v. Salem Erode Electricity Distribution Co. Ltd., Employees' Union*, 1966-2 SCR 498= (AIR 1966 SC 803) this Court, however, took the same view which we have stated above and held that the provisions of the Act clearly indicated that matters specified in the Schedule to the Act should be covered by uniform standing orders applicable to all workmen employed in an industrial establishment and not merely to entrants employed after their certification. The question arose out of an application made by the employer for modification of the existing standing orders by providing different rules relating to holidays and leave for employees appointed before a certain date and those appointed after that date. Negating such a modification, the Court, after examining the relevant provisions of the Act, stated at pages 504 and 505 (of SCR)=(at p. 811 of AIR) as follows:

"One has merely to examine these clauses one by one to be satisfied that there is no scope for having two separate Standing Orders in respect to any one of them. Take the case of classification of workmen. It is inconceivable that there can be two separate Standing Orders in respect of this matter. What we have said about classification is equally true about each one of the other said clauses; and so, the conclusion appears to be irresistible that the object of the Act is to certify Standing Orders in respect of the matters covered by the Schedule; and having regard to these matters, Standing Orders so certified would be uniform and would apply to all workmen alike who are employed in any industrial establishment".

"On principle, it seems expedient and desirable that matters specified in the Schedule to the Act should be covered by uniform Standing Orders applicable to all workmen employed in an industrial establishment. It is not difficult to ima-

gine how the application of two sets of Standing Orders in respect of the said matters is bound to lead to confusion in the working of the establishment and cause dissatisfaction amongst the employees. If Mr. Setalvad is right in contending that the Standing Orders in relation to these matters can be changed from time to time, it may lead to the anomalous result that in course of 10 or 15 years there may come into existence 3 or 4 different sets of Standing Orders applicable to the employees in the same industrial establishment, the application of the Standing Orders depending upon the date of employment of the respective employees. That, we think, is not intended by the provisions of the Act."

At pages 509 to 510 (of SCR)=(at p. 813 of AIR) the Court referred to the case of Guest, Keen, Williams Private Ltd., 1960-1 SCR 348=(AIR 1959 SC 1279) (supra), relied on by the employers' counsel, and explained why the Court had fixed 60 years as the age of superannuation for the employees appointed before the standing orders were certified although the standing orders had fixed 55 years as the age of superannuation stating that:

"that course was adopted under the special and unusual circumstances expressly stated in the course of the judgment."

This decision thus confirms the view taken by us that the object of the Act is to have uniform standing orders providing for the matters enumerated in the Schedule to the Act, that it was not intended that there should be different conditions of service for those who are employed before and those employed after the standing orders come into force, and finally, that once, the standing orders come into force, they bind all those presently in the employment of the concerned establishment as well as those who are appointed thereafter.

8. Counsel for the workmen, however, drew our attention to the award in Ref. 91 of 1964, under Section 4 (k) of the U. P. Industrial Disputes Act, 1947. That reference, no doubt, was between the appellant-company and its workmen and the question decided there was whether the company was right in compulsorily retiring the six workmen there concerned under these very standing orders although they were employed before they were certified and came into force. The Labour Court, relying on Workmen of Kettlewell Bullen & Co. Ltd. v. Kettle-

well Bullen & Co. Ltd., 1964-2 Lab LJ 146 (SC) which in turn had relied on Guest, Keen, Williams' case, 1960-1 SCR 348= (AIR 1959 SC 1279) (supra) held that standing order 32 of these Standing Orders could not be applied to those previously appointed and that, therefore, the company's action in retiring those workmen was not justified.

9. We may mention that the case of Kettlewell Bullen & Co., 1964-2 Lab LJ 146 (SC) (supra) was not one concerned with Standing Orders but with rules made by the company and this Court, relying on the decision in Guest, Keen, Williams Private Ltd., 1960-1 SCR 348= (AIR 1959 SC 1279) (supra) held that where the rules of retirement are framed by the company they would have no application to its prior employees unless such employees have accepted the new rules. It is clear that neither the case of Kettlewell Bullen & Co., 1964-2 Lab LJ 146 (SC) (supra) nor the case of Guest, Keen, Williams Private Ltd., 1960-1 SCR 348= (AIR 1959 SC 1279) (supra), in the light of the explanation given in the case of Salem Erode Electricity Distribution Co. Ltd., 1966-2 SCR 498= (AIR 1966 SC 808) (supra), was applicable and the Labour Court was, therefore, clearly in error in basing its award on the decision in the case of Kettlewell Bullen & Co., 1964-2 Lab LJ 146 (SC) (supra).

10. The argument, however, was that even if that award was erroneous, the company did not appeal against it, consequently it became final and the issue there decided being the same and between the same parties, principles analogous to the principle of *res judicata* would apply and therefore no relief should be granted in the present case to the company. It is true, as stated in the Newspapers Ltd. v. The State Industrial Tribunal, U. P., 1957 SCR 754 at p. 761 =(AIR 1957 SC 532 at p. 536) that an award binds not only the individuals present or represented but all workmen employed in the establishment and even future entrants. But that principle is founded on the essential condition for the raising of an industrial dispute itself. If an industrial dispute can be raised only by a group of workmen acting on their own or through their union, the conclusion must be that all those who sponsored the dispute are concerned in it and therefore bound by the decision on such dispute. (See *M/s. New India Motors (P) Ltd. v. K. T. Morris*, 1960-3

SCR 350 at p. 357=(AIR 1960 SC 875 at p. 878)). Such a consideration, however, is not the same as the principle of res judicata or principles analogous to res judicata. In *Workmen v. Balmer Lawrie & Co.*, 1964-5 SCR 344= (AIR 1964 SC 728), no doubt, a case of revision of wage scales, this Court cautioned against applying technical considerations of res judicata thereby hampering the discretion of industrial adjudication. (See also *Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. Shahdara Saharanpur Railway Workers' Union*, 1969-1 Lab LJ 734= (AIR 1969 SC 513) (supra)). How inexpedient it is to apply such a principle is evident from the fact that the award in Ref. 91 of 1964 was based on the decision in *Kettlewell Bullen & Co., Ltd.*, 1964-2 Lab LJ 146 (SC) (supra), which in turn had followed the case of *Guest, Keen Williams Private Ltd.* (supra) on the supposition (which, as aforesaid was not correct) that standing orders are not binding on those who are employed prior to their certification and their coming into force. The company, presumably, did not challenge the correctness of that award because it was perhaps then thought that that was the law laid down in *Guest, Keen, Williams Private Ltd.*, 1960-1 SCR 348= (AIR 1959 SC 1279) (supra). The consequence of holding that the company is barred by principles analogous to res judicata would be that there would be two sets of conditions of service, one for those previously employed and the other for those employed after the standing orders were certified, a consequence wholly incompatible with the object and policy of the Act. The very basis of the award in Ref. 91 of 1964, namely, the wrong understanding of the decision in *Guest, Keen, Williams Private Ltd.*, 1960-1 SCR 348= (AIR 1959 SC 1279) (supra), having gone, it becomes all the more difficult and undesirable to perpetuate the distinction made therein between those who were previously appointed and those appointed subsequently and to refuse on such an untenable distinction relief to the company. The award in Ref. 91 of 1964 was made on May 24, 1965 when it was believed that the decision in *Guest, Keen, Williams Pvt. Ltd.*, 1960-1 SCR 348= (AIR 1959 SC 1279) laid down the principle that standing orders would not bind workmen previously employed. That that was not so was clarified in the case of *Salem Erode Electricity Distribution Co. Ltd.*, 1966-2 SCR 498= (AIR 1966 SC 808) (supra), the

decision in which was pronounced on November 3, 1965 removing thereby any possible misapprehension. The present reference was made on June 23, 1966, long after the decision in *Salem Erode Electricity Distribution Co. Ltd.*, 1966-2 SCR 498= (AIR 1966 SC 808) (supra), and the Labour Court gave the award impugned in this appeal on July 24, 1968. Thus, both the reference and the award were made in circumstances different from those which prevailed when Ref. 91 of 1964 was made and disposed of, a factor making it doubtful the application of a principle such as res judicata.

11. The second question relates to the workman, Shameem Khan. The company appointed him under a letter of appointment dated December 2, 1965 to the post of a clearer as a probationer for 6 months with discretion to the resident engineer to extend that period. The letter also stated that during his probationary period his service would be liable to termination without any notice and without assigning any reason therefor and that he would not be deemed to have been confirmed automatically in the post on the expiry of the probation period unless so advised in writing. The workman worked as such probationer till February 28, 1966 when he was served with a memorandum that his service was terminated as from the close of that day.

12. The workman's case was that the company had no right to terminate his service before the expiry of the 6 months period of probation which is the period prescribed by standing order 2 (c), that the stipulation in the letter of appointment that his service was liable to termination during the probation period was contrary to that standing order, and that therefore, that stipulation was not valid, and lastly, that the said order, though apparently one of termination simpliciter, was not a bona fide order, was in truth punitive in nature, and therefore, could not be passed without an opportunity of being heard having been given to him in a properly held enquiry. The fact is that no such enquiry was held and no opportunity was given to the workman to explain any misconduct for which he could be removed or dismissed.

13. The evidence before the Labour Court was that the concerned workman had unauthorisedly used the motor-cycle belonging to one Sidhana, a shift engineer in the company and that that motor-cycle met with an accident while the workman

was using it causing damage to it. Three days after that accident a report alleging that his work as a probationer was unsatisfactory was made by his superior officer. On this evidence the Tribunal came to the conclusion that the impugned order was not an order of termination simpliciter, that though couched in that language it was passed as a punishment for the workman having used that vehicle without the consent of its owner and was, therefore, an order of dismissal. The Tribunal was also of the opinion that the said report alleging unsatisfactory work by the workman was colourable and made at the instance of the shift engineer or at any rate was inspired by the said incident. In this view the Labour Court held that the exercise of power to terminate the service of the workman was not bona fide and consequently it set aside that order and directed his reinstatement.

14. Now, it is a well settled principle of industrial adjudication that even if an impugned order is worded in the language of a simple termination of service, industrial tribunals can look into the facts and circumstances of the case to ascertain if it was passed in colourable exercise of the power of the management to terminate the service of an employee and find out whether it was in fact passed with a view to punish him. The letter of appointment clearly states that the workman, Shameem Khan, was appointed as a probationer for a period of 6 months with power to the resident engineer to extend the period of probation. Ordinarily, that would mean that at the end of the probation period the company would have to decide whether to confirm him to a permanent post or, if that is not possible, to terminate his service. Standing Order 2 (c) provides that a probationer is an employee who is provisionally employed to fill a permanent vacancy in a post and who has not completed the period of probation thereunder. It also lays down that the normal period of probation shall be 6 months but the resident engineer has the discretion to extend that period, the maximum period of probation being 12 months in all. Ordinarily, this would mean that a probationer's service cannot be terminated except for some misconduct until the expiry of the probation period. The letter of appointment, no doubt, contained a provision that the service of the workman was liable to termination even during the probationary period. That provision, however, must be read to mean that the

appointment was subject to the management's power of termination as provided in the standing orders. Standing Order 14 provides for such a power and lays down that the service of "any employee" (which expression includes a probationer as is clear from the classification of employees in standing order 2) can be terminated on grounds (a) to (f) therein set out. It is quite clear that the termination of service of the concerned workman cannot be attributed to any one of these grounds. Therefore, that order cannot be said to have been passed in conformity with the power to terminate his service under the standing orders.

15. But apart from this consideration, the Labour Court came to a finding on the evidence before it that the real reason for passing the impugned order was not the alleged unsatisfactory work on the part of the workman but his having unauthorisedly used the motor-cycle and causing damage to it, that the order was punitive and not a simple termination of service and was therefore in colourable exercise of the power of termination. This finding is clearly one of fact and meant that the Labour Court rejected the evidence led by the management that the work of the concerned workman was found unsatisfactory. It is impossible to say from the evidence before the Labour Court that that finding was perverse or such as could not be reasonably arrived at. In that view, it is impossible to interfere with the order of the Labour Court relating to workman, Shameem Khan.

16. In the result, the appeal is partly allowed. The order of the Labour Court in connection with the 3 workmen whom the company retired, is set aside but its order relating to workman, Shameem Khan, is confirmed. In accordance with the order passed by this Court on January 24, 1969, while granting stay to the appellant-company, the company will pay to the workman, Shameem Khan, interest at 6 per cent per annum on the amount of the arrears of wages still due to him under the order of the Labour Court. As the appeal is partly allowed and partly dismissed, there will be no order as to costs.

Appeal partly allowed.

AIR 1970 SUPREME COURT 520
(V 57 C 113)
(From Kerala: ILR (1967) 2 Kerala 676)
S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.
K. Ranganatha Reddiar, Appellant v.
The State of Kerala, Respondent.
Criminal Appeal No. 141 of 1967, D/-
14-S-1969.

Prevention of Food Adulteration Act
(1954), Sections 14, 19 (2) — Prevention
of Food Adulteration Rules (1955), R. 12A
proviso — Object underlying Act achieved
by giving reasonable interpretation —
Court must do so — Warranty as required
by proviso to Rule 12A — Use of
popular language therein — Object of Act
is not defeated — ILR (1967) 2 Ker 676,
Reversed — (Civil P. C. (1908), Pre. —
Interpretation of Statutes).

When the proviso to R. 12A of Prevention
of Food Adulteration Rules expressly
says that no warranty in form VI A shall
be necessary in certain eventualities it
would be rewriting the rule to infer that
nevertheless the same things must exist
in the label or the cash memo. If the
words in the warranty can reasonably be
interpreted to have the same effect as
certifying the nature, substance and quality
of an article of food, the warranty
will fall within the proviso. The Act is
of wide application and millions of small
traders have to comply with the provisions
of the Act and the Rules. If the
object underlying the Act can be achieved,
without disorganising the trade, by
giving a reasonable interpretation to
Rule 12A it is Court's duty to do so. The
object of the Act is not defeated even if
traders use ordinary language of the trade
or popular language in warranties. AIR
1966 SC 1569, Distinguished; ILR (1967)
2 Ker 676, Reversed. (Paras 6, 7)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1569 (V 53) =
1966-2 SCR 815 = 1966 Cri LJ
1208, Baborally v. Corporation of
Calcutta 9
Mr. A. S. R. Chari, Senior Advocate
(M/s. A. S. Nambiar and K. R. Nambiar,
Advocates with him), for Appellant; Mr.
V. K. Krishna Menon, Senior Advocate
(Mr. M. R. K. Pillai, Advocate, with him),
for Respondent.

The following Judgment of the Court
was delivered by
SIKRI, J.:— In this appeal by certifi-
cate the only point that arises is whether
LM/AN/D934/69/SSG/P

the cash memo. Ex. D1, issued by the
seller to the appellant contains a war-
ranty within Rule 12A of the rules fram-
ed under the Prevention of Food Adulter-
ation Act, 1954 (Act 37 of 1954), herein-
after referred to as the Act. The Magis-
trate, who tried the complaint, held that
Ex. D1 was a proper warranty and it fell
within the proviso to Rule 12A. The High
Court on appeal held to the contrary.

2. The relevant facts are these. The
appellant is a Rice & General Merchant
and holds a wholesaler's licence. It was
alleged in the complaint that the appel-
lant had stored and exposed for sale and
sold compounded Asafoetida which was
found to have been adulterated by wheat
starch and tapioca starch and that non-
permitted orange coal-tar dye was present.
The report of the Public Analyst to Gov-
ernment, Trivandrum, was relied on in
this connection.

3. The appellant appeared as a wit-
ness and he stated that he purchased
Asafoetida from L. T. Alakesan and Bro-
thers, received it in enclosed packets in
bags and sold it in bags. He received in-
voice which reads as follows:

"L. T. Alhakesan & Bro-
thers, Asafoetida Merchants,
Vellamadom
Sri K. Ranganatha Reddiar
Kottarakara Rate: 6.00
Particulars: C. S. T. Rs. 2.
One case of Asafoetida
Misky bag 50 Rs. 180.00
The quality is up to the
mark C.S.T. Rs. 3.60
Rs. 183.60

Rupees one hundred and eighty-three
and N. P. sixty only.
One case (1d) (1d) 1/4/64 (Sd.) 147542
18/5/64."

He further stated that "it is written on
the packet as "Extra Superior" in English
and as "Compounded misky full of quality
and flavour" in Tamil."

4. The relevant statutory provisions
are:
The Prevention of Food Adulteration
Act, 1954.
"S. 14. Manufacturers, distributors and
dealers to give warranty:—

No manufacturer, distributor or dealer
of any article of food shall sell such arti-
cle to any vendor unless he also gives a
warranty in writing in the prescribed form
about the nature and quality of such arti-
cle to the vendor."

"S. 19 (2). A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proved:—

(a) that he purchased the article of food—

(i) in a case where a licence is prescribed for the sale thereof, from a duly licensed manufacturer, distributor or dealer.

(ii) in any other case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form; and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it."

The Prevention of Food Adulteration Rules, 1955.

"Rule 12-A. Warranty — Every trader selling an article of food to a vendor shall, if the vendor so requires, deliver to the vendor a warranty in Form VI-A:

Provided that no warranty in such form shall be necessary if the label on the article of food or the cash memo delivered by the trader to the vendor in respect of that article contains a warranty certifying that the food contained in the package or container or mentioned in the cash memo is the same in nature, substance and quality as demanded by the vendor.

Explanation.— The term 'trader' shall mean an importer, manufacturer, wholesale dealer or an authorised agent of such importer, manufacturer or wholesale dealer."

5. We are not concerned with the question whether Rule 12A is contrary to the provisions of the Act. We take it that it is valid and if the appellant's case falls within the proviso he is entitled to acquittal.

6. It was contended before us on behalf of the respondent that the warranty must state expressly that the food mentioned in the cash memo was the same in nature, substance and quality as demanded by the vendor, and if these words did not exist in the cash memo, the proviso would not apply. We are unable to accede to this contention. It may be that if the warranty is not contained in a label or cash memo the warranty must be in Form VI-A, which uses these words:

"We hereby certify that the food/foods mentioned in this invoice is/are warranted to be the same in nature, substance and quality as that demanded by the vendor." But we do not decide this as it is not necessary to do so. In our view when the

proviso expressly says that no warranty in such form shall be necessary in certain eventualities it would be rewriting the rule to hold that nevertheless the same things must exist in the label or the cash memo. It seems to us that if the words in the warranty can reasonably be interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food, the warranty will fall within the proviso. The Act is of wide application and millions of small traders have to comply with the provisions of the Act and the Rules. The learned counsel for the State says that if they are not able to comply with the provisions they should stop carrying on their trade. But if the object underlying the Act can be achieved without disorganising the trade by giving a reasonable interpretation to Rule 12A, it is our duty to do so.

7. A number of English cases were referred to us, but we do not find it necessary to refer to them as they interpret the Sale of Food & Drugs Act, 1875, and the later Food & Drugs Act 1955. The language of the relevant sections dealing with defences is different and warranties employing different words have been interpreted. But they do at least show this that trade can be carried on and the object of the Act is not defeated even if traders use ordinary language of the trade or popular language in warranties.

8. Coming now to the language used in the cash memo it seems to us that the words "quality is up to the mark" mean that the quality of the article is up to the standard required by the Act and the vendee. Quality in this context would include nature and substance because the name of the article is given in the cash memo. It must be remembered that it is not a document drafted by a solicitor; it is a document using the language of a tradesman. Any tradesman, when he is assured that the quality of the article is up to the mark will readily conclude that he is being assured that the article is not adulterated. The offence, if any, has been committed by the seller and not the appellant.

9. There was some argument before us as to the difference in the meaning of the words "nature, substance and quality". It was pointed out that Section 14 only uses two words "nature and quality" and not substance. But it is not necessary to express our views on this point. Refer-

ence was made to the case of Baburally v. Corporation of Calcutta, 1966-2 SCR 815= (AIR 1966 SC 1569). This Court held that the words on the label and the so-called cash memo in that case did not contain the requisite warranty. But we are unable to see how that case assists either the appellant or the State.

10. In the result the appeal is allowed, judgment of the High Court set aside and that of the Magistrate restored. The appellant's bail bond shall be treated as cancelled.

Appeal allowed.

AIR 1970 SUPREME COURT 522
(V 57 C 114)

(From: Allahabad)*

K. S. HEGDE AND A. N. RAY, JJ.

B. P. Maurya, Appellant v. Prakash Vir Shastri and others, Respondents.

Civil Appeal No. 1573 of 1968, D/- 14-8-1969.

Representation of the People Act (1951), Section 123 (4) and (3A) — Statement in newspaper that differences between communities are spread by supporters of rival candidates and that candidate favoured by the newspaper will not preach communal hatred — Statement is not hit either by clause (4) or clause (3A).

Publication of certain statement can be said to be in contravention of clause (4) of Section 123 only when it makes any reflection on the moral or mental nature of the contesting candidate or touches his personal character. The Act is intended to protect freedom of speech on the one hand and to restrain malicious propaganda on the other. It is the personal character and conduct of the candidate which is to be protected from malicious or false attacks. The statement in question has to be first a false statement bearing on the personal character and conduct of the candidate and secondly, the statement complained of must be one which is reasonably calculated to prejudice the prospects of the election of the person.

(Para 30)

So also, clause (3A) can be said to be contravened when there is appeal to vote for a person on the ground of religion or there is appeal not to vote for contest-

* (Ele. Petn. No. 19 of 1967, D/- 12-4-1968 — All.)

ing candidate on the ground of religion.
(Para 32)

Where a newspaper, which is inclined in favour of certain candidate, publishes statements to the effect that differences between the two communities are spread by the supporters of the rival candidate and that the candidate favoured by the newspaper will not preach communal hatred, such statements do not make any reflection on the moral or mental nature of the rival candidate and they do not touch the personal character of the rival candidate nor do they promote enmity or hatred on grounds of religion.

(Paras 34, 35)

The electorate at the time of the election has to be kept in the forefront in judging whether the article can be said to offend the provisions relating to corrupt practices. In reading the documents it would be unrealistic to ignore that when appeals are made by candidate there is an element of 'partisan feeling' and there is 'extravagance of expression in attacking one another' and 'it would be unreasonable to ignore the question as to what the effect of the document would be on the mind of the ordinary voter who reads the document'. Case law discussed.

(Para 35)

Cases Referred: Chronological Paras
(1968) Civil Appeal No. 1778 (NCE)/67

D/- 19-11-1968= 1969-1 SCC 82,

Guruji Shrihari Baliram Jovatode v. Vithalrao

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(1965) AIR 1965 SC 141 (V 52)=

(1964) 7 SCR 790, Kultar Singh v.

Mukhtiar Singh

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(1964) AIR 1964 SC 538 (V 51)=

1965-1 SCJ 747, Badat & Co. v.

E. I. Trading

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(1960) 22 Ele LR 261= ILR (1960)

Mys 290 (SC), T. K. Gangi Reddy

v. M. C. Anjaneya Reddy

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Appellant in Person; M/s. L. M. Singhvi and Veda Vyasa, Senior Advocates (M/s. Rishi Ram, Bishambhar Lal, K. C. Sharma, H. K. Puri, U. P. Singh and K. K. Jain, Advocates, with them), for Respondent No. 1.

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal against the judgment and order of the High Court at Allahabad dated 12th April, 1968, dismissing the election petition filed by the appellant.

2. The appellant contested the General Election to the Lok Sabha from Hapur Parliamentary Constituency in the year

1967. There were seven rival candidates numbered respondents 1 to 7. The appellant contested the election on the ticket of the Republican Party. He was then a sitting member of Parliament. Among the rival candidates, Prakash Vir Shastri was an independent candidate. The election symbol of the appellant was elephant and the election symbol of Prakash Vir Shastri was lion. Prakash Vir Shastri secured 1,49,943 votes while the appellant secured 1,01,875 votes. The Swatantra candidate Sri Naseem secured 34,274 votes. The Congress candidate respondent Smt. Kamla Chaudhury secured 33,988 votes. The appellant challenged the election on grounds of corrupt practices as mentioned in sub-sections (2), (3) and (4) of the Representation of the People Act, 1951 (hereinafter referred to as the Act).

3. At the hearing of the appeal the appellant appeared in person after counsel on his behalf had obtained leave of this Court to withdraw and to allow the appellant to appear in person.

4. The various corrupt practices on which the appellant relied relate to occurrences at six places. The appellant did not press the other occurrences. The first occurrence relates to a meeting held at the Town Hall Maidan at Hapur on 7th February, 1967. The appellant alleged that at the Hapur meeting respondent Prakash Vir Shastri and his supporters delivered inflammatory speeches against the appellant and thereafter the said respondent Shastri's supporters entered the office of the Republican Party, to which the appellant belonged, assaulted the workers of the appellant, tore posters, abused the appellant and threatened his workers. In support of the allegations the appellant relied on Exhibit 28 the news report in the 'Hindustan' published on 8th February, 1967, and also on Exhibit 23 the news report in the newspaper named 'Vir Arjun' published on 8th February, 1967 and Exhibit 22 being the editorial in the 'Vir Arjun' published on 7th February, 1967. The newspaper report in the 'Hindustan' Exhibit 28 published on 8th February, 1967 contains the note of the correspondent from Hapur bearing the date 7th February, 1967, stating that a big meeting was held in support of respondent Shastri, Lok Sabha candidate from Hapur-Gaziabad Constituency. In the 'Vir Arjun' dated 8th February, 1967, Exhibit 23 it is stated that the supporters of the Republican Party were raising slo-

gans that they were championing the cause of Harijans and Muslim youths from Aligarh University were brought for that purpose. It was also stated in the said newspaper that Muslim students of Aligarh were raising the slogans "Harijan Muslim are brothers and where from Hindu community has come. Black face be of Brahmin, barber and lala. Throw shoes on Bhat, Gujar and Rajput". The appellant in paragraph 11 of the petition further alleged that respondent Shastri was associated with the 'Vir Arjun' and K. Narendra, Editor of Vir Arjun who was a colleague of respondent Shastri wrote an editorial by way of an appeal to support the candidature of respondent Shastri in that newspaper on 7th February, 1967, Exhibit 22 and the said appeal was also an instance of corrupt practice. The further allegations in the petition were that at the meeting which was held at the Town Hall Maidan at Hapur on 7th February, 1967, respondent Shastri and the said K. Narendra, Editor of Vir Arjun delivered inflammatory speeches.

5. The appellant generally impeached the judgment of the High Court on two grounds. First, that there was no discussion of the entire evidence and, secondly, that there was rejection of the evidence on behalf of the appellant on consideration that the appellant's witnesses belonged to particular castes and sects.

6. The criticism on behalf of the appellant with regard to Hapur meeting was that respondent Shastri in answer to the petition did not state that there was a meeting on 6th February, 1967, and thereby the appellant was denied the opportunity of meeting that case. The appellant relied on the decision of this Court in Badat & Company v. E. I. Trading, AIR 1964 SC 538 and the observations appearing at page 547 of the report in support of the contention that under the provisions of the Code of Civil Procedure and, in particular, the provisions contained in Order VIII of the Code, respondent Shastri should have alleged in the pleadings that the meeting was held on 6th February, 1967 and in the absence of such allegations respondent Shastri should not have been allowed to make that case. The decision of this Court is of no aid to the appellant. In the case of Badat & Company, AIR 1964 SC 538 (supra) the question was whether there was a contract between the parties and it was alleged by the plaintiff with reference to

two letters that the letters would indicate some of the terms of the transaction. The defendant in the written statement did not specifically deny the said two letters. This Court observed that a mere denial of the contract was not sufficient and the rules of the Code enjoined denial of the existence of the letters. In the present case the question was whether a meeting was held at Hapur Town Hall Maidan on 7th February, 1967. The respondent denied such a meeting. The respondent was not called upon to state as to whether there was a meeting on 6th February, 1967.

7. The news item in the newspaper 'Hindustan' Exhibit 28 gave news from Hapur under the date 7th February, 1967, that a meeting was held at Hapur. Exhibit 23 was a news item in the newspaper 'Vir Arjun' under the date 7th February, 1967, that Shri Narendra, Editor of Vir Arjun spoke at an election meeting at Hapur. Neither the Vir Arjun news item dated 7th February, 1967 nor the news item appearing under the date 7th February, 1967 Hapur published in the Hindustan on 8th February, 1967 contains any intrinsic evidence that a meeting was held at Hapur on 7th February, 1967.

8. Further, of the witnesses on behalf of the appellant P. W. 25 Bal Kishan spoke of the meeting at the Hapur Town Hall Maidan on 7th February, 1967 and he also stated that three pamphlets were distributed and two issues of newspapers were also distributed, namely, the Vir Arjun and Pratap. No such pamphlet was produced. The two witnesses on behalf of respondent Shastri, Bhagwati Prasad Jain D. W. 16 and Rameshwar Prasad Goel D. W. 18 said that a Congress election meeting was held at the Town Hall Maidan, Hapur and no election meeting was held in support of respondent Shastri at the Town Hall Maidan, Hapur on 7th February, 1967.

9. With regard to the meeting at the Town Hall Maidan at Hapur alleged by the appellant to have been held on 7th February, 1967, the oral evidence on behalf of the appellant is that the meeting was held and the oral evidence on behalf of the respondent is that the meeting was not held. In the case of conflicting oral testimony it is safer to place reliance on documentary evidence. First the newspaper report on which the appellant relies contained intrinsic evidence which totally nullifies the appellant's case.

Exhibit 28 being the 'Hindustan' dated 8th February, 1967 indicates the news about Hapur under the date 7th February, 1967 that a meeting was held "yesterday night" meaning thereby 6th February, 1967, in support of respondent Prakash Vir Shastri. Secondly, the newspaper 'Vir Arjun' published on 8th February, 1967 gave the news at Hapur under the date 7th February, 1967. The news referred to an election meeting at Hapur but did not mention that the meeting was held on 7th February or on 6th February, 1967. Thirdly, Exhibit A-12 which is an application by one Lakhi Ram seeking permission from the Municipal Board for holding a meeting on 7th February, 1967 in the Town Hall Maidan, Hapur throws light on this aspect. The permission given by the authorities which is marked Exhibit A-13 required the persons holding the meeting to pay certain charges towards the use of the electricity. Exhibit A-14 is a receipt for payment of Rs. 5. These three documents indicate that the meeting which was held on 7th February, 1967 was a meeting organised by the supporters of the Congress Party. Fourthly, Exhibit A-2 which is a General Diary of Thana Hapur bearing the date 7th February, 1967 shows that a constable was sent to the Town Hall Maidan to make arrangements in connection with the meeting which was to be addressed by one Kailash Prakash. The witnesses on behalf of the respondent Shastri mentioned the name of Kailash Prakash and Smt. Kamla Chaudhury as speakers on behalf of the Congress candidate. It is highly improbable that two meetings of the two rival candidates, namely of the Congress and of the respondent Prakash Vir Shastri would both be held on the same date and at the same place. Fifthly, the reports which were lodged by the supporters of the appellant with regard to the attack on the office of the Republican Party on 7th February, 1967 do not mention or refer at all to any meeting on behalf of respondent Prakash Vir Shastri on 7th February, 1967 at the Town Hall Maidan, Hapur. It would be natural if a meeting had been held on 7th February, 1967 that there would have been reference to the same.

10. The other allegations of the appellant were that respondent Shastri's supporters on 7th February, 1967, attacked the office of the Republican Party, to which the appellant belonged. There was the First Information Report dated 7th

February, 1967 about the attack on the office of the Republican Party. This report is significantly silent about any meeting having been held on 7th February, 1967 at Hapur Town Hall Maidan. Though there was the alleged complaint about the attack on the office of the Republican Party, it appears that there was no investigation. The attack on the party office was not proved by the appellant to have been made by respondent Shastri's workers and supporters. The High Court correctly came to the conclusion that no meeting was held at Hapur on 7th February, 1967 and there was no attack on the office of the Republican Party.

11. With regard to the attack on the office of the Republican Party to which the appellant belonged though the first information report gave the news about the attack it is strange that there was no investigation. The report of the joint Secretary of the Republican Party to the President of the Republican Party bearing the date 8th February, 1967 alleged that the supporters of Prakash Vir Shastri attacked the office of the Republican Party on 7th February, 1967 forcibly took necessary papers and a flag of the Party. Dal Chand Nimesh, Joint Secretary of the Republican Party, P. W. 71 in his evidence stated that none of the processionists went to his office and further he hid himself in an adjoining room. He did not prove the truth of the statements contained in his report which was marked as Exhibit 11. The attack on the office of the Republican Party was not mentioned at all either in the Vir Arjun of 8th February, 1967 or in the Hindustan dated 8th February, 1967. It is obvious that if in fact any attack had been made on the office of the Republican Party, the supporters of the appellant would have taken steps for investigation and publication.

12. The second occurrence on which the appellant relied is alleged to have happened at a place called Nagola. The appellant's case was that on 18th February, 1967, Prakash Vir Shastri and his supporters who were mostly Tyagi by caste asked the Tyagis to stop the Jatav voters from going to the polling station to cast their votes. It was alleged that Thawariya made the announcement by beat of drums that the Muslim, Chamar, Bhangi and Jatav voters would not be allowed to go to the polling station to cast their votes. The other part of the

appellant's case about the Nagola incident was that there was an assault on Shamshad Elahi, a worker of the appellant. The appellant relied on the oral testimony of P. W. 11, P. W. 12, P. W. 15, P. W. 16, P. W. 17, P. W. 19, P. W. 23, P. W. 65 and P. W. 80. The witnesses on behalf of the respondent were D. W. 4, D. W. 12, D. W. 13, D. W. 30 and D. W. 33. The oral evidence is in support of the rival contentions, namely, that the Jatav voters would not be allowed to vote and the denial of the same by the respondent. The appellant also relied on Exhibit N that the Jatav voters would not be allowed to cast their votes by the Tyagis.

13. In support of the case with regard to assault on Shamshad Elahi the appellant relied on the oral evidence of Shamshad Elahi, P. W. 11 and the injury report Exhibit 30 and other documents, namely, Exhibits 31, 32 and 35. The appellant criticised the judgment by contending that there was no discussion of the oral evidence of P. W. 17, Satya Pal Malik. P. W. 11, Shamshad Elahi said that he went to Nagola at about 3.30 p. m. on 19 February, 1967, the date of the election and the voters told him about the proclamation by beat of drums on the previous night and the voters further said that they would be insulted and they should remain there. Shamshad Elahi further said that he met Sevak Ram and Surajbhan Tyagi and 10 or 12 other persons were with them and they beat the witness with lathis and he received a number of injuries.

14. The other witnesses on whose testimony the appellant relied said that people wearing lion badges which was the election symbol of Prakash Vir Shastri asked the witnesses not to cast their votes and they also said that it was announced by beat of drums that no Chamar or Bhangi should cast a vote.

15. Nagola is a village within the circle of Badhnauli. R. K. Aggarwal, D. W. 33 who was the Presiding Officer at Badhnauli polling station gave evidence. He said that the votes of village Nagola were polled and no Harijan or Mohammedan voter was stopped from casting votes and that there was no complaint that Harijan and Mohammedan voters were being stopped from casting their votes. In cross-examination the witness said that no voters from Haidernagar or Nagola were brought to the polling station under police protection.

16. P. W. 80, Sukhbir Singh who was posted as Station Officer Thana Karkoda said that he received information from Shamshad Elahi that voters at Badhnauli were being stopped from casting their votes. Sukhbir Singh went to Badhnauli. He also went to Nagola. He said that 30 or 40 Harijans voters went to Badhnauli to cast their votes. He said that there was no voter who was taken by him to a polling station in a truck. Sukhbir Singh proved Exhibit 35 which was a contemporaneous report to the effect that no one was stopped from voting at Nagola.

17. Satya Pal Malik on whose testimony the appellant relied said that Prakash Vir Shastri came to Badhnauli polling station on 19th February, 1967 and there were 40 to 50 persons around him with lion badges on. His further evidence was that Prakash Vir Shastri asked the Pradhan to beat the voters to make them run away. Prakash Vir Shastri however denied having asked Sheoraj Singh Pradhan to drive away the voters.

18. Thanwaria, P. W. 23 on whose evidence the appellant relied said that he beat the drum in Nagola village on a day before the polling. He said that there were two parties of the Tyagis. One was of Sheoraj Singh and the other was of Pyare Lal. The Jatavs, according to his testimony, were in Pyare Lal's party and the Bhangis were in Sheoraj's party. The appellant said that Thanwaria was disbelieved only because he belonged to the Chamar caste. That is misreading the judgment. The High Court said that the evidence of Thanwaria did not inspire confidence. That criticism of the evidence of Thanwaria is justified because he came to support the case of the appellant and he belonged to the appellant's camp.

19. Pyare Lal, D. W. 12 said that no Harijan was stopped from casting his vote at Badhnauli polling station and no worker of Prakash Vir Shastri threatened any Harijan voter at the polling station. The appellant criticised the evidence of Pyare Lal that he did not know as to what was happening in the village. Satya Pal Malik, P. W. 17 mentioned the name of Pyare Lal as the leader of one of the parties and Sheoraj Singh as Pradhan of the village Nagola.

20. The oral evidence on behalf of the appellant is not acceptable for two reasons. First, if there had been any incident of a voter being prevented from

voting a complaint would have been made to the polling officer of the polling station. Secondly, Vireshwar Tyagi and Mahendra Singh Verma who were the supporters of the appellant and who are alleged to have said that voters at Nagola were prevented from voting did not lodge any report about the alleged corrupt practice particularly when it was said to be committed by Prakash Vir Shastri himself.

21. The assault on Shamshad Elahi which was also said to be an incident of corrupt practice is unacceptable for these reasons. First, the injury report Exhibit 30 has to be considered along with the statement of Shamshad Elahi being Annexure M and the report of the appellant being Exhibit 32 and the complaint of Shamshad Elahi being Annexure N being Exhibit 30. The appellant in the report dated 17th February, 1967 Exhibit 32 spoke of voters not being allowed to exercise their votes. Shamshad Elahi in his complaint said that 10 or 12 persons beat him with lathis. All this happened on 19th February, 1967. The doctor's report was about the injuries. First, it is peculiar that there was no complaint about the injuries after the injury report. Secondly, there is no evidence that the assault was by the workers of Prakash Vir Shastri. Shamshad Elahi in his evidence mentioned the names of Sevak Singh and Surajbhan Tyagi. These names were not mentioned in the complaint being Exhibit 30. In cross-examination Shamshad Elahi was asked as to how he had obtained the names and his answer was that he met the grass cutter who gave the names. It is curious that the grass cutter who gave the names was not examined.

22. The third incident on which the appellant relied took place at Chhajipur. The allegations are that on 2nd February, 1967 an election meeting was organised in support of the candidature of the appellant and the supporters of respondent Prakash Vir Shastri created disturbance with the result that the meeting could not be continued and the supporters of respondent Prakash Vir Shastri are alleged to have chased the appellant. The High Court rightly commented on the absence of any report having been made by the appellant to the Election Commissioner or the police about the alleged occurrence. It is obvious that if the appellant had been chased he would have made report to the Election Commissioner or to the police. The appellant relied on

the news item in the Patriot dated 5th February, 1967. The news item was referred to by Mahesh Chandra Agarwal, P. W. 14 who, however, was not present at the meeting at Chhajjupur. He referred to a conversation with the Superintendent of Police. The Senior Superintendent of Police was not examined. No police report was produced. The truth of the newspaper report was not corroborated nor was the statement in the news item proved. On the contrary, Mahesh Chandra Agarwal nullified the news item by admitting that he was not present at the meeting.

23. P. W. 18 Tejpal Singh spoke of the incident of 2nd February, 1967 and mentioned about the shouting of slogans and throwing of brick-bats. P. W. 10, Som Prakash spoke of charge-sheet under Sections 147 and 342 of the Indian Penal Code against certain persons. He spoke of the report of 3rd February, 1967 and a report of 9th February, 1967. The report dated 3rd February, 1967 relates to the occurrence on 2nd February, 1967 at Chhajjupur. The report of 9th February, 1967 also relates to the alleged incident of 2nd February, 1967 at Chhajjupur. The witness Som Prakash P. W. 10 admitted that no investigation was made. It is significant that the name of the appellant is not mentioned in either of complaints or reports. The allegations in the report are that some disturbance was created and names of various persons are mentioned as having tried to run towards the jeep which carried the leaders of the Republican Party. One of the witnesses Devi Dayal Sen, P. W. 63 said that when the appellant rose to speak some people pelted stones at him.

24. The alleged incident at Chhajjupur is unacceptable because, first, there was no complaint by the appellant to the Election Commissioner, secondly, there was no police case and no investigation, thirdly, the reports did not mention the name of the appellant as having been assaulted or chased and fourthly, the news item in the Patriot was not proved as to the truth of the contents therein.

25. The fourth occurrence on which the appellant relied was at a place called Opehra. The appellant alleged that some persons were stopped from casting their votes. The appellant relied on the oral evidence of P. Ws. 58, 59 and 60. P. W. 60 is Manzoor Ahmad, M. L. A. The other two witnesses were Durga Das and Ram Prasad. The appellant criticised the judg-

ment that there was no mention of the name of Manzoor Ahmad. The diaries being Exhibits A-23, A-32 and A-29 were produced to show that the election at Opehra polling station passed off peacefully and therefore no one stopped any voter from casting vote. Manzoor Ahmad in his oral evidence said that he saw people armed with lathis and ballams. He said that he made a complaint to the Presiding Officer and admitted in cross-examination that there was no written complaint. Manzoor Ahmad did not prove that any person was stopped from voting.

26. The fifth and the sixth occurrences on which the appellant relied took place at Datiyana and Bankhanda. It is alleged by the appellant that at Datiyana the agents and the supporters of respondent Prakash Vir Shastri threatened the Scheduled Caste and Harijan voters and prevented them from going to the polling station. The allegations about the occurrence at Bankhanda are to similar effect. The appellant relied on Exhibit 18 which was a memorandum addressed by several voters who stated that they remained within the house and could not vote because the villager Tyagi Kailash Chand threatened to kill them if, they would vote. P. W. 65, Vireshwar Tyagi spoke of the incidents at Nagola, Bankhanda and Hapur and his wife Smt. Prakash Vireshwar Tyagi spoke of the alleged incident at Datiyana. The respondent's witnesses denied that any person was prevented from casting vote at Datiyana.

27. The allegations with regard to the Bankhanda were referred to by Vireshwar Tyagi and other witnesses. The diary which was produced with regard to the polling station disproved any such incident. The diaries are Exhibits A-19 and A-21. D. W. 20, Chandoo Singh stated that he was at the polling station at Bankhanda and no one was stopped from exercising the right of franchise. D. Ws. 21 and 22 also spoke of polling at Bankhanda having been peaceful. The appellant referred to religious songs which were said to be in praise of respondent Prakash Vir Shastri. Mere praiseworthy songs will not be an instance of corrupt practice.

28. All the allegations about the voters having been stopped from casting their franchise followed the same pattern of oral evidence. The absence of any report either to the Election Commission or to

the Police authorities is an important and noticeable feature and therefore the oral evidence is not acceptable.

29. The other allegations relied on by the appellant are that respondent Prakash Vir Shastri is guilty of corrupt practice under sub-sections (3), (3-A) and (4) of Section 123 of the said Act. The appellant contended that respondent Prakash Vir Shastri made communal propaganda against the appellant and also published false statements in relation to the personal character of the appellant. In aid of the contentions the appellant relied on annexures KK and MM. The appellant relied on the upper portion of annexure KK in support of the contention that the slogans amounted to communal propaganda. The lower portion of annexure KK was contended by the appellant to be allegations against the personal character of the appellant. Annexure MM was said by the appellant to contain slogans amounting to communal propaganda against the appellant. It was said by the appellant that respondent Prakash Vir Shastri promoted feelings of enmity or hatred against the appellant and further raised communal propaganda. The appellant also relied on Exhibit 22 being the editorial in *Vir Arjun* dated 7th February, 1967 in support of the contention that the editorial constituted communal propaganda against the appellant.

30. In *Guruji Shrihari Baliram Jovade v. Vithalrao*, Civil Appeal No. 1778 of 1967, D/- 19-11-1968 = (reported in 1969-1 SCC 82), this Court dealt with the scope and content of sub-section (4) of Section 123 of the Act. The Act is intended to protect freedom of speech on the one hand and to restrain malicious propaganda on the other. The provisions contained in sub-section (4) of Section 123 were said by this Court to be contravened when "any false allegation of fact pierces the politician and touches the person of the candidate." It is the personal character and conduct of the candidate which is to be protected from malicious or false attacks. The statement in question has to be first a false statement bearing on the personal character and conduct of the candidate and secondly, the statement complained of must be one which is reasonably calculated to prejudice the prospects of the election of the person.

31. Under the provisions contained in sub-section (3-A) of the said Act the promotion of, or attempt to promote, feel-

ings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language, is the mischief which is sought to be avoided by making the same a corrupt practice. The sub-section further says that such promotion or attempt to promote enmity or hatred is for the furtherance of the election of the candidate or for prejudicially affecting the election of any candidate.

32. The words "personal character or conduct" were explained by this Court in *T. K. Gangi Reddy v. M. C. Anjaneya Reddy*, (1960) 22 ELR 261 "to be equated with his mental or moral nature. Conduct connotes a person's actions or behaviour". Annexure KK was not proved and therefore it cannot be said to constitute any communal propaganda. Assuming it were proved there is no appeal to vote for a person on the ground of religion nor is there any appeal not to vote for a person on the ground of his religion. Further, the provisions contained in sub-section (4) of Section 123 require the publication with the consent of the candidate or his election agent. In the present case, annexure KK has not been established to be published with the consent of the respondent Prakash Vir Shastri or his election agent. It, therefore, follows that annexure KK offends neither the provisions contained in sub-section (3A) nor in sub-section (4) of Section 123 of the Act.

33. Annexure MM was said by the appellant to be a communal propaganda. Annexure MM was not proved. Even if it were proved the slogans do not offend the provisions of either sub-section (3A) or sub-section (4) of Section 123 of the Act.

34. The publication in the newspaper '*Vir Arjun*' Exhibit 22 is to the effect that differences between Hindus and Harijans were being spread by the supporters of the Republican candidate meaning thereby the appellant and if students from Muslim University were brought in by them then students from Ghaziabad would be brought into the field. The newspaper certainly was inclined in favour of respondent Prakash Vir Shastri but the newspaper publication said that Prakash Vir Shastri would not unlike the Congress candidate preach communal hatred. The statements in Exhibit 22 do not make any reflection on the moral or mental nature of the appellant and they do not touch the personal character of

the appellant nor do they promote enmity or hatred on grounds of religion.

35. The appellant failed to prove that respondent Prakash Vir Shastri committed any corrupt practice in relation to the personal character and conduct of the appellant. The newspaper publication Exhibit 22 was an appeal on behalf of respondent Prakash Vir Shastri. As long as the publication is not tainted by corrupt practice, such an appeal will not be an infraction of the provisions as to corrupt practices as contemplated in the Representation of the People Act. Suggestions that attempts are made to accentuate the differences between the Hindus and Harijans in the article cannot be extracted in isolation from the entire context. The electorate at the time of the election has to be kept in the forefront in judging whether the article can be said to offend the provisions relating to corrupt practices. The Court is to ascertain whether the statement is reasonably calculated to prejudice the prospects of the candidate's election. This Court observed in *Kultar Singh v. Mukhtiar Singh*, (1964) 7 SCR 790 = (AIR 1965 SC 141) that in reading the documents it would be unrealistic to ignore that when appeals are made by candidate there is an element of 'partisan feeling' and there is 'extravagance of expression in attacking one another' and 'it would be unreasonable to ignore the question as to what the effect of the pamphlet would be on the mind of the ordinary voter who reads the pamphlet'. In the light of these principles, we are of opinion that there is no infraction of the provisions contained in sub-sections (3A) and (4) of Section 123 of the Act.

36. For the reasons mentioned above, this appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 529 (V 57 C 115)

(From Allahabad: (1964) 52 ITR 811)

J. C. SHAH, Actg. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

M/s. Juggilal Kamlatpat, Kanpur, Appellant v. Commissioner of Income Tax, U. P., Respondent.

Civil Appeal No. 1953 of 1968, D/- 31-7-1969.

LM/AN/E2/69/GDR/P

1970 S. C./34 IV G—10

Income-tax Act (1922), Sections 10, 3 and 12A — Adventure in nature of trade — Assessee firm purchasing large block of shares with borrowed money at ruling rates and soon thereafter selling at a profit in small lots — Transaction, held, was a commercial one entered into with profit motive and was not in the nature of capital investment.

Whether a transaction is or is not an adventure in the nature of trade is question of mixed law and fact; in each case the legal effect of the facts found by the tribunal on which the tax payer could be treated as a dealer or an investor in shares, has to be determined. (Para 8)

A large block of shares was purchased by the assessee firm at the ruling rates with borrowed money, and soon thereafter the shares were disposed of at a profit in small lots. The firm used to promote companies. One of its activities was to finance sister concerns. Some of the shares were sold through brokers to strangers. The story of the firm that some or all the shares were merely distributed to its associates was not proved. The interest which the firm had to pay for the amount borrowed for purchasing the shares was debited in the revenue account and was claimed as a revenue allowance. The story that the shares had to be sold on account of financial difficulties were plainly belied by the circumstance that the firm went on purchasing and selling the shares.

Held, that the transaction was a commercial transaction entered into with a profit motive and was not a transaction in the nature of capital investments.

(Paras 8, 9)

Held further, that the tribunal was right in inferring that the purchase and sale of shares was a business activity which was continuous and since the firm had entered upon a well planned scheme for earning profit and that in furtherance and execution of that profit making scheme they sold the shares at the opportune time, and that the sale of the shares was not merely on account of pecuniary embarrassment as claimed, the profit realised by the firm by the sale of shares could not be characterised as a casual receipt, nor could it be treated as accretion to a capital asset. AIR 1961 SC 1141, Distinguished. (Para 5)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 1141 (V 48) =

41 ITR 534, Ramnarain Sons (P)

Ltd. v. Commr. of I. T., Bombay 7

Mr. A. K. Sen, Senior Advocate (Mr. G. L. Sanghi, Advocate, and B. R. Agarwal, Advocate of M/s. Gagrath and Co. with him), for Appellant; Mr. Jagdish Swarup, Solicitor-General of India (M/s. S. K. Iyer, R. N. Sachthey and B. D. Sharma, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, Actg. C. J.: In proceedings for assessment to income-tax for the year 1946-47, the appellant firm was assessed to tax in respect of an amount of Rupees 3,99,587 received by it as profit on sale of shares. The plea of the firm that the amount was "capital gain" and was on that account not taxable was rejected. In the view of the Income-tax Officer the profit arose from "a well planned business activity in which the assessee had fully utilised its resources". The Appellate Assistant Commissioner affirmed the decision of the Income-tax Officer. The Income-tax Appellate Tribunal dismissed the appeal filed by the firm.

2. The Tribunal, amongst others, referred the following question to the High Court of Allahabad for opinion:

"Whether the surplus realised by the sale of the shares of Aluminium Corporation of India Ltd., J. K. Investment Trust and Raymond Woollen Mills amounting in aggregate to Rs. 3,99,587 or any part thereof was the revenue income of the assessee liable to tax under the Income-tax Act, 1922?"

The High Court answered the question in the affirmative. The firm has appealed to this Court with special leave.

3. In 1944 the firm purchased 50,000 ordinary shares of Raymond Woollen Mills Ltd. (hereinafter called "Raymond") for Rs. 69,75,255. The firm paid Rupees 7,00,000 on November 4, 1944 and the balance on December 6, 1944. The transaction was financed with the aid of a loan of Rs. 70 lakhs borrowed from the Hindustan Commercial Bank Ltd. The firm sold those shares through brokers between November 23, 1944 and April 2, 1946 and realised Rs. 72,42,200, the transaction resulting in a net profit of Rs. 2,66,945. Between January 26, 1945 and April 5, 1946 the firm also purchased 67 debentures, 5,582 preference shares and 18,576 ordinary shares of the Aluminium Corporation Ltd. (hereinafter called "Aluminium") for Rs. 8,57,480. Except 2,118 preference shares, the entire lot of shares with the debentures was sold for

Rs. 7,05,957 between February 1, 1945 and August 13, 1945. Adjusting the cost of shares left on hand the firm realised a net profit of Rs. 60,278 in that transaction. The firm also purchased 290 "A" Class shares of J. K. Investment Trust Ltd. (hereinafter called "J. K. Trust") on February 4, 1945 for Rs. 1,45,000 and sold the same on August 22, 1945 for Rupees 2,17,264, the transaction resulting in a net profit of Rs. 72,364.

4. Before the departmental authorities the firm claimed that it had taken over the entire share capital issued by Raymond with a view to secure its managing agency and had thereafter distributed the shares of Raymond to the various associates of the firm, and the transaction being one to facilitate acquisition of a capital asset being a capital investment, the profit realised by sale of the shares was not liable to be assessed to income-tax. The firm also claimed that when a part of the new issue of capital of Aluminium was not taken over by the public, the firm as financiers of the J. K. Group of Industries took over the shares and the debentures not subscribed within the time allowed. This transaction, it was contended, was also of the nature of capital investment. It was explained that the shares were sold on account of "financial embarrassment" and not with the object of earning income, and the profit realised by the sale did not attract tax. Similar contentions were also raised in respect of the shares of J. K. Trust. The departmental authorities rejected the contentions. The Tribunal agreed with them.

5. From the facts found by the Tribunal it is clear that for purchasing the Raymond shares, the firm paid Rs. 7,00,000 on November 4, 1944, and the balance on December 6, 1944, and commenced selling the shares on November 23, 1944. The contention that the shares were only distributed to the "allied concerns" is contrary to the findings of the Tribunal. Some of the shares were sold through brokers to outsiders. It is a significant circumstance that the firm parted with all the Raymond shares by April 2, 1946 and did not retain a single share after that date. It is true that some of the shares were held by J. K. Industries Ltd. and other J. K. concerns. But the transfer even to the J. K. concerns was in all cases for a profit. Within a few days after purchasing the Raymond shares, the "firm started unloading them", and the shares were never sold without making

profit. The interest paid for the loan borrowed from the Hindustan Commercial Bank Ltd. for financing the purchase of Raymond shares was debited in the accounts as a revenue expenditure, and it was claimed as a permissible allowance. The firm used to promote Companies. One of its activities was to finance "sister concerns" known as J. K. Industries. The case of the firm that the shares had to be sold on account of "financial embarrassment" was plainly untrue. The Tribunal, was in our judgment right, in inferring that the "purchase and sale of shares was a business activity which was continuous", and since the firm "had entered upon a well-planned scheme for earning profit and that in furtherance and execution of that profit making scheme they sold the shares at the opportune time" and that "the sale of the shares was not merely on account of pecuniary embarrassment" as claimed, the profit realised by the firm by the sales of shares could not be characterised as a casual receipt nor could it be treated as accretion to a capital asset.

6. Strong reliance was, however, placed on a somewhat obscure statement in the order of the Appellate Assistant Commissioner:

"In the case of Raymond Woollen Mills shares it is clear beyond doubt that the purchase of the shares was a first rate business deal and that it was motivated by the desire and intention to acquire the Managing Agency of the Mills. If this is not an operation in the scheme of profit-making it is not known what will constitute such a transaction."

Apparently there is a typographical error in the second clause of the first sentence, and the word "not" has by inadvertence been omitted otherwise in the context in which it occurs the clause has no meaning whatever. In any event as rightly pointed out by the High Court the reasons given by the Tribunal and the conclusion recorded by it are inconsistent with the finding that the shares were purchased with the sole object of acquiring the Managing Agency of the Raymond Woollen Mills and not with a view to make profits.

7. Counsel for the firm invited our attention to the decision of this Court in *Ramnarain Sons (P) Ltd. v. Commissioner of Income-tax, Bombay*, 41 ITR 534 = (AIR 1961 SC 1141) in support of his contention that a transaction for purchasing shares with the object of acquiring the

managing agency of a Company will be regarded as capital investment and not a business in share. In *Ramnarain Sons' case*, 41 ITR 534 = (AIR 1961 SC 1141) the appellant Company was a dealer in shares and securities and also carried on business as managing agents of other companies. With a view to acquire the managing agency of a company, the appellant Company purchased from a managing agents a large block of shares at a rate approximately 50 per cent above the ruling market rate. Two months later the appellant Company sold a small lot out of those shares at a loss and claimed the loss as a trading loss. It was found in that case by the Tribunal that the intention of purchasing the shares was not to acquire them as part of the stock-in-trade of tax-payer's business in shares, but to facilitate the acquisition of the managing agency of the Company which was in fact acquired, and on that account loss incurred by the sale of a small lot could be regarded only as a loss of capital nature. The Court observed in that case that the circumstance that the tax-payer had borrowed loans at interest to purchase the shares or that it was a dealer in shares and was authorised by its memorandum of association to deal in shares was of no effect. On a review of the evidence the Tribunal held that the shares were purchased with the object of acquiring the managing agency and with that view the High Court agreed.

8. Whether a transaction is or is not an adventure in the nature of trade is question of mixed law and fact: in each case the legal effect of the facts found by the Tribunal on which the tax-payer could be treated as a dealer or an investor in shares, has to be determined. In the present case the transaction since the inception appears to be impressed with the character of a commercial transaction entered with a view to earn profit. Large block of shares was purchased at the ruling rates with borrowed money, and soon thereafter the shares were disposed of at a profit in small lots. Some of the shares were sold through brokers to strangers. The story of the firm that some or all the shares were merely "distributed" to its associates is not proved. The interest which the firm had to pay for the amount borrowed for purchasing the shares was debited in the revenue account and was claimed as a revenue allowance.

9. It was not the case of the firm that Aluminium and J. K. Trust shares were purchased for acquiring the managing agency. It was claimed that the shares were taken over because the public did not accept those shares. It was one of the objects of the firm to finance its allied concerns and in taking over shares which the public did not subscribe the firm was acting in the course of its business. The firm commenced selling the shares soon after they were purchased. Aluminium shares were purchased between January 26, 1945 and April 5, 1946 (except a few which were retained) and sold at profit. Whereas the first lot was purchased on January 26, 1945, the first sale was made on February 1, 1945. It could not be said that this was an investment in shares independent of the trading activity of the firm. The story that the shares had to be sold on account of financial difficulties is plainly belied by the circumstance that the firm went on purchasing and selling the Aluminium shares. J. K. Trust shares were purchased on February 14, 1945 and were sold on August 22, 1945. Aluminium shares as well as J. K. Trust shares were sold at a profit and through brokers. These transactions were also stamped with the character of commercial transactions entered into with a profit motive and were not transactions in the nature of capital investments. The answer recorded by the High Court is therefore correct.

10. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 532
(V 57 C 116)

(From: Allahabad)*

J. C. SHAH, Actg. C. J. AND
G. K. MITTER, J.

Ramchand (dead) by his legal representatives, Appellants v. Thakur Janki Ballabhji Maharaj and another, Respondents.

Civil Appeal No. 574 of 1966, D/- 23-7-1969.

(A) Hindu Law — Religious endowment — Private trust temple — Mismanagement and misappropriation by pujari — Right to sue — Suit on behalf

*(First Appeal No. 39 of 1952, D/- 22-9-1964—All.)

LM/BN/D388/69/VBB/M

of deity to protect property maintainable — Person making donations for temple maintenance can sue on behalf of deity — Civil P. C., Section 92 has no application — (Civil P. C. (1908), Sections 9 and 92, Order 7, Rule 4).

Where R, acting as pujari or manager of a private Hindu temple, raises residential buildings of his own in the temple premises and converts them to his own use and asserts a proprietary title to them, R commits acts of mismanagement and misappropriation of the temple and its properties and is therefore not fit to remain in possession as pujari or manager of the temple. (Para 8)

A person, who has made large donations for the maintenance of the temple, has clearly a substantial interest to maintain a suit for possession of the temple and its properties against the pujari or manager, on behalf of the deity to protect the property from mismanagement and misappropriation. (Para 8)

Section 92, Civil P. C., has no application to the suit and the sanction of the Advocate-General is not a condition of its initiation. (Para 6)

(B) Civil P. C. (1908), Sections 92, 9, Order 41, Rule 33 — Private trust temple — Mismanagement — Suit for possession of temple and its properties by deity — Civil Court has jurisdiction to frame scheme for management — (Scheme directed to be framed by appellate Court in exercise of powers under Order 41, Rule 33) — (Hindu Law — Religious endowment — Private trust temple).

The Civil Courts have jurisdiction to frame a scheme for the management of a temple which is not a public but a private trust: AIR 1925 PC 139 and AIR 1957 Mad 583 and AIR 1952 Cal 763, Rel. on. (Para 9)

Where in a suit for possession of a temple and its properties which was a private trust, the temple and its properties were situated within the State of U. P. and the plaintiff belonged to the State of Rajasthan, and it appeared difficult for the plaintiff to look after the administration of the temple and its properties from Rajasthan the appellate Court (in this case, the Supreme Court) in exercise of the powers under Order 41 Rule 33, Civil P. C. can direct the Court of first instance to frame a scheme for management of the temple and its properties, to make the decree for possession effective. (Para 10)

Cases Referred: Chronological Paras

- (1957) AIR 1957 Mad 583 (V 44) =
 1956-2 Mad LJ 58, Asha Bibi v.
 Nabissa Sahib 9
 (1952) AIR 1952 Cal 763 (V 39) =
 89 Cal LJ 224, Mahadev Jew v.
 Balkrishna Vyas 9
 (1925) AIR 1925 PC 139 (V 12) =
 52 Ind App 245, Pramatha Nath
 Mullick v. Pradyumna Kumar
 Mullick 9

M/s. J. P. Goyal and Sobhag Mal Jain
 Advocates, for Appellants; Mr. K. B.
 Mehta, Advocate, for Respondent No. 2.

The following Judgment of the Court
 was delivered by

SHAH, Actg. C. J.: Suit No. 41 of 1947
 was filed in the Court of the Civil Judge,
 Mathura by the deity Thakur Janki
 Ballabhji Maharaj, acting through its
 manager—L. Tulsiram, authorised agent
 of the Bharatpur State, for a decree for
 possession of the temple of the deity at
 Brindaban in U. P.; and of the temple
 properties and for an order calling upon
 the defendant, Ramchand, to account for
 the realisations of the estate of the deity.

2. The case of the plaintiffs was that
 the Ruler of the State of Bharatpur built
 the temple at Brindaban and installed
 the idol of Thakur Janki Ballabhji Maha-
 raj and dedicated the temple to the deity;
 that the Shebait of the deity who was
 a paid employee of the State was ap-
 pointed by the Ruler of the State of
 Bharatpur; that one Chhotelal was ap-
 pointed a priest to perform the worship
 in the temple under a written agreement
 dated April 8, 1936; that after the death
 of Chhotelal on May 13, 1942 Ramchand
 was appointed the priest of the temple
 on condition that he shall execute the
 usual agreement in favour of the State;
 that Ramchand entered upon the duties
 as pujari but failed to execute the agree-
 ment, and in course of time raised vari-
 ous constructions of his own on the pre-
 mises in dispute and converted them into
 private residential buildings, and illegally
 used the temple as a lodging house for
 pilgrims "to the utter detriment, loss and
 desecration of the deity" and thereby ac-
 quired "illegal benefit to himself out of
 the temple properties"; and that Ram-
 chand was not performing the seva puja
 of the deity.

3. The suit was resisted by Ramchand.
 He denied that the temple was built at
 the expense of the Ruler of the State of
 Bharatpur or that he—Ramchand—was

appointed to be a priest of the temple
 by the Ruler of Bharatpur. He contend-
 ed that one Ram Narain Kedar Nath had
 taken a piece of land at Brindaban on
 rent from the temple of Govindji and
 after constructing a temple thereon and
 installing the Thakurji had given it as an
 offering to Sitaram, ancestor of Ram-
 chand, and had appointed Sitaram as the
 Manager of the temple: that the temple
 had since then remained in the manage-
 ment of the descendants of Sitaram, and
 that he (Ramchand) was in possession of
 the temple and its properties as "Mana-
 ger and proprietor".

4. The trial Court dismissed the suit
 holding that the Ruler of Bharatpur was
 never the owner of the temple or of the
 articles mentioned in Schs. A and B of the
 plaint, that the Ruler was also not the
 founder of the temple nor its shebait;
 and that the Ruler had never appointed
 any pujari of this temple and was not
 authorised to appoint or dismiss such a
 pujari.

5. In appeal against the decree passed
 by the Court of First instance it was urg-
 ed before the High Court of Allahabad
 that the trial Court erred in dismissing
 the suit merely on the finding that the
 Ruler of the State of Bharatpur
 "had no concern with the construction of
 the temple or with the installation of the
 idol in the temple", and that in the suit
 filed by the deity, having regard to the
 acts of mismanagement and misapprop-
 riation committed by the defendant Ram-
 chand, a decree should have been made
 in favour of the deity. Counsel for Ram-
 chand contended that the suit being of
 the nature of a suit under Section 92 of
 the Code of Civil Procedure could not
 be instituted without obtaining the sanc-
 tion in writing of the Advocate-General
 and that in any event the second plain-
 tiff, the State of Bharatpur, could not file
 the suit, since it was not a shebait or the
 settlor of the temple.

6. It was common ground before the
 High Court that the property of the
 temple was not property of a public trust
 of a religious or charitable nature. From
 the averments made in the plaint it is
 clear that the suit was filed by the deity
 against the person in management and it
 was not a suit filed by the relators. Sec-
 tion 92 of the Code of Civil Procedure
 had no application to the suit and the
 sanction of the Advocate-General was not
 a condition of the initiation of the suit.

The High Court therefore rightly rejected the contention that the suit was not maintainable without the sanction of the Advocate-General.

7. The High Court held it was open, even to a worshipper, if he possesses sufficient qualifying interest to start a suit to protect the property of the deity. Observing that the defendant Ramchand had raised residential buildings of his own in the temple premises and that he was lodging pilgrims in a part of those buildings and was asserting a proprietary title to them and was on that account guilty of conduct detrimental to the interest of the deity and had rendered himself liable to be ejected from the temple and its properties, and that he was unfit to act as pujari, the High Court reversed the decree passed by the trial Court and decreed the plaintiffs' suit for possession of the temple and its properties and restrained the defendant Ramchand by an injunction from interfering with the management of the temple and performance of worship of the deity. With special leave Ramchand has appealed to this Court.

8. Ramchand has committed several acts of mismanagement and misappropriation of the temple and its properties. He has set up a personal title to the temple properties and has converted the properties to his own use. Ramchand is therefore not fit to remain in possession as pujari or as manager of the temple. The suit is filed by the deity acting through the Manager. Granting that it is not proved that the Ruler of Bharatpur established the temple and installed the deity, there is abundant evidence that the State of Bharatpur had made from time to time large donations for the maintenance of the temple. The Ruler of Bharatpur had therefore clearly a substantial interest to maintain the suit on behalf of the deity to protect the property. There is no merit in the appeal and therefore it must fail.

9. It is, however, necessary to make an effective decree in this appeal. It may be noticed that even though the suit has been filed and prosecuted on behalf of the State of Bharatpur and later by the State of Rajasthan through its District Magistrate, the temple is situate within the State of U. P. and it would be difficult for the District Magistrate or any other authority acting on behalf of the State of Rajasthan to look after the admin-

istration of the temple and to protect its properties from misappropriation. This is undoubtedly a private trust but the Civil Courts have jurisdiction to frame a scheme for the management of the temple which is not a public trust. The Judicial Committee of the Privy Council in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 Ind App 245= (AIR 1925 PC 139) directed that a scheme be framed for the regulation of the worship of the idol even though there was no public trust. In *Asha Bibi v. Nabissa Sahib*, AIR 1957 Mad 583 the Madras High Court held that a suit for removing the trustees of a private trust and for framing a scheme was maintainable. A similar view was also taken by the Calcutta High Court in *Mahadeo Jew v. Balkrishna Vyas*, AIR 1952 Cal 763.

10. The Civil Court has therefore jurisdiction to frame a scheme for management of the temple and its properties. The present is, in our judgment, a case in which in exercise of the powers under Order 41, Rule 33 of the Code of Civil Procedure we should direct that the Court of first instance to frame a scheme of management of the temple collections and the income and disbursement of expenses, application of the surplus if any and for that purpose to appoint a manager of the property of the deity and its properties, with authority to take possession of the temple and the properties from the defendant Ramchand and to administer the property and its income under the directions of the Court. We direct accordingly. The Court will also take an account of his dealings with the property of the deity from Ramchand and determine his liability and recover the amount found due from him on taking accounts. The Court will pass appropriate orders with regard to the constructions made by Ramchand and will prevent the property being used for the private benefit of Ramchand or any other person. The scheme to be framed will be consistent with the law relating to private religious endowments, if any, in force in the State of Uttar Pradesh.

11. Subject to this modification, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 535
(V 57 C 117)

(From: Allahabad)

S. M. SIKRI AND P. JAGANMOHAN
REDDY, JJ.

Sheo Nath, Appellant v. The State of
Uttar Pradesh, Respondent.

Criminal Appeal No. 49 of 1969, D/-
15-10-1969.

Penal Code (1860), Sections 411, 396
— Recovery of cloth, stolen in dacoity,
from accused, a cloth merchant, three days
after occurrence — Other stolen articles
not recovered from him — His name not
mentioned as one of the participants in
dacoity, either by any eye-witnesses or in
dying declaration of person killed in
dacoity — No evidence to show that in
village in which accused lived, it was
known that dacoity took place and goods
stolen — Held, only presumption that
could be drawn was that accused knew
that goods were stolen but he did not
know that they were stolen in dacoity —
He could be convicted only under S. 411
and not under Section 396 — Decision of
All. H. C., Reversed — Evidence Act
(1872), Section 114, Illustration (a). ILR
(1954) 4 Raj 476, Approved; AIR 1956 SC
54, Rel. on; AIR 1956 SC 400, Disting.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1956) AIR 1956 SC 54 (V 43)=

1956 Cri LJ 150, Sanwat Khan v.

State of Rajasthan

4

(1956) AIR 1956 SC 400 (V 43)=

1956 SCR 191= 1956 Cri LJ 790,

Wasim Khan v. State of U. P.

4

(1954) ILR (1954) 4 Raj 476= 1954

Raj LW 404, Bhurgiri v. State

7

The following Judgment of the Court
was delivered by

SIKRI, J.:— The only question which
arises in this appeal by special leave is
whether the appellant, Sheo Nath, should
be convicted under Section 396, Indian
Penal Code, or Section 411, Indian Penal
Code, or Section 412, Indian Penal Code.
The facts as found by the High Court
are these. A dacoity was committed at
the shop of Ram Murat in Dhaneja vil-
lage by 15 to 20 persons on August 19,
1966, at about 11.30 p. m. One dacoit
Ram Shankar, was armed with a gun
while others carried spears, Gandasas and
lathis. During the course of the dacoity

Ram Murat was injured. One Pancham
who lived in a house not far from Ram
Murat's shop, and two others came run-
ning on hearing the noise. Pancham was
shot down with the gun by dacoit Ram
Shankar. The dacoits then escaped with
clothes, ornaments, cash, etc., looted from
Ram Murat's shop. After the dacoits left
Ram Murat dictated a report about the
occurrence in which he named Ram Shan-
kar Singh, Jaintri Prasad Singh, Nanhe
Singh and Sulai accused as having been
among the culprits and this report was
sent to the Jalalpur police station, five
miles away, where it was received and
recorded at 6 a. m. next morning.

2. On August 22, 1966, i.e., three days
after the dacoity, the house of Sheo Nath,
appellant, was searched and three lengths
of cloth were recovered which were subse-
quently identified by Ram Murat and a
tailor named Bismillah as having been
stolen from Ram Murat's shop in the
dacoity.

3. The High Court, agreeing with the
learned Sessions Judge, relied on the evi-
dence of three eye-witnesses regarding
the manner in which the occurrence took
place and regarding the participation of
the four named accused persons. Sheo
Nath had not been named by the eye-
witnesses or in the dying declaration of
Pancham and no witness claimed to have
identified him taking part in the dacoity.
But, relying on the discovery of three
lengths of cloth and their identification,
the High Court convicted Sheo Nath
under Section 396, I. P. C. The High
Court observed:

"From the material on record we are
fully convinced that the Exhs. 2 and 3
were stolen from the shop of Ram Murat
in the course of the dacoity committed
in the night between 19 to 20 August
1966, and since they were recovered from
the possession of Sheo Nath appellant
only 2 or 3 days later, it is legitimate to
infer that he was one of the dacoits, vide
illustration (a) to Section 114 of the Evi-
dence Act. Sheo Nath, therefore, has
been rightly convicted under Section 396,
I. P. C."

4. The learned Counsel for the appel-
lant contends that in the circumstances of
the case the High Court should not have
convicted the appellant under Section 396,
Indian Penal Code, but only under Sec-
tion 411, Indian Penal Code. Section 114
of the Evidence Act and illustration (a)
read as follows:

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.

Illustrations.

The Court may presume—

(a) that a man who is in possession of stolen goods after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

This Section was considered by this Court in *Sanwat Khan v. State of Rajasthan*, AIR 1956 SC 54. This Court, after considering some High Court cases, observed:

"In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

In *Wasim Khan v. State of Uttar Pradesh*, 1956 SCR 191= (AIR 1956 SC 400) this Court held that "recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder." On the facts of that case this Court held that the appellant was rightly convicted of the offence of murder and robbery. But, apart from the possession of stolen property, there were other circumstances indicating that the appellant was guilty of murder and robbery. The circumstances were that the appellant in that case had travelled with the deceased on his bullock cart alone and the deceased never reached his home and was found murdered. The appellant was found in possession of the goods of the deceased three days after and the appellant made no effort to trace the whereabouts of the deceased or lodge information of his disappearance from the bullock cart.

5. In the present case three presumptions are possible from the recovery of the stolen goods from the appellant three days after the occurrence of the dacoity:

(1) that the appellant took part in the dacoity;

(2) that he received stolen goods knowing that the goods were stolen in the commission of a dacoity; and

(3) that the appellant received these goods knowing them to have been stolen. The choice to be made, however, must depend on the facts proved in this case. It is quite clear that all the property which was stolen by the dacoits was not recovered from the appellant. We may repeat that clothes, ornaments, cash, etc., were stolen. The only articles that were found with the appellant were a length of muslin (exh. 2) and a length of char-khana doriya (Exh. 3). The appellant is stated to be a cloth merchant and he may well have acquired these goods as a receiver. It has not been shown that in the village in which the appellant lived it was known that a dacoity had taken place and goods had been stolen in the dacoity.

6. On the facts of this case it seems to us that the only legitimate presumption to be drawn is that the appellant knew that the goods were stolen but he did not know that they were stolen in a dacoity. The appellant, therefore, can only be convicted under Section 411, Indian Penal Code.

7. In this connection we may refer to a decision of the Rajasthan High Court in *Bhurgiri v. State*, ILR (1954) 4 Raj 476 at pp. 482, 483 (Wanchoo, C. J., and Dave, J.). Wanchoo, C. J., after holding that the recovery of ornaments from Bhurgiri had been established, observed:

"The next question is whether on this evidence Bhurgiri can be convicted for dacoity. The recovery took place five days after the dacoity. It is not impossible that during that period the property might have passed from the dacoits to a receiver. Under these circumstances, we are of opinion that it would not be safe to convict Bhurgiri of dacoity on the evidence of this recovery alone. It would be more proper to convict him as a guilty receiver.

Then the question arises whether he should be convicted under Section 411 or 412, Indian Penal Code. So far as Section 411 is concerned, he is clearly guilty under that section. The presumption under Section 114 applies, and we can safely presume that he is a guilty receiver of stolen property particularly when we find that the property was kept in the

Bara, and not at his own house. He must have had reason to believe that it was stolen when he received the property, and that is why he left it in the Bara. But we feel that it would not be proper to convict him under Section 412 because that section requires that the receiver should know or have reason to believe that the property had been transferred by the commission of dacoity. The prosecution, in our opinion, has to show something more than the mere possession of stolen goods for a conviction under Section 412. If the prosecution is only able to show mere possession, the proper section to use is 411."

8. In the result the appeal is allowed and the appellant convicted under Section 411, Indian Penal Code, instead of Section 396, Indian Penal Code, and sentenced to undergo rigorous imprisonment for three years.

Appeal allowed.

AIR 1970 SUPREME COURT 537 (V 57 C 118)

(From Assam: AIR 1969 Assam 3)

J. C. SHAH, J. M. SHELAT, C. A.
VAIDIALINGAM, K. S. HEGDE
AND A. N. RAY, JJ.

State of Nagaland, Appellant v. G. Vasantha, Respondent.

Civil Appeal No. 1354 of 1968, D/- 16-10-1969.

Constitution of India, Article 311 — Temporary Government Servant — Appointment made purely on a temporary basis — Post, however, made permanent by a Government circular — Incumbent however not made permanent — No declaration under Rule 3 (2) of Central Services (Temporary Services) Rules 1949.

Held that notwithstanding the fact that incumbent had put in five years, the termination by a notice is not by way of punishment and Article 311 is not attracted. AIR 1969 Assam 3, Reversed; AIR 1968 SC 1089 & AIR 1958 SC 36, Rel. on. (Paras 10 and 12)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1089 (V 55)=
1968 Lab IC 1286, State of Punjab
v. Sukh Raj 12
(1958) AIR 1958 SC 36 (V 45)=
1958 SCR 828, Parshottam Lal
Dhingra v. Union of India 12

LM/BN/F203/69/GCM/P

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.— This appeal, by special leave, by the appellant-State is directed against the judgment and order of the High Court of Assam and Nagaland, dated March 4, 1968 in Civil Rule No. 206 of 1967 (reported in AIR 1969 Assam 3) by which the High Court quashed an order passed by the Deputy Director of Education, Nagaland, dated February 10, 1967 terminating the services of the respondent as an Assistant Teacher with effect from April 1, 1967.

2. The respondent was appointed by an order of the Chief Secretary of Nagaland, dated October 23, 1962 as an Assistant Teacher and she was posted in Zunheboto Government High School. The category of the post to which she was appointed was Class III (Non-Gazetted). By an order dated February 16, 1967 of the Deputy Director of Education, Nagaland, the services of the respondent as Assistant Teacher were terminated with effect from April 1, 1967.

3. The respondent filed Civil Rule No. 206 of 1967 in the High Court of Assam and Nagaland for quashing the order dated February 16, 1967 terminating her services. According to her she had served as a teacher for a period of five years and she was fairly high in the Seniority List and that her work has been completely free from any blemish. While so, without giving any reason her services had been terminated arbitrarily and illegally. She also pleaded that by virtue of the order dated November 10, 1966 of the State Government, her services as well as the post which she held had both been made permanent. It was her further case that she had been appointed by the Chief Secretary of the Government, while the order of termination was by a subordinate officer, viz., the Deputy Director of Education. On these grounds the respondent pleaded that the order terminating her services was illegal and opposed to the principles of natural justice and there had been a breach of the provisions of Article 311.

4. The State of Nagaland, the appellant, controverted the claim of the respondent that her services had been made permanent and that there had been a violation of Article 311. On the other hand, the State pleaded that the respondent had been appointed on a purely temporary basis to a temporary post and, according

to the terms and conditions governing the appointment, her services could be terminated by giving one month's notice. The order of termination fully satisfies this requirement. The State further pleaded that the services of the respondent had never been made permanent. The Deputy Director of Education, who was exercising the powers of the Head of the Department was fully competent to pass the order in question. In view of these circumstances, the State pleaded that Article 311 of the Constitution did not apply and that the order of termination was valid.

5. Before the High Court the respondent raised two contentions both related to Article 311 and they were (1) that as the respondent had been appointed by the Chief Secretary to Government, the order of termination by a subordinate authority was in violation of Article 311 and therefore void; and (2) though initially she was appointed on a temporary basis, later on the post which she held as well as her services, had both been made permanent and therefore the order of termination, without complying with the requirements of Article 311, was void.

6. The High Court has substantially accepted both the above contentions. It has taken the view that the Deputy Director of Education had no jurisdiction to terminate the services of the respondent as her appointment was by the Chief Secretary to the Government. Even though there may have been a delegation of powers to the Deputy Director of Education, the High Court's view is that the said officer has no authority to pass an order of termination as that will be depriving the respondent of her rights under Article 311. The High Court, relying upon the Circular, dated November 10, 1966 of the Government, has further held that the services of the respondent had been made permanent and therefore the order terminating her services has the effect of removing her from service and placing the respondent in a position where she could no longer serve the State. This, according to the High Court, attracts Article 311. The High Court has further taken the view that though the termination of the respondent's services was innocuous and not on any disciplinary or punitive grounds, nevertheless, in view of the fact that she has been in service for merely five years and no reason is given by the State for terminating her services,

it must be inferred that the order of termination must have been passed by way of punishment or penalty. On these grounds the High Court quashed the order, dated February 10, 1967.

7. Mr. Naunit Lal, learned counsel for the appellant, pointed out that the High Court has committed a very serious error in holding that Article 311 has been violated when the order terminating the services of the respondent was passed. The counsel further pointed out that the High Court has committed a mistake in proceeding on the basis that the respondent was a quasi-permanent employee. It was also urged that the High Court, having come to the conclusion that the order of termination was not passed on any disciplinary or punitive grounds, erred in setting aside the order on the ground that the said order must have been passed by way of punishment or penalty because the respondent has been in service for nearly five years. The counsel finally urged that the respondent being a temporary servant, her services had been terminated under the contract of service and the State Government was entitled to pass such an order.

8. Mr. Lakshmi Narasu, learned counsel appearing for the respondent, in view of the approach made by the High Court, found considerable difficulty in supporting the order. But the counsel urged that as the High Court has come to the conclusion that the order of termination must have been passed by way of punishment, and as the services of the respondent who had been in service for over five years had been terminated without giving any reason, this Court need not interfere with the decision of the High Court.

9. In our opinion, the High Court has committed a fundamental error in proceeding on the basis that Article 311 applies to the respondent. The High Court has also committed another serious mistake in proceeding on the basis that the order dated November 10, 1966 of the State Government made the respondent a quasi-permanent government servant. The order dated October 23, 1962 appointing the respondent as an Assistant Teacher clearly says that the post to which she is appointed is a temporary one and that her appointment itself is made on a purely temporary basis. The order further states that the services of the respondent may be terminated by one calendar month's

notice in writing on either side. No doubt the respondent was in service till the impugned order was passed.

10. Rules 2 (b), 3 and 4 of the Central Services (Temporary Services) Rules, 1949 read together show that a government servant shall be deemed to be in quasi-permanent service if the said government servant has been in continuous government service for more than three years and the appointing authority is satisfied regarding the matters relating to the said employee referred to in Rule 3, and issues a declaration to that effect. The State Government, no doubt appears to have taken a decision on August 17, 1966 to make certain temporary employees quasi-permanent and accordingly certain posts also were made permanent. The Government also issued a Circular, dated October 10, 1966 making the temporary posts in the Schedules attached to that order into permanent posts under the Education Department. But it will be seen that except making those posts permanent, the services of the incumbents of such posts had not been made permanent, as wrongly assumed by the High Court. On the other hand, by order dated September 14, 1967 the State Government made various temporary employees permanent. No such notification had been issued in respect of the respondent, i.e., no declaration in respect of the respondent, as required under Rule 3 (2) of the Central Services (Temporary Services) Rules, 1949 has been issued. Therefore the position was that the respondent continued to be a temporary servant on the date when the order under attack was passed.

11. The High Court itself has stated: "It is true that the termination appears to be innocuous and not on any disciplinary or punitive grounds". After this finding and in view of the fact that the respondent was only a temporary government servant, whose services had been terminated under the contract of service, no further question regarding the validity of the order arises at all. But the High Court has expressed the opinion that Article 311 has been violated because it must be inferred that the order has been passed by way of punishment, especially when the respondent has been in service for over five years. This reasoning, in our opinion, is erroneous. In fact the High Court has recorded two inconsistent findings: (i) that the termination is innocuous and not on any disciplinary or punitive grounds; and (ii) that the order of

termination must be considered to have been passed by way of punishment. Even the respondent, so far as we could see, has not taken up any plea to the effect that the order terminating her services was by way of punishment.

12. No doubt the High Court has referred to certain passages in the decision of this Court in *Parshotam Lal Dhingra v. Union of India*, (1958) SCR 828= (AIR 1958 SC 36) but those principles have no application to the facts of the present case. Reviewing the case-law on the subject, the recent decision of this Court in *State of Punjab v. Sukh Raj*, AIR 1968 SC 1089 has laid down several propositions of which proposition No. 1 is as follows:

"On a conspectus of these cases, the following propositions are clear:—

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution."

As we have already pointed out, the services of the respondent have been terminated according to the terms of the contract of service and the order terminating the service is one simpliciter and not by way of punishment. If so, the matter comes squarely within the proposition No. 1 set out above and it follows that Article 311 has no application at all.

13. As we have mentioned earlier, the respondent has raised a contention that as she was appointed by the Chief Secretary, the order terminating her services passed by the Deputy Director of Education, a subordinate authority, is not valid. But that contention, again, was on the basis that Article 311 has been violated in this regard. The appellant State has taken the stand that the power of appointment had been subsequently vested in the Director of Education and that there has been a delegation in favour of the Deputy Director of Education to exercise all the powers of the Director in this regard. In the view that we take that Article 311 has no application to the case of the respondent, it becomes unnecessary to consider this aspect.

14. In the result the order of the High Court, dated March 4, 1968 is set aside and this appeal allowed. In the circumstances of the case, there will be no order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 540
(V 57 C 119)

(From Punjab: AIR 1965 Punj 307)

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.

Tribhuban Parkash Nayyar, Appellant
v. The Union of India, Respondent.

Civil Appeal No. 1568 of 1966, D/- 10-10-1969.

(A) Displaced Persons (Claims) Act (1950), Section 6 — Displaced Persons (Claims) Supplementary Act (1954), Sections 5 (1) (a) and (b) and 2 (f) — Displaced Persons (Verification of Claims) Supplementary Rules (1954), Rule 18 — Power of Chief Settlement Commissioner under Section 5 (1) (b) — It includes power to review final order under the Act of 1950.

On the plain reading of Section 5 (1) (b), the Chief Settlement Commissioner's special power of revision would extend to suo motu revision of the verified claims which have become final under the Principal Act as a result of orders made by the Chief Claims Commissioner on revision. (Para 7)

The language used in Section 5 (1) (b) of the Supplementary Act is unambiguous and it clearly empowers the Chief Settlement Commissioner, subject to any rules that may be made, to revise any verified claim and make such orders in relation thereto as he thinks fit. A verified claim as defined in Section 2 (f) of the Supplementary Act means any claim registered under the Principal Act in respect of which a final order has been passed under that Act. (Para 7)

A Preamble is a key to open the mind of the Legislature but it cannot be used to control or qualify precise and unambiguous language of the enactment. It is only when there is a doubt as to the meaning of a provision that recourse may be had to the preamble to ascertain the reasons for the enactment and hence the intention of the Parliament. If the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble. In other words, Preamble may assist in ascertaining the meaning but it does not affect clear words in a statute. The Courts are thus not expected to start with the Preamble for construing a statutory provision nor does the mere fact that a clear and unambiguous statutory provision goes

beyond the preamble give rise itself to a doubt on its meaning. (Para 6)

Further, the submission that an order made on a revision can in no case be subjected to further revision, is also unacceptable on the statutory scheme and language. No constitutional bar to further scrutiny of such orders on revision could be pointed out. (Para 8)

(B) Displaced Persons (Claims) Supplementary Act (1954), Ss. 5 (1) (b) and 2 (f) — Power in revision — It includes valuation of claim.

The power of revision under S. 5 (1) (b) is not restricted to the verification of the claim but it also embraces the power of valuation. It is true that "claim" as defined in the principal Act (1950), broadly speaking means the assertion of a right to ownership of or to any interest in, immovable property. But the Claims Officer under that Act has also to value the claim and the final order embraces both verification of title and valuation. The definition of "verified claim" in Section 2 (f) of the Supplementary Act speaks of the final order and it includes valuation. (Para 9)

(C) Displaced Persons (Claims) Supplementary Act (1954) Section 5 (1) (b) — Displaced Persons (Verification of Claims) Supplementary Rules (1954), Rule 18 Cl. (iv) — Interpretation of Cl. (iv) — Rule of ejusdem generis does not apply.

The first three categories contained in Rule 18 do not form a genus or a class with the result that Cl. (iv) would not attract the ejusdem generis rule for its construction. The expression "other sufficient cause" occurring in Clause (iv) of Rule 18 has therefore to be read in this context. When in a statute there are general words following particular and specific words, the general words are sometimes construed as limited to things of the same kind as those specified. This rule of interpretation generally known as the ejusdem generis rule reflects an attempt to reconcile incompatibility between the specific and general words, in view of the other rules of interpretation, that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous. Ejusdem generis rule being one of the rules of interpretation, only serves, like all such rules, as an aid to discover the legislative intent; it is neither final nor conclusive and is attracted only when the specific words enumerated, constitute

a class, which is not exhausted and are followed by general terms and when there is no manifestation of intent to give broader meaning to the general words. AIR 1954 SC 526, Distinguished.

(Para 13)

(D) Displaced Persons (Claims) Supplementary Act (1954), Section 5 (1) (a) — Order passed by Claims Commissioner — In review Chief Settlement Commissioner reducing amount substantially — Review order based on conclusions on pure conjectures and surmises and not on legal evidence — Order set aside in writ petition by Single Judge on ground of error apparent on face of record — Order of Single Judge set aside in Letters Patent Appeal against order — Held, that the decision of Letters Patent Bench was illegal. AIR 1965 Punj 307, Reversed.

(Para 15)

Cases Referred: Chronological Paras

(1954) AIR 1954 SC 526 (V 41)=
1955-1 SCR 520, M. M. B. Catholicos v. Most. Rev. Mar. Poulouse 11

The following Judgment of the Court was delivered by

DUA, J.— The appellant, a displaced person from Lahore, now in West Pakistan, submitted his claim in respect of the immovable property left by him there. The claim was submitted under the provisions of the Displaced Persons (Claims) Act XLIV of 1950 (hereinafter called the principal Act). The property in respect of which the claim was submitted was valued by the appellant at Rs. 10 lacs. It consisted of a building $2\frac{1}{2}$ storeyed high with 12 shops and a well as also some platform etc. in Landa Bazar, in Lahore. The Claims Officer verified this claim for Rs. 8 lacs. Against this order a revision was taken by the appellant to the Claims Commissioner who on May 1, 1953 in a brief order raised the value of the verified claim to Rs. 10 lacs. The relevant part of that order reads as under:

"I have gone through the order of the learned Claims Officer and I find that he has given a queer argument to allow Rs. 8,00,000/- to the claimant. By every method tried by him the assessment went beyond Rs. 10,00,000/- and I think he ought to have allowed Rs. 10,00,000/- as claimed by the claimant. I enhance the assessment and allow Rs. 10,00,000/- to the claimant."

We would assume that the Claims Commissioner had been duly delegated the power of the Chief Claims Commissioner to revise the order of the Claims Officer, because no dispute was raised on this point. On the strength of the verified claim the appellant purchased two properties in Delhi at a public auction; one of them is situated in Daryaganj and the other in New Rajinder Nagar. On November 8, 1957, Shri M. S. Chaddha, Settlement Commissioner, exercising power of the Chief Settlement Commissioner issued to the appellant a notice under the Displaced Persons (Claims) Supplementary Act, 1954 calling upon him to show cause why the order of the Claims Commissioner dated May 1, 1953, be not revised and varied. On May 23, 1958, the said officer reduced the appellant's claim of Rs. 10 lacs to Rs. 15,000/-. The appellant then filed a writ petition under Article 226 in the Punjab High Court challenging the order reducing the value of his claim. A learned Single Judge on November 1, 1962 allowed the writ petition holding that the learned Settlement Commissioner exercising the power of the Chief Settlement Commissioner had proceeded to deal with the value of the property on wholly conjectural grounds. In a detailed order the learned Single Judge came to the conclusion that the Settlement Commissioner had not only ignored important evidence but had also held certain documents to be forged without any evidence in support of the findings. In the opinion of the learned Single Judge, therefore, there were clear errors of law on the face of the record rendering the order of the Settlement Commissioner open to challenge in writ proceedings in the High Court. On this view the order was set aside and quashed. It was, however, observed that it would be open to the department to reconsider the entire matter as to valuation and come to a proper conclusion on evidence.

2. The respondent took the matter on appeal to a Division Bench under the Letters Patent and the Letters Patent Bench reversed the order of the learned Single Judge holding that on a reading of the order of the Settlement Commissioner it could not be said that his finding was based on no legal evidence. The appeal was accordingly allowed and setting aside the order of the learned Single Judge, the appellant's writ petition was dismissed. The appellant has come to this Court on appeal with certificate.

3. On behalf of the appellant two main points were raised before us. It was contended, in the first instance, that Shri M. S. Chaddha, while exercising the power of the Chief Settlement Commissioner, had no jurisdiction to revise the order made by the Claims Commissioner exercising the revisional power of the Chief Claims Commissioner under the principal Act. Secondly, it was contended that there was a clear error of law apparent on the face of the record with the result that the learned Single Judge was fully justified in quashing the order of the Settlement Commissioner, and that the Letters Patent Bench was in error in allowing the appeal. While developing this ground of attack the counsel also submitted that in exercising the power of revision the Settlement Commissioner could not interfere with conclusions of fact and that he had, therefore, exceeded his jurisdiction in so doing.

4. In order to examine the first submission we have to turn to the provisions of the Principal Act and of the Displaced Persons (Claims) Supplementary Act 12 of 1954 (Hereafter called the Supplementary Act). The Principal Act, enacted with the object of providing for the registration and verification of claims of displaced persons in respect of immovable property in Pakistan, was brought on the statute book on May 18, 1950 and was initially to remain in force for a period of two years only. Its life was extended by a further period of one year by means of an amendment in 1952. On the expiry of the third year the Displaced Persons (Claims) Supplementary Ordinance No. 3 of 1954 was promulgated pending the passage by the Parliament of the bill which later emerged in the shape of Supplementary Act. The Ordinance was enforced on January 18, 1954. The Supplementary Act was enacted, as its preamble shows, to provide for the disposal of certain proceedings pending under the Principal Act and for matters connected therewith. We have specifically referred to the preamble because on behalf of the appellant strong reliance was placed on the preamble in support of his construction of Sections 4 and 5 of the Supplementary Act which deal with the revisional power of the Chief Settlement Commissioner appointed under this Act. It is not disputed at the bar that this Act was primarily designed to finalise the disposal of certain proceedings pending under the Principal Act at

the time of its expiry. According to the appellant the words "for matters connected therewith" in the preamble are intended to have the effect of restricting the ambit of its provisions exclusively to the proceedings actually pending on the date of the expiry of the Principal Act, whereas, according to the respondent these words demand a liberal construction so as to bring within the fold of the Act all proceedings initiated for the registration of claims, notwithstanding the fact that final order of verification and valuation had already been made thereon. The respondent also placed strong reliance on the language used in Section 5 which, he argued, is plain and unambiguous and its ambit cannot be restricted by the Preamble. That section reads as under:

"5. Special power of revision in respect of cases decided under Act XLIV of 1950. (1) Notwithstanding anything contained in the principal Act, the Chief Settlement Commissioner:

(a) may, on an application for revision made to him within time by any person aggrieved by the decision of the Claims Officer, call for the record of the case and make such order in the case as he thinks fit.

"Explanation—For the purposes of this clause, an application for revision shall be deemed to be or to have been made within time, if—

(i) such application was not barred by limitation on the appointed day under the rules made under the principal Act and is filed within one month from the commencement of this Act; or

(ii) such application had been filed before the appointed day and was not, on the date on which it was filed barred by limitation under the rules made under the principal Act;

(b) may, on his own motion, but subject to any rules that may be made in this behalf, revise any verified claim and make such order in relation thereto as he thinks fit.

(2) No order varying the decision of the Claims Officer or revising any verified claim which prejudicially affects any person shall be made without giving an opportunity of being heard."

5. This special power of revision was conferred on the Chief Settlement Commissioner in addition to the ordinary power of revision conferred by the pro-

viso to Section 4 (3) which was similar to the power of revision conferred on the Chief Claims Commissioner under the principal Act. The suo motu power to revise verified claims, according to the appellant's learned counsel, was designedly vested in the Chief Settlement Commissioner, he being the final authority under the Supplementary Act. But this power, argued the counsel, was not intended to extend to proceedings, which could not be considered to be pending under the Principal Act. This argument was sought to be founded on the Preamble of the Supplementary Act. A verified claim which had been subjected to scrutiny by the Chief Claims Commissioner and bore that officer's seal under the Principal Act, according to the appellant's counsel, could not be described to be a matter pending under the Principal Act and a revision of such a claim could not be held to be a matter connected with a pending proceeding.

6. The object and purpose of a preamble to a statute is well settled and at the bar before us there was no serious dispute on this point. A preamble is a key to open the mind of the legislature but it cannot be used to control or qualify precise and unambiguous language of the enactment. It is only when there is a doubt as to the meaning of a provision that recourse may be had to the preamble to ascertain the reasons for the enactment and hence the intention of the Parliament. If the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble. In other words, Preamble may assist in ascertaining the meaning but it does not affect clear words in a statute. The courts are thus not expected to start with the preamble for construing a statutory provision nor does the mere fact that a clear and unambiguous statutory provision goes beyond the preamble give rise by itself to a doubt on its meaning.

7. Now the language used in Section 5 (1) (b) of the Supplementary Act is unambiguous and it clearly empowers the Chief Settlement Commissioner, subject to any rules that may be made, to revise any verified claim and make such orders in relation thereto as he thinks fit. A verified claim as defined in Sec. 2 (f) of the Supplementary Act means any claim registered under the Principal Act in respect of which a final order has been

passed under that Act. Now it is difficult to contend that on a plain reading of Section 5 (1) (b) in the light of the definition of the expression "verified claim", the Chief Settlement Commissioner had no power suo motu to revise a claim on which a final order had been passed under the Principal Act by the Chief Claims Commissioner. It may be pointed out that according to the statutory scheme, under Section 5 (1) (a) of the Supplementary Act an aggrieved party is entitled to apply to the Chief Settlement Commissioner for revision of decisions of the Claims Officers and there is adequate provision for safeguarding the interests of the aggrieved parties from any possible injury by reason of lapse of time. The difference in the language used in Clauses (a) and (b) of Section 5 (1) throws sufficient light on the legislative intent. The use of the words "revise any verified claim" seems prima facie to extend the power of revision also to verified claims bearing the stamp of scrutiny by the Chief Settlement Commissioner. Had the Parliament intended this power to be restricted, as suggested on behalf of the appellant, then it would have expressed such intention in clear words. The statutory scheme also supports this view. Under the proviso to Section 4 (3) the Chief Settlement Commissioner has suo motu power of revision from the decisions of the Settlement Officers and under Section 5 (1) (a) he has the power of revision on applications by aggrieved parties from the decisions of Claims Officers. But under S. 5 (1) (b) the suo motu power of revision does not extend to all decisions but is confined only to verified claims though in this respect it takes within its fold all such claims and is not restricted to the claims verified only by the Claims Officers. On a plain reading of Section 5 (1) (b), therefore, the Chief Settlement Commissioner's special power of revision would seem to us to extend to suo motu revision of the verified claims which had become final under the Principal Act as a result of orders made by the Chief Claims Commissioner on revision. Neither any statutory bar nor any precedent has been cited against the exercise of this power; nor has any principle been brought to our notice which would induce us to restrict the plain language of Section 5 (1) (b).

8. The submission that an order made on a revision can in no case be subjected to further revision, is also unacceptable

on the statutory scheme and language. No constitutional bar to further scrutiny of such orders on revision was pointed out. It may in this connection be borne in mind that verification of claims under the Principal Act involved proof in regard to title to and value of property left by the displaced persons in West Pakistan; and this had to be completed within a period of originally two years which was later extended by one year. The best evidence in this respect was only available in West Pakistan, and it is a matter of common knowledge that it was not easy for an average displaced person to secure such evidence. Chances of errors in verification and valuation of claims, in these circumstances, being not too few, the highest authority was advisedly in larger public interest vested with a wide power to review and reassess such verified claims.

9. It was then contended that the power of revision under Section 5 (1) (b) is restricted to the verification of the claim and its valuation is outside its purview. This contention is difficult to accept. It is true that "claim" as defined in the principal Act broadly speaking means the assertion of a right to ownership of, or to any interest in, immovable property. But the Claims Officer under that Act has also to value the claim and the final order embraces both verification of title and valuation. The definition of "verified claim" in Section 2 (f) of the Supplementary Act speaks of the final order and it includes valuation.

10. This takes us to the submission that the power of revision of the Chief Settlement Commissioner is circumscribed within the four corners of Rule 18 of the Displaced Persons (Verification of Claims) Supplementary Rules, 1954. This Rule, of course, specifically controls the exercise of the power of revision conferred by Section 5 (1) (b) and this is not disputed. Rule 18 is in the following terms:

"18. Special revision of verified claims under Clause (b) of sub-section (1) of Section 5 — The Chief Settlement Commissioner may, while exercising the powers of special revision conferred on him by Clause (b) of sub-section (1) of Section 5, call for the record of any verified claim and may pass any order in revision in respect of such verified claim in such manner as he thinks fit, if he is satisfied that such order should be passed on one

or the other of the following grounds, namely:—

"(i) the discovery of any new matter or documentary evidence which after the exercise of due diligence was not within the knowledge of or could not be produced by the claimant at the time when the claim was verified; or

(ii) correction of any clerical or arithmetical mistakes apparent on the face of the record; or

(iii) gross or material irregularity or disparity in the valuation of the claim; or

(iv) any other sufficient reason:

Provided that the Chief Settlement Commissioner shall not entertain or take into consideration any application or representation made to him under this rule by any claimant if such application or representation is made after the 30th day of April 1954."

11. It was contended that the grounds on which the Chief Settlement Commissioner revised the verified claim do not fall within the first three clauses of this rule. The fourth clause, according to Shri Gosain's argument, must be read ejusdem generis and so read this clause would also be inapplicable to the case. Reliance in support of this argument was placed on *M. M. B. Catholicos v. Most. Rev. Mar Poulouse*, 1955-1 SCR 520 = (AIR 1954 SC 526) a case dealing with the power of review under Order 47, Rule 1, Civil P. C. the language of which, according to the appellant's counsel, is completely identical with that of rule 18.

12. Let us examine the language of these two provisions. Rule 18 has already been reproduced. Order 47, Rule 1 (c), Civil P. C. which alone is relevant for our purpose is in the following terms.

"Rule 1. Any person considering himself aggrieved—

(a)

(b)

(c) by a decision on a reference from a Court of Small Causes and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of

judgment to the Court which passed the decree or made the order.

(2)

13. From a plain reading of these two provisions the difference in their language is quite obvious. Clauses (i) and (ii) of Rule 18 are certainly similar to Cl. (c) of Order 47, Rule 1, but Clause (iii) of Rule 18 is wholly different from Cl. (c) of Rule 1 of Order 47. It is difficult to hold these clauses to be similar in kind or to have a common genus. The former seems not only to take within its fold gross and material irregularity in the valuation of the claim, which to some extent resembles one of the grounds on which revisional power as contemplated by Section 115, Civil P. C. can be exercised, but also to include cases where there is disparity in the valuation of the claim. Quite clearly this clause is much wider in scope than Order 47, Rule 1 (c). The expression "other sufficient cause" occurring in Clause (iv) of Rule 18 has therefore to be construed in this context. When in a statute there are general words following particular and specific words, the general words are sometimes construed as limited to things of the same kind as those specified. This rule of interpretation generally known as *ejusdem generis* rule has been pressed into service on behalf of the appellant. This rule reflects an attempt to reconcile incompatibility between the specific and general words, in view of the other rules of interpretation, that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous. *Ejusdem Generis* rule being one of the rules of interpretation, only serves, like all such rules, as an aid to discover the legislative intent; it is neither final nor conclusive and is attracted only when the specific words enumerated, constitute a class, which is not exhausted and are followed by general terms and when there is no manifestation of intent to give broader meaning to the general words.

14. The first three categories contained in Rule 18, in our opinion, do not form a genus or a class with the result that Clause (iv) would not attract the *ejusdem generis* rule for its construction. But assuming that they constitute a class or kind of objects or genus, it appears to us that grounds given by the Settlement Commissioner are analogous to

Clause (iii) which speaks of gross and material irregularity or disparity in the valuation of the claim. This submission must, therefore, be rejected.

15. We now come to the merits of the order of the Settlement Commissioner. After going through the order and the material on the record, to which our attention has been drawn, we are satisfied that the Settlement Commissioner has at more places than one based his conclusions on pure conjectures and surmises without there being any legal evidence on the record to support them. We do not consider it necessary to exhaustively deal with the argument in support of the errors of law on the face of the record for the purpose of considering the alleged infirmities in the order of the Settlement Commissioner. The learned Single Judge has dealt with this question at length and we are in agreement with his conclusions. We may only add that we have also looked at the original documents which appeared suspicious to the Settlement Commissioner, but we are unable to find any circumstance which could be said to be suspicious or abnormal so as to give rise to any reasonable doubt about their genuineness. The respondent's learned counsel also expressed his inability to bring to our notice any material throwing suspicion on the genuineness of these documents. Indeed the learned counsel was frank enough to express his inability to support the view taken by the Letters Patent Bench or to find fault with the conclusions of the learned Single Judge, whose order seems to be unexceptionable. We accordingly allow the appeal and setting aside the order of the Letters Patent Bench restore that of the Single Judge. It was agreed at the bar that as directed by the Single Judge the case should go back to the Chief Settlement Commissioner for a fresh decision in accordance with law. That this case can be remitted back to the Chief Settlement Commissioner in these proceedings was not disputed before us. We should, however, make it clear that this order is not to be construed to contain any expression of opinion on merit on the evidentiary value of the material on the record on the question of valuation of the claim. The appellant is entitled to his costs.

Appeal allowed.

AIR 1970 SUPREME COURT 546
(V 57 C 120)

J. C. SHAH AND K. S. HEGDE, JJ.

Nathulal, Appellant v. Phoolchand, Respondent.

Civil Appeal No. 2345 of 1966, D/- 16-10-1969.

(A) Contract Act (1872), Ss. 31 and 55 — Conditional agreement — Agreement to transfer land — Statute prescribing prior permission of authority — Agreement must be deemed subject to implied condition.

Where by a statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. AIR 1930 PC 287 and AIR 1964 SC 978, Rel. on. (Para 5)

(B) Contract Act (1872), Section 55 — Readiness and willingness — Purchaser need not produce money or vouch a concluded scheme for financing the transaction. AIR 1950 PC 90, Rel. on. (Para 6)

(C) Transfer of Property Act (1882), Section 53A — Defence of part performance — Conditions essential — Sale of land — Necessity of permission — Section 70 (8) of M. B. Land Revenue and Tenancy Act creates no bar.

The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed

therefor by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract. Section 70 (8) of the M. B. Land Revenue and Tenancy Act creates no bar to defence of part performance. (Para 9)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 978 (V 51) =

(1964) 2 SCR 495, Mrs. Chandnee Widyavati Madden v. Dr. C. L. Katial

5

(1950) AIR 1950 PC 90 (V 37) =

77 Ind App 76, Bank of India Ltd. v. Jamsetji A. H. Chinoy and M/s. Chinoy and Co.

6

(1930) AIR 1930 PC 287 (V 17) =

57 Ind App 333, Motilal v. Nanhe-lal

5

The following Judgment of the Court was delivered by

SHAH, J.: Nathulal—appellant in this appeal—was the owner of a Ginning Factory constructed on a plot of agricultural land bearing Khasra No. 259/1. The land stood entered in the revenue records in the name of Chittarmal—brother of Nathulal. On February 26, 1951, Nathulal agreed to sell to Phoolchand the land and the Ginning Factory for Rs. 43,011. He received in part payment Rs. 22,011 and put Phoolchand in possession of the property. Phoolchand agreed to pay the balance on or before May 7, 1951. The terms of the agreement were reduced to writing in counter-part and were duly signed by the parties.

2. On the plea that Phoolchand had failed to pay on the due date the balance of price, Nathulal rescinded the contract on October 8, 1951 and commenced an action in May, 1954 in the Court of the District Judge, Nimar, for a decree for possession of the land and the factory and for mesne profits from the date of delivery till possession was restored to him, alleging that Phoolchand was a trespasser because he had contrary to the express terms of the agreement made default in payment of the balance of the purchase price on or before May 7, 1951. Phoolchand contended that Nathulal had failed to get the name of Chittarmal “deleted” from the revenue record according to the terms of the agreement,

that he Phoolchand was ready and willing to pay the balance of Rs. 21,000, that he had sent a telegram on May 7, 1951, offering to pay the balance against execution of the sale deed, that the agreement had been unlawfully altered by Nathulal after execution by adding a clause by which the possession of Phoolchand in default of payment of money on or before May 7, 1951, was declared unlawful.

3. The Trial Court decreed the suit holding that Phoolchand committed breach of contract in that he failed to pay the balance due by him on or before the due date. In appeal the High Court of Madhya Pradesh reversed the decree. The High Court declared that Nathulal was entitled to the balance of the consideration as also "mesne profits" at the rate of Rs. 1,500 per annum from May 7, 1951 till the date on which Rs. 21,000 were deposited by Phoolchand within two months of the passing of the decree. Subject to this direction Phoolchand was allowed to retain possession of the entire property i. e. land Khasra No. 259/1 including the Ginning Factory and structures standing on the land. It was directed that if Phoolchand, committed default Nathulal may claim possession of the entire property with mesne profits at the rate of Rs. 3,000 per annum from the date he was out of possession and till the date on which possession was delivered. The cross-objections filed by Nathulal relating to mesne profits were disposed of in the light of the directions given in the decree. With certificate granted by the High Court this appeal has been preferred by Nathulal.

4. In the view of the Trial Court Phoolchand was unable to procure the amount of Rs. 21,000 which he had agreed to pay on or before May 7, 1951 and on that account he had committed breach of the contract. The High Court held that Nathulal was not guilty of breach of contract, for, Phoolchand had arranged with a Bank to borrow upto Rs. 75,000, when needed by him, and Phoolchand had on that account sufficient resources at his disposal to enable him to pay the amount due. The Trial Court and the High Court have held that Phoolchand failed to pay the amount on or before May 7, 1951. They have also held that he had not made the tender as pleaded by him.

5. Under the terms of the agreement Nathulal had undertaken to get the name of his brother Chittarmal removed from the revenue records and to get his own name entered, but the lands continued to stand recorded in the name of Chittarmal till October 6, 1952, and before that date Nathulal rescinded the contract. Again by virtue of Section 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, Phoolchand not being an agriculturist the land could not be sold to him without the sanction of the State Government. In the absence of any specific clause dealing with this matter, a condition that Nathulal will secure the sanction under Section 70 (4) after paying the appropriate fee must be implied for it is well settled that where by statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned: see *Motilal v. Nanhelal*, 57 Ind App 333 = (AIR 1930 PC 287) and *Mrs. Chandnee Widya Vati Madden v. Dr. C. L. Katial*, (1964) 2 SCR 495 = (AIR 1964 SC 978).

6. Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction: *Bank of India Ltd. v. Jamsetji A. H. Chinoy and Messrs. Chinoy and Co.*, 77 Ind App 76 at p. 91 = (AIR 1950 PC 90 at p. 96).

7. The High Court proceeded to decide the case largely upon the view that Nathulal committed breach of contract. But the question whether Nathulal had committed the breach is not of much significance. Nathulal was the owner of the land: he had executed no conveyance in favour of Phoolchand in the land or the factory. Nathulal had sued for possession relying upon his title, and Phoolchand could defeat that claim if he established his defence of part-performance under Section 53A of the Transfer of Property Act.

8. The argument raised by counsel for Nathulal, that by virtue of S. 70 (8) of the Madhya Bharat Land Revenue and Tenancy Act, the plea of part perfor-

mance is not available to a person put in possession of the property under a contract of sale, has, in our judgment, no force. Section 70 (8) provides:

"No sale under this section shall be deemed to be valid until the sale deed effecting such a sale has been registered in accordance with the law of registration in force for the time being".

But this clause only requires that not only the conditions prescribed by Section 70, but registration of sale deed in accordance with the law of registration for the time being in force is a condition required to be complied with before a sale is deemed valid. There is no sale in the present case, and Phoolchand is not relying upon any sale. He is relying upon a contract of sale and equity which he may set up to defend his possession against the claim made by Nathulal. To the making of such a claim, relying upon the doctrine of part performance in Section 53A of the Transfer of Property Act, there is nothing in Section 70 (8) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950 which may operate as a bar.

9. The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing against the transferee any right in respect of the property of which the trans-

feree has taken or continued in possession, other than a right expressly provided by the terms of the contract.

There is in this case a contract to transfer for consideration immoveable property by writing signed by Nathulal from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. In part performance of the contract, Phoolchand has taken possession of the property and he had in pursuance thereof paid an amount of Rs. 22,011. The argument raised by counsel for Nathulal that the act done in pursuance of the contract must be independent of the terms of the contract cannot be accepted. The first three conditions, for the defence of part performance to be effectively set up by Phoolchand exist. Mr. Shroff for Nathulal however contends that Phoolchand was not willing to perform his part of the contract.

10. Nathulal had expressly undertaken to have the revenue records rectified by securing the deletion of Chittarmal's name, and it was an implied condition of the contract that Nathulal will secure the sanction of the Collector to the transfer under Section 70 (4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950. The first condition was not fulfilled till October 6, 1952 and the second condition was never fulfilled. We are unable to agree with Mr. Shroff that the repeal of the Madhya Bharat Act 66 of 1950 by the Madhya Pradesh Land Revenue Code, 1959, has retrospective operation.

11. In considering whether a person is willing to perform his part of the contract the sequence in which the obligations under a contract are to be performed must be taken into account. The argument raised by Mr. Shroff that Nathulal was bound to perform the two conditions only after the amount of Rs. 21,000 was paid is plainly contrary to the terms of the agreement. By virtue of Section 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. If, therefore, under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in

the sequence of obligations is performable by him earlier.

In view of the arrangement made by Phoolchand it was clear that he had at all relevant times made necessary arrangements for paying the amount due, but so long as Nathulal did not carry out his part of the contract, Phoolchand could not be called upon to pay the balance of the price. It must therefore be held that Phoolchand was at all relevant times willing to carry out his part of the contract.

12. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 549 (V 57 C 121)

(From Madras: 1969 Mad LW (Cri) 274)

S. M. SIKRI, G. K. MITTER,
K. S. HEGDE, A. N. RAY AND
P. JAGANMOHAN REDDY, JJ.

Lennart Schussler and another, Appellants v. Director of Enforcement and another, Respondents.

Criminal Appeals Nos. 113 and 163 of 1969, D/- 14-10-1969.

(A) Defence of India Rules (1962), Rule 132A (since repealed by Defence of India (Amendment) Rules, 1965) — Prosecution for offence under Rule cannot be launched subsequent to its repeal as there is no saving provision under the Defence of India (Amendment) Rules (1965) — AIR 1970 SC 494, Foll.

(Para 6)

(B) Penal Code (1860), Ss. 120B, 120A — Foreign Exchange Regulation Act (1947), Section 21 (1) — Contract contemplated under Section 21 (1) — Nature — Section 121 (1) does not cover criminal conspiracy similar to Section 120B — Complaint in respect of illegal acquisition of foreign exchange — Allegation therein that two accused agreed to obtain foreign exchange illegally — Framing of charge under Section 120B — Maintainability.

A complaint in respect of illegal acquisition of foreign exchange filed against the two accused contained the following allegations:

P, one of the accused, who was the Managing Director of a Company entered into agreement with a foreign Company for supply of raw material to his company. Under the agreement the foreign

company also agreed to over-invoice the value of goods and give credit of the over-invoiced amount to the personal account of P. Another accused, L, a foreigner, also entered into agreement with P, by which he agreed to help P in opening the account in a foreign bank and to deposit in bank the amounts credited to P's account by the foreign company from time to time and to intimate P secretly about the accounts. All these agreements were entered into outside India and before coming into force of Foreign Exchange Regulation Act or Rule 132-B of Defence of India Rules. Acquisition of foreign exchange in this manner was not an offence at the time of the agreement between P and L, nonetheless, L agreed to assist P in the belief that he would be assisting P in acquiring foreign exchange illegally. L continued to help P even after acquisition of foreign exchange in such manner became offence under the law.

Held (Per Majority, Mitter & Hegde, JJ. contra), on the allegations in the complaint both the accused could be charged under S. 120B, Penal Code as it seemed that the several alleged acts of both the accused were in furtherance of the alleged conspiracy to obtain foreign exchange illegally. (Para 10)

Held, further that the alleged agreement between the two accused was not one which transgressed Section 21 (1) of the Foreign Exchange Regulation Act. Hence Section 120B would apply. Agreement between P and the foreign company if proved, would however, fall within the mischief of Section 21 (1). (Para 8)

The combined effect of the several provisions of Section 21 does not lead to the view that sub-section (1), covers a case of criminal conspiracy similar to Section 120B. Section 21 does not in terms deal with an agreement to commit an offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The contracts or agreements contemplated under Section 21 are those which are entered into during the course of commercial transactions and it is the intention of the legislature to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of any of the provisions of the Act either directly or indirectly. The words "directly or indirectly" do not take in any

agreement to do illegal acts in future:
1969 Mad LW (Cri) 274, Affirmed.
(Para 8)

(C) Penal Code (1860), Sections 120A, 120B — Agreement to do illegal act — Acts not amounting to offence done by one conspirator in furtherance of that agreement — He is still liable to be convicted under Section 120B.

Where the agreement between certain persons is a conspiracy to do or continue to do something which is illegal, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. Consequently, even if the acts done by a conspirator in furtherance of the criminal conspiracy do not strictly amount to offence, he is liable to be convicted under Section 120B. LR 3 HL 305, Ref. to.
(Para 9)

(D) Penal Code (1860), Section 120A — Essentials of offence — Agreement between two or more persons — When constitutes conspiracy — Continuance of agreement — Effect.

The first of the offences defined in Section 120A, Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in

agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement.
(Para 8A)

Cases Referred:	Chronological	Paras
(1970) AIR 1970 SC 494 (V 57) =		
Rayala Corporation (P) Ltd.		
v. The Director of Enforcement		
N. Delhi	3, 6, 20, 24, 28	
(1968) Cri Misc. Petns. Nos. 978 and 980 of 1968 = 1969 Mad LW (Cri) 98, Rayala Corporation (P) Ltd. v. Director of Enforcement, Delhi		8
(1951) 1951-2 KB 425 = (1951) 1 All ER 917, Rex v. Barnett		26
L. R. 3 H. L. 305, Lord Chancellor in Denis Dowling Mulcahy v. Queen		9

The following Judgments of the Court were delivered by

JAGANMOHAN REDDY, J. (on behalf of Sikri and Ray, JJ. and himself): The Director of Enforcement, New Delhi, filed complaint on February 16, 1969 before the Chief Presidency Magistrate, Madras against Lennart Schussler, accused No. 1, and M. R. Pratap, accused 2 Managing Director, the Rayala Corporation Ltd. hereinafter referred to as A.1 and A.2 respectively under Section 120-B I. P. C. and Sections 4 (3), 5 (1) (a) and 9 of the Foreign Exchange Regulation Act (VII) of 1947 (hereinafter called the Act). Two Criminal Miscellaneous Petitions, one filed by A1 being No. 459 of 1969 and the other filed by A2 being No. 621 of 1969 for quashing the complaint were dismissed by the Madras High Court by a common judgment against which these two appeals by certificate have been filed.

2. The complaint which is in respect of the acquisition of 88913.09 Swiss Kronars in contravention of the Act states that on reliable information received by the Assistant Director of Enforcement, Madras that A2 was utilising his position as Managing Director of the Rayala Corporation Ltd. in acquiring foreign exchange illicitly, on December 20, 1966, a search was conducted of the premises of the said company in the presence of A2, Jaga Rao and the legal adviser of the company one Sita Ram. During the search certain documents were recovered and seized, one of which was a letter dated the 25th March, 1965 in Swedish language from the Associated Swedish

Steels A. B. Sweden, known as ASSAB to A1 with the enclosures. The Rayala Corporation Private Ltd. was a concern manufacturing Halda typewriters for which purpose certain materials were being imported from Sweden. The firm with which initially the transactions were being entered into was known as A. B. Atvidabergs, later known as Facit AB, of which A1, a Swedish national, has been the export manager. It is alleged that in August 1963, A2, Jaga Rao and A1 met together at Stockholm and agreed to a plan regarding purchase of certain raw materials, namely, Steel alloy sheets directly from ASSAB instead of purchasing them from Atvidabergs. At that meeting A2 informed A1 that henceforth he would buy material on behalf of his company from ASSAB instead of M/s. Atvidabergs. A2 further informed A1 that the arrangement made between him and the ASSAB was to over-invoice the value of goods by 40 per cent of the true value and that he should be paid the difference of 40 per cent on account of the aforesaid over-invoicing by crediting it to his personal account, and that since under the laws of India this acquisition by him was unlawful and had to be kept secret, it should not be mentioned in the Official correspondence of Messrs. Rayala Corporation with the Swedish firm. He requested the first accused to help him in opening the account in Svenska Handels Banken, Sweden, in order not to transfer the money lying to his credit in Atvidabergs but also to have further deposits to his personal account from ASSAB on account of the difference between the actual value and the over-invoiced value. A1 agreed to act as requested by A2. A2 made arrangement with ASSAB to intimate to A1 the various amounts credited to A2's account and asked A1 to keep a watch over the correctness of the account and to further intimate to him the account position from time to time through unofficial channels and whenever A1 came to India. A1 is said to have agreed to comply with this request. Subsequently in November 1965 A1 came to India when he is said to have brought the incriminating letter dated the 25th March 1965 which was seized. He is said to have also agreed at that time with A2 to continue to help him to accumulate foreign exchange illegally in the same manner. In September 1966 also A1 arrived at Madras where he stayed for a month and at that time

also he brought further details of the account. The gravamen of the charge is set out in paragraph 9 of the complaint as follows;— "Thus it is clear that A 1 and A 2 agreed to commit illegal acts, namely, acquisition by A 2 of foreign exchange illicitly and retaining the same abroad without surrendering the same to the Government of India and also to defraud the Government of India of foreign exchange thereby contravening Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964 and further that between August 1963 and 1966, A 1 and A 2 in pursuance of the said agreement did commit acts in contravention of Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964 and thereby committed offence punishable under Section 120B of the Indian Penal Code, read with Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964".

3. The complaint also refers to the fact that C. C. No. 8736 of 1968 had already been filed against the Rayala Corporation Private Ltd. In view of this reference it is necessary, for a better appreciation of the issues involved in this petition, to give a brief account of the earlier proceedings taken by the Directorate of Enforcement in this regard. It appears that the earlier notice sent by the Enforcement Directorate dated the 25th August, 1967, was for the contravention of the Act in respect of 244,713.70 Swiss Kronars alleged to have been deposited in A 2's bank account, which amount included 88,913.09 Swiss Kronars. This notice was followed by a further show cause notice under Section 23 (3) of the Act dated the 4th November, 1967, to A2 as to why he should not be prosecuted in respect of 88913.09 Swiss Kronars. A 2 in his reply of November 13, 1967, to the show cause notice of the 25th August, 1967, denied the allegations. The Enforcement Director further issued another show cause notice dated the 15th November, 1967, to the other directors of the Corporation and its General Manager, Jaga Rao in continuation of the notice dated the 25th August, asking them to show cause why adjudication proceedings should not be instituted. On November 29, 1967, A 2 replied to the notice of the 4th November, 1967, denying the allega-

tions. Thereafter on January 20, 1968, the Director of Enforcement issued a notice to the Rayala Corporation to show cause why it should not be prosecuted for violation in respect of 88,913.09 Swiss Kronars. Two months later, namely, on March 16, 1968, a revised show cause notice was issued to the Corporation and A 2 superseding the notice of 25th August, 1967 and intimating to them that they were prosecuting the Corporation and A 2 for the contravention of the Foreign Exchange Regulation Act in respect of 88,913.09 Swiss Kronars. Four days thereafter the Director of Enforcement filed a complaint against the Corporation and A 2 under Rule 132A of the Defence of India Rules and Sections 4 (1), 4 (3), and 5 (1) (e) of the Act. Both the Corporation and A 2 filed Criminal Misc. Petns. being respectively Nos. 978 and 980 of 1968, (reported in 1969 Mad LW 98) for quashing the complaint but the High Court of Madras dismissed these petitions in October 1968. Two appeals by certificate preferred against that order, being Criminal Appeals Nos. 18 and 19 of 1969, (reported in AIR 1970 SC 494) were allowed by this Court on July 23, 1969, setting aside the order of the High Court rejecting the applications under Section 561-A of the Code of Criminal Procedure for quashing the proceedings against the appellants therein. While the above proceedings were pending, A 1 who happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam was detained on November 27, 1968, by the officers of the Office of the Enforcement Directorate when the aircraft which had landed at Palam on November 26, 1968, for refuelling had to be temporarily grounded due to engine trouble. On November 30, 1968, the Enforcement Directorate served a notice for adjudication on A1 in his capacity as a director of the Rayala Corporation which was purported to be in continuation of the previous adjudication notice dated August 25, 1967 issued to the company under Section 23C of the Act. These allegations were also denied by A 1 on the 30th January 1969, and on 5th February, 1969, A 1 filed a writ petition in this Court for the issue of a writ of habeas corpus. It is however unnecessary to narrate the various stages of this and the subsequent petitions for directing A 1's release and for according him permission to leave this country for Sweden. The subsequent writ

petition filed by him after the withdrawal of the first one filed on 5th February, 1969, came up for hearing along with these criminal appeals and this Court on the 10th September, 1969, while allowing the writ petition to be withdrawn passed a consent order permitting A 1 to depart from India provided he furnishes bank guarantee in the foreign exchange equivalent of Rs. 1,50,000/- in Swedish Kronars and on his undertaking to appear before the Chief Presidency Magistrate, Madras or any other Magistrate to whom the complaint case might be transferred at the time of the disposal thereof.

4. The main question in these appeals is whether A 1 can be charged in respect of acts alleged against him in the complaint with an offence under Section 120B Indian Penal Code or with offences under the several provisions of the Act and Rule 132A of the Defence of India Rules, read with Section 120B Indian Penal Code.

5. Before considering this question it is necessary to mention that at the time of the alleged agreement between A 1 and A 2 at Stockholm neither the Defence of India Rules nor the Foreign Exchange Regulation Act contained any provision specifically making it an offence for a person resident in India to acquire foreign exchange abroad. Rule 132A of the Defence of India Rules was added on 21st January, 1964, by Defence of India (Amendment) Rules 1964 by which dealings in foreign exchange by persons other than an authorised person were prohibited. This provision remained in force till 31st March, 1965, when it was repealed. Section 4 of the Foreign Exchange Regulation Act was also amended as from 1st April, 1965, so as to prohibit the buying or otherwise acquiring or borrowing or selling or otherwise transferring or lending to any person other than an authorised dealer any foreign exchange without the previous general or special permission of the Reserve Bank. It is therefore apparent that at the time when the alleged agreement between A 1, A 2 and Jaga Rao is said to have taken place in Stockholm in August 1963, it was neither an offence under the Defence of India Rules nor under the Act to acquire foreign exchange in a foreign country. But it is contended by the learned Solicitor General that pursuant to that agreement A 1 continued to help and agreed to help even after it became an offence under the

Defence of India Rules or under the Act and consequently no exception can be taken to the complaint against A 1. At any rate, Section 21 (1) of the Act would cover such agreements which are offences and consequently the accused can be charged with Section 120B, Indian Penal Code. On the other hand, learned counsel for the appellants Shri Asoke Sen submits that firstly, there was no mention of any allegation against A 1 in the several show cause notices issued either to the Rayala Corporation or to the directors of that Corporation or to A 2 but it is an afterthought brought about by the machinations of Jagga Rao who was hostile and inimical to A 2; secondly, as it appears on the enquiry made by A 2 at the instance of the Enforcement Directorate from Swenska Handels Banken, Stockholm, that in fact there is no account as alleged either in the name of the Rayala Corporation or in the name of the Managing Director of the Rayala Corporation, that is, A 2, there would be no basis for the complaint; and thirdly, the agreement alleged does not either come under Section 120B, Indian Penal Code or would amount to a contravention of any of the provisions of the Act including Section 21 (1) thereof. It would not be necessary at this stage to go into these questions because that has to be seen is whether, assuming the facts as stated in the complaint to be true, A 1 and A 2 could be charged with the offences specified therein. The answer to this question must depend upon the nature of the part which A 1 agreed to play in the acquisition of the foreign exchange under which agreement he is said to have continued to participate in the conspiracy by rendering help to A 2 in acquiring foreign exchange even after 21st of January, 1964, and also till after the amendment of Section 4 (1) of the Act.

6. Under Section 120B there must be an agreement between two or more persons to commit an offence or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act. In so far as the offence under Rule 132A of the Defence of India Rules is concerned, in 1963 what Pratap did was not an offence, nor was it an offence under the Act as Section 4 was amended with effect from 1st April, 1965. In so far as any acts which may be considered to constitute an offence under Rule 132A of the Defence of India

Rules, it has been held by this Court in Criminal Appeals Nos. 18 and 19 of 1969, D/- 23-7-1969 (reported in AIR 1970 SC 494), Rayala Corporation etc. v. Director of Enforcement, that no prosecution can be launched for an offence under that provision subsequent to the repeal as there is no saving provision thereunder.

7. It is then contended that the agreement entered into in 1963 continued to be effective even after the acquisition of foreign exchange became an offence after the amendment of the Act on 1st April, 1965, and at any rate after this amendment an agreement by A 1 to assist A 2 was again said to have been arrived at in Madras in 1965. It is, therefore, necessary to examine whether such an agreement would constitute an offence and if so under what provision of law. The agreement in Madras has a reference to the initial agreement in Sweden. This alleged agreement between A 1 and A 2, as set out in the complaint, can be briefly stated to consist of the following, namely, in August 1963, A 2 asked A 1 to help him (a) to open an account in Swenska Handels Banken, Stockholm, (b) to get the money lying to A 2's credit with Atvidabergs accumulated by him as a result of over-invoicing transferred to Pratap's account with the bank and (c) to keep a watch on and check the correctness of the account of the acquisitions from time to time and not to mention anything in the official correspondence but to give information otherwise. Even in Madras in 1965 A 1 is alleged to have agreed to keep a watch on the account and bring him statements of the account. The offence by A 2 under the Act would consist of getting the goods which the Rayala Corporation was purchasing over-invoiced by 40 per cent so that permission to remit foreign exchange from India to the extent of the amount of the over-invoice could be obtained from the Reserve Bank and after money is received in Sweden by the Swedish Company that company was to credit Pratap's (A 2) account with 40 per cent of the over-invoice price. If these facts are established, they certainly amount to a contravention of Clause (1) and Clause (3) of Section 4 which provide that where any foreign exchange is acquired by any person other than by any authorised dealer for any particular purpose or where any person has been permitted conditionally to acquire foreign exchange the said person

shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or, as the case may be, the condition cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer. Now it is alleged that A 2 Pratap has in breach of this condition on which foreign exchange was released to the Rayala Corporation to pay the actual cost of the goods has not only not complied with the conditions on which the permission was granted but has also committed default in not selling the foreign exchange so acquired by him without delay to an authorised dealer.

8. Before dealing with the question whether the agreement of A1 to help A2 amounts to criminal conspiracy punishable under Section 120B I. P. C., it will be convenient first to dispose of the submission that Section 120B I. P. C. does not apply because Section 21 (1) covers the same ground. It would appear that the alleged agreement between A1 and A2 is not one which transgresses Section 21 (1) of the Act. What Section 21 (1) provides is that the provisions of the Act must be avoided or evaded by the agreement or contract itself. The contracts or agreements are those which are entered into during the course of commercial transactions and it is the intention of the legislature to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of any of the provisions of the Act either directly or indirectly. This assumption is made clear by the subsequent sub-section in which the legislature is anxious to preserve the integrity of these transactions by providing that any reference to any act being done without the permission of the Central Government or Reserve Bank shall not render the agreement invalid and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or Reserve Bank shall not be done unless such permission is granted. Sub-section (3) provides that notwithstanding anything in the Act or any provision in the contract that anything for which permis-

sion has to be obtained from the Central Government or Reserve Bank shall not be done without that permission, no legal proceedings shall be prevented from being brought in India to recover any sum which apart from any of the said provisions and any such term would be due whether as a debt, damages or otherwise but subject to the certain conditions provided in Clauses (a) to (c) therein. Similarly, sub-section (4) states that nothing shall be deemed to prevent any instrument being a bill of exchange or promissory note in spite of any inhibitions in the Act and notwithstanding anything contained in the Negotiable Instruments Act. The combined effect of the several provisions of Section 21 does not incline us to the view that sub-section (1) covers a case of criminal conspiracy similar to Section 120B. Section 21 does not in terms deal with an agreement to commit an offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The agreement entered into between ASSAB and A 2 Pratap would, if proved, come within the mischief of S. 21 (1) but the agreement such as the one alleged to have been entered into between A 1 and A 2 does not itself evade or avoid any of the provisions of the Act, rules or directions. The words directly or indirectly do not take in any agreement to do illegal acts in future.

8-A. It now remains to be seen whether the alleged agreement which A 1 and A 2 arrived at in Stockholm in 1963 and again in Madras in 1965, would, if established, amount to a criminal conspiracy. The first of the offence defined in Section 120A Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy or the plot they cannot

be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. It is also clear that an agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement.

9. As has been noticed earlier at the time A 1 and A 2 entered into an agreement though A 2 thought it was an offence to acquire foreign exchange by the method he was employing it was not in fact an offence. It is none the less alleged that A 1 agreed to help in the belief that what he is doing would be to assist A 2 to acquire foreign exchange illegally. This agreement continued and A 1 was assisting A 2 even after the acquisition of foreign exchange became illegal and is said to have agreed even after he came to Madras in 1965 to continue to help in acquiring the foreign exchange. It is however contended that the agreement of A 1 with A 2 does not amount to a criminal conspiracy because all that A 1 has agreed to do was to help A 2 to open an account in the Swedish Bank, have the amounts lying to the credit of A 2 with Atvidabergs to that account and to help A 2 by keeping a watch over the account. It is true that none of these acts amounts to an offence, because the opening of the account in the Bank and having the amounts transferred from Atvidabergs was not an offence in August 1963, and there is nothing to show that A 1 had not completed that part of the agreement relating to Atvidabergs and the opening of the account with the bank before January, 1964, or that he had rendered the assistance after that date. If this part of the agreement does not amount to a conspiracy to do an unlawful act, then it is submitted that the subsequent watching over the account and sending or bringing a statement of the account of A 2 relating to the acquisition of the foreign exchange does not amount to an offence. The agreement which constitutes an offence, it is said is the one between A 2 and ASSAB. The subsequent act of A 1 was neither neces-

sary to acquire nor does it further the acquisition of the foreign exchange in contravention of the provisions of the Act and is therefore not an offence under S. 120B of the Penal Code. This argument would postulate that the several acts which constitute it can be split up in parts and the criminal liability of A 1 must only be judged by the part he has played. It appears to us that this is not a justifiable contention, because what has to be seen is whether the agreement between A 1 and A 2 is a conspiracy to do or continue to do something which is illegal and if it is, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. As observed by Willis, J., in his 11th answer given on behalf of the Judges when consulted by the Lord Chancellor in *Denis Dowling Mulcahy v. Queen*, LR 3 HL 305 at page 317:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

10. In this case on the allegations A 2 asked A 1 to help him in acquiring foreign exchange illegally and A 1 agreed to help him. This agreement though initially may not have been an offence was none the less an offence subsequently but A 1 did not withdraw from it and was said to have continued to carry out that agreement. A 1's help was necessary for A 2's design because otherwise he would not know whether ASSAB was in fact crediting his account in the bank with the amount of over-invoice. Only when ASSAB credited A 2's account could he be said to have acquired the foreign exchange till then it was only an understanding or agreement under which if it is enforceable a debt would be created in favour of A 2. The knowledge that the amount was being credited from

time to time was an essential part of the agreement between A 1 and A 2 and would be in furtherance of illegal and unlawful design to acquire foreign exchange contrary to the provisions of the Act. It consisted in, as has already been stated A 1 keeping a watch over the accounts, his coming over to India on several occasions, his bringing a letter in reply to his letter, with a statement of account annexed in November 1965 from ASSAB to himself, in which the amount of foreign exchange credited by ASSAB to A2's account with Svenska Handels Banken was mentioned, his statement at the time of handing it over that he brought the letter in person as he did not want to send it by post in view of the nature of the transaction and his further agreeing in Madras with A 2 that he will continue to help him. The several acts of A 1 are all acts in consequence of the agreement which had its origin in Sweden. A 2 Pratap one of the conspirators also in furtherance of that conspiracy obtained foreign exchange invoices which were over priced with a view to acquire the same in Sweden. It would, therefore, appear that on the allegations contained in the complaint A 1 and A 2 could be charged with an offence under Section 120B.

11. These appeals are accordingly dismissed with a word of caution that nothing that has been stated here should be taken as establishing any of the facts required to constitute the offence which if the prosecution case has to be sustained must be proved at the trial in accordance with law.

12. MITTER, J.:— These two appeals by certificate arise out of a common judgment of the Madras High Court in Cr. M. P. 469/1969 and Cr. M. P. No. 621/1969, the object of both being to quash the complaint in C. C. No. 5438 of 1969 on the file of the Court of the Chief Presidency Magistrate, Egmore, Madras. Cr. M. P. 469 of 1969 was by Lennart Schussler while Cr. M. P. 621/1969 was by M. R. Pratap. The complaint before the Chief Presidency Magistrate was filed on February 16, 1969, by the Director of Enforcement against Schussler and Pratap under Section 120-B of the Indian Penal Code read with various sections of the Foreign Exchange Regulation Act, 1947.

13. In order to appreciate how the complaint came to be made, it is necessary to note a few facts which preceded

it. The Rayala Corporation Private Ltd., (hereinafter referred to as the 'Corporation') used to manufacture Halda typewriters and in that connection import materials through A. B. Atvidabergs, Sweden later known as Facit AB. M. R. Pratap was the Managing Director of the Corporation. Schussler, a Swedish national, has been export manager of Facit AB for many years. He became a director of the corporation in April 1966. On information received about violation of the Foreign Exchange Regulation Act (hereinafter referred to as the 'Act') the Enforcement Directorate raided the premises of the corporation at Madras on 20th and 21st December, 1966 and seized certain records. According to the information at the Directorate a plan had been hatched in August 1963, between Pratap, Schussler and one Jaggarao, General Manager of the Corporation, in Stockholm regarding purchase of raw materials by the corporation directly from a firm known as ASSAB instead of Facit AB to give effect to an arrangement already made by Pratap with ASSAB to over-invoice the value of the goods imported by the corporation by 40% of their true value thereof and the difference of 40% to be paid to the personal account of Pratap. The part played by Schussler was to help Pratap in opening an account in Svenska Bendela Banken, Sweden (hereinafter referred to as the bank) and to transfer the moneys lying to his credit to Facit AB and to have further deposits made to his personal account on account of over-invoicing by Assab. It is the case of the Directorate that Pratap had been acquiring large amounts of foreign exchange abroad by the above means from before 1963 and had retained the same abroad to put it beyond the reach of the Government of India. On August 25, 1967, the Enforcement Directorate sent a notice to the corporation and Pratap alleging violations of Sections 4 (1) and 9 of the Act calling upon them to show cause why adjudication proceedings under the Act should not be had. The notice was not only in respect of 88,913.09 Krs. but an additional sum making a total of 244,713.70 Sw. Krs. alleged to have been deposited in a bank account. This was followed by a further show cause notice dated November 4, 1967, from the Directorate to Pratap under Section 23 (3) of the Act for prosecuting him under the Act in respect of 88,913.09 Krs. On November 13, 1967,

Pratap replied to the show cause notice dated August 25, 1967, denying the allegations. On November 15, 1967, the Directorate sent show cause notices to the other Directors of the Corporation and its Manager in continuation of the notice dated 25th August, asking them to show cause why adjudication proceedings should not be instituted. On 29th November, 1967, Pratap denied the allegations in the notice dated 4th November. On 20th January, 1968, notice was issued by the Director of Enforcement to the Corporation to show cause why it should not be prosecuted for the violation of the Act in respect of 88,913.09 Sw. Krs. On March 16, 1968, a revised adjudication show cause notice was issued by the Director of Enforcement to the Corporation and Pratap superseding the notice dated August 25, 1967, and informing them that they were prosecuting the Corporation and Pratap for 88,913.09 Sw. Krs. and adjudicating in respect of 1,55,801 Sw. Krs. On March 20, 1968, the Director of Enforcement filed a complaint against the Corporation and Pratap under Rule 132-A of the Defence of India Rules and Sections 4 (1), 4 (3) and 5 (1) (e) of the Act. The Corporation and Pratap filed Cr. M. Ps. 978 and 980 of 1968 for quashing the complaint. The High Court of Madras dismissed these petitions in October 1968. The appeals preferred to this Court on a certificate were disposed of in July 1969, quashing the complaint.

14. Schussler happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam in November 1968. When the aircraft touched at Palam for a short space of time engine trouble was noticed and all the passengers including Schussler were asked to spend the rest of the night at a hotel until the aircraft became airworthy once more. Before Schussler could board the plane the next day i.e., 27th November, 1968, he was taken to the Enforcement Directorate Office and interrogated. His departure from India was prohibited at the instance of the Director of Enforcement under the Foreigners Order of 1948. On November 30, 1968 Schussler was served with an adjudication notice dated November 15, 1967, under Section 23-C of the Act in his capacity as Director of the Corporation and the notice was described as in continuation of the previous adjudication notice dated 25th August, 1967, issued to the company. On

13th December, 1968, Schussler replied to the show cause notice denying the allegations. On January 21, 1968, Schussler was served with another adjudication notice similar to the notice of 16th March 1968 in his capacity as Director of the Corporation under Section 23C of the Act. On 30th January, 1969, Schussler denied the allegations in the last adjudication notice. On February 5, 1969, Schussler filed a Writ Petition in this Court for the issue of a writ of habeas corpus etc. On 17th February, 1969, when the said Writ Petition came up for hearing before this Court a statement was made on behalf of the respondents that a complaint C. C. No. 5438 of 1969, had already been filed in the Court of the Chief Presidency Magistrate, Madras, under Section 120-B, Indian Penal Code read with different sections of the Act. A suggestion was then made that Schussler might be permitted to leave India by giving security by way of a bank guarantee for Rs. 1,50,000/-. Ultimately, on April 21, 1969, when the Writ Petition came up for hearing before this Court a consent order was made and the respondent agreed to withdraw the order dated November 30, 1968 under the Foreigners Act on condition that Schussler should move for bail before the Chief Presidency Magistrate and then apply for permission to the Foreigners Registration Officer to leave India. The Chief Presidency Magistrate granted bail to Schussler on two sureties but his application for permission to the Foreigners Registration Officer was rejected on the objection raised by the Additional Director, Enforcement. On April 30, 1969 Schussler filed Writ Petition No. 144 of 1969 for the issue of a writ of habeas corpus directing the respondents, the Foreigners Regional Registration Officer and others, to allow him to leave the territory of India and for other reliefs. This Writ Petition came up for hearing before this Court along with the above Criminal Appeals Nos. 113 and 163 of 1969 on 8th September. On 10th September the Court ordered that the Foreigners Regional Registration Officer would permit him to leave India on condition of his giving a bank guarantee for 155,800 Sw. Krs. and on his undertaking to appear before the Chief Presidency Magistrate Madras or any other Magistrate to whom the complaint case might be transferred at the time of disposal.

15. The complaint in this case filed on February 16, 1969 by the Director of En-

forcement recites that to the knowledge of Schussler Pratap had before August 1963, acquired foreign exchange amounting to 756,529 Sw. Krs. by getting Facit AB to over-invoice the goods imported by the Corporation by 40 per cent of their true value and that in August 1963 an agreement was arrived at in Stockholm between Pratap, Schussler and Jaggarao for the opening of an account in the name of Partap in the bank with the help of Schussler not only to transfer the moneys lying to the credit of Pratap in Facit AB but also to cause further deposits to be made in the said account from Assab on account of similar over-invoicing by Assab of the value of the goods to be bought by the Corporation. Support for the case of the Directorate that Pratap had been acquiring foreign exchange illicitly by the above device of over-invoicing and retaining the same abroad in a Swedish bank was said to be received as a result of the search of the premises of the Corporation in December 1966 and in particular the seizure of the letter dated March 25, 1965, from Assab to Schussler in reply to Schussler's letter (not in the record) to the Assab. Reference is made in the complaint to several invoices and other documents seized during the course of search allegedly lending support to the case of the Directorate. According to the complaint such device had been adopted by the Corporation and Pratap in respect of 14 invoices involving 88,913.09 Krs. which had been released and secured for import of goods but was actually not utilised for the purpose and kept back abroad credited to the personal account of Pratap thus violating the order made by the Central Government by Notification dated 25th September 1958 No. F. 1 (67) E/57 under Section 9 of the Act. This amount of 88,913.09 Sw. Krs. was said to have been acquired surreptitiously in the year 1964-65 by Pratap without the previous or general permission of the Reserve Bank of India and Pratap had failed to offer the same to the Reserve Bank or to any authorised dealer within one month from the date of the acquisition in terms of the notification mentioned. The complaint goes on to relate that the letter of 25th March, 1965 was brought by Schussler in person to India when he came here in November 1965. The complaint also alleges that in November 1965 Schussler agreed with Pratap "to continue to help him and accordingly did help

him to accumulate foreign exchange illegally in the same manner. Thereafter even later when Schussler became Director of Rayala Corporation similar transactions were continued by him and Pratap." In September 1966 Schussler came to Madras bringing further details of the said account. The complaint winds up with the statement that Schussler and Pratap had agreed to commit illegal acts, namely, acquisition by Pratap of foreign exchange illicitly and retaining the same abroad without surrendering it to the Government of India and to defraud the Government of India of foreign exchange thereby contravening Sections 4 (3), 5 (1) (e) and 9 of the Act and Rule 132-A of the Defence of India Rules 1962 and further between August 1963 and 1966 Schussler and Pratap in pursuance of the said agreement did commit acts in contravention of the said sections of the Act and the said Rule 132-A and thereby committed an offence punishable under Section 120-B of the Indian Penal Code read with the said sections of the Act and the said rule.

16. The relevant provisions of the Act may now be noticed. Sub-section (1) of Section 4 of the Act as originally provided that:

"Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, buy or borrow from or sell or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange."

The above was considered to be sufficient to attract the ban on acquisition of foreign exchange by other means e.g., by over-invoicing the price of goods imported as was alleged to have been done by the Corporation and Pratap. The section as amended with effect from April 1, 1965 contains the words "or otherwise acquire" in between the words "by" and "or borrow from" and the words "or otherwise transfer" in between the words "sell" and "or lend to". Rule 132-A of the Defence of India Rules was promulgated on January 21, 1964 and cured the lacuna in Sec. 4 (1) of the Act as from the said date. But this rule was omitted from the rules by a notification dated March 30, 1965 in view of the amendment of Section 4 (1) which became effective from April 1, 1965.

17. Section 4 (3) prohibits the use of any foreign exchange for a purpose other than for which it was given and runs as follows:

"Where any foreign exchange is acquired by any person other than an authorised dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be used or, as the case may be, the conditions cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer."

18. Section 5 contains certain restrictions on payments. The provision, Section 5 (1) (e), reads:

"Save as may be provided in and in accordance with any general or special exemption from the provisions of this subsection which may be granted conditionally by the Reserve Bank, no person in, or resident in, India shall—

(a) to (d) x x x x
(e) make any payment to or for the credit of any person as consideration for or in association with —

(i) the receipt by any person of a payment or the acquisition by any person of property outside India;

(ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside India;

xx xx xx xx xx."

Section 9 reads:

"The Central Government may, by notification in the official Gazette, order every person in, or resident in, India—

(a) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person as the Reserve Bank may authorise for the purpose, at such price as the Central Government may fix, being a price which is in the opinion of the Central Government not less than the market rate of the foreign exchange when it is offered for sale;

(b) who is entitled to assign any right to receive such foreign exchange as may be specified in the notification to transfer that right to the Reserve Bank on be-

half of the Central Government on payment of such consideration therefor as the Central Government may fix:

Provided that the Central Government may by the said notification or another order exempt any persons or class of persons from the operation of such order:

Provided further that nothing in this section shall apply to any foreign exchange acquired by a person from an authorised dealer and retained by him with the permission of the Reserve Bank for any purpose."

19. The other provisions which are necessary to note are:

"Section 21 (1). No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.

Section 23 (1). If any person contravenes the provisions of Section 4, Section 5, Section 9, Section 10 or sub-section (2) of Section 12, Section 17, Section 18A or Section 18B or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudicated by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A) If any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

xx xx xx xx

(3) No Court shall take cognizance—

(a) of any offence punishable under sub-section (1) except upon a complaint in writing made by the Director of Enforcement, or

(aa) xx xx xx xx

(b) of any offence punishable under sub-section (1A) of this section or Section 23F, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by

the Central Government or the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

23C. (1) If the person committing a contravention is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

23D. (1) For the purpose of adjudicating under Clause (a) of sub-section (1) of Sec. 23 whether any person has committed a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of the said Section 23:

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the court.

(2) While holding an inquiry under this section, the Director of Enforcement shall have power to summon and enforce the attendance of any person to give evidence or to produce a document or any other thing which, in the opinion of the Director of Enforcement, may be useful for, or relevant to, the subject-matter of the inquiry:

xx xx xx xx."

Of the two agreements mentioned in the complaint the one arrived at in August 1963 was not unlawful. Section 4 (1) of the Act did not make it unlawful for

anyone to acquire foreign exchange abroad. Any foreign exchange acquired by Pratap after January 21, 1964 when Rule 132-A of the Defence of India Rules was promulgated would be an unlawful acquisition but there could be no conspiracy under Section 120-A in respect of the agreement arrived at in August, 1963. In paragraph 7 of the complaint it was only Pratap who was charged with contravention of Section 9 of the Act in respect of 88,913-09 Sw. Krs. but the agreement of November, 1965 stands on a different footing. According to paragraph 8 of the complaint, Schussler agreed with Pratap at Madras in November, 1965 to help him to accumulate foreign exchange as before by getting the same credited to his account in the bank. This agreement would be one in violation of Sections 4 (1) and 9 of the Act. However any violation of Section 4 (1) or Section 9 or Section 4 (3) and Section 5 (1) (e)—the last two provisions being hardly applicable to the facts of the case—would be offences under the Act, in respect whereof the Director of Enforcement was competent to levy penalty under Section 23 (1) (a) of the Act after following the procedure for adjudication prescribed in Section 23D of the Act or alternatively by making a complaint in court under Section 23 (1) (b).

20. The recent judgment of this Court in Cr. As. 18 and 19/1969 dated 23-7-1969 (reported in AIR 1970 SC 494) arising out of the complaint in Case No. 8736 of 1968 has laid down that before a complaint can be filed under Sec. 23 (1) (b) the Director of Enforcement must not only initiate proceedings under Section 23 (1) (a) but proceed with the inquiry under Section 23-D (1) and form an opinion in course thereof that having regard to the circumstances of the case, the penalty which he was empowered to impose under Section 23 (1) (a) would not be adequate and that it was necessary to make a complaint in writing to the court instead of levying a penalty himself.

21. Mr. Sen arguing the appeal of Schussler contended that the Act was a complete Code containing provisions not only for punishment of violation of different sections of the Act but also a conspiracy to commit acts prohibited under the Act which might otherwise have been amenable to the jurisdiction under Sections 120-A and 120-B of the Indian Penal Code. In this connection, he referred to

the provisions in Section 21 (1) of the Act. Under Section 21 (1) any agreement which could directly or indirectly evade in any way the operation of the provisions of the Act or any rule, direction or order made thereon was forbidden. The contravention of Section 21 (1) does not find a place in Section 23 (1) of the Act but it would be an offence covered by Section 23 (1A) and any contravention of Section 21 (1) would be punishable upon conviction by a court with imprisonment for a term which may extend to two years or with fine or with both. The punishment is the same as the one prescribed under Section 23 (1) (b) and is greater than that laid down in Section 120-B (2) of the Indian Penal Code.

22. The learned Solicitor-General arguing the case of the respondents contended that Section 21 (1) did not touch a criminal conspiracy which is covered by Section 120-A of the Penal Code. I find myself unable to accept this argument. An agreement which can form the basis of a criminal conspiracy under Section 120-A may, inter alia be one to do or cause to be done an illegal act or an offence. Under Section 21 (1) of the Act any agreement which directly or indirectly evades in any way the operation of the Act etc. is forbidden. An agreement by two persons whereby one agrees to help the other by facilitating transfer of foreign exchange from a foreign exporter into the banking account of that other is an agreement the object whereof is not only the acquisition of foreign exchange but the retention of it abroad. This is clearly an agreement to evade the operation of the provisions of the Act relating to the illegal acquisition and retention of foreign exchange.

23. In my view, the Act is a complete Code with regard to the offences specified by it though it is not a self-sufficient Code with regard to the procedure to be followed irrespective of the provisions of the Criminal Procedure Code. It is true that there are different sections in the Act regarding the power to search persons believed to have secreted any documents which will be useful or relevant to any proceeding under the Act (Section 19A), to arrest any person believed to be guilty of an offence punishable under the Act (19-B), to stop and search conveyances (19-C), to search premises (19-D), to examine persons during the course of any enquiry in connection with any offence (19-E), to summon persons to give evidence

and produce documents in connection with enquiries (19-F), to retain custody of documents (19-G) which are not in consonance with the provisions of the Procedure Code. Section 24A contains a very special rule of evidence regarding the proof of documents seized and the evidentiary value thereof at complete variance with the Indian Evidence Act. Some of these powers are more drastic and are in addition to similar powers contained in the Code of Criminal Procedure. But so far as the violation of the different provisions of the Act, or rule or direction or order made thereunder are concerned, the Act is a complete Code including in its ambit a criminal conspiracy to acquire foreign exchange abroad illicitly and retaining the same abroad by reason of the provisions of Section 21 (1).

24. The judgment of this Court in Cr. As. Nos. 18 and 19 of 1969 (reported in AIR 1970 SC 494) lays down that a complaint under Section 23 (1) (b) cannot be launched before the Director of Enforcement has taken up the adjudication proceedings and made some inquiry in those proceedings and formed the opinion that it was necessary to have resort to the more drastic provision of conviction by a court as envisaged by Section 23 (1) (b).

25. No proceedings have been started either against Schussler or Pratap in pursuance of the notices dated 30th November, 1968 and 21st January, 1969. It would therefore appear that in respect of the substantive offences for contravention of the different sections of the Act, the Director of Enforcement cannot at present make a complaint as he has not followed the procedure laid down in Section 23D of the Act. It would therefore be absurd to allow him to file a complaint for violation of Section 21 (1) by making a charge under Section 120-B, I. P. C. when the overt acts alleged are contraventions of different provisions of the Act, punishable only under S. 23 (1) (b) by following the procedure indicated in Section 23-D. To allow the prosecution to be proceeded with at this stage would in effect be stultifying Sec. 23 (1) (b) by allowing the establishment of commission of offences punishable only by following a procedure not yet adopted by the Director of Enforcement.

26. Mr. Sen relied on the decision in Rex v. Barnett, 1951-2 KB 425 in aid of

his contention that when a statute makes unlawful that which was lawful before and appoints a specific remedy that remedy and no other must be pursued. In that case a number of persons alleged to be dealers in scrap metal were charged on account of an indictment to the effect that they conspired together and with other persons unknown, to contravene the provisions of Section 1 of the Auctions (Building Agreements) Act, 1927, by being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction. What in effect had happened there was that the prosecution alleged that a number of persons had agreed to form a ring and in pursuance of that agreement they attended at auction sales where cable and other Ministry of Supply commodities were being sold and that after some representatives of the ring bid for and acquired goods on behalf of the ring they were reaucted and the profits shared by the ring in an agreed proportion. The forming of a ring in order to bid at an auction in the way indicated was not an offence at law up to the passing of the Act of 1927 and it was therefore submitted on behalf of the persons who had been convicted on account of indictment at the Central Criminal Court before the Court of Criminal Appeal that as the agreement was not an offence under the common law and only became one under the Act of 1927 the procedure laid down by the Act should be followed. The submission on behalf of the prosecution was that the indictment alleged was a conspiracy which was something different from the offences which the Act created. It was pointed out by the Court of Appeal that although it was possible to frame a charge alleging conspiracy to contravene this Act in any given set of circumstances, the court must ascertain what in fact was alleged. According to the court:

"In alleging the conspiracy to contravene the Act particulars are given, and those particulars are 'by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.' This Court is of opinion that those particulars of this particular conspiracy describe in terms offences which the Act creates, or are substantially the same." The same can be said on the facts of this case. The particulars of conspiracy alleged in this case are offences which

the Act has created. In my view the Director of Enforcement must first take up the adjudication proceedings, it being open to him in the course thereof to form an opinion that the penalty which he may impose will not be adequate having regard to the circumstances of the case, whereupon he can make a complaint in writing to the court. He can at the same time make a complaint about the agreement to evade the operation of the provisions of the Act calling for punishment under Section 23 (1A) of the Act. The agreement with overt acts alleged for proving a conspiracy under Section 120-B I. P. C. is in reality an offence under Section 23 (1A) read with Section 21 (1). The complaint does not lie at this stage and must be quashed.

27. In the result I would allow the appeals and quash the complaint made on 16th February, 1967.

28. **HEGDE, J.:** I have gone through the judgment just now read out by my esteemed colleague Mitter, J. I agree with him that these appeals should be allowed following the rule laid down by this Court in Criminal Appeals Nos. 18 and 19 of 1969, D/- 23-7-1969 (reported in AIR 1970 SC 494). In my opinion it is a fundamental principle of law that what cannot be done directly should not be permitted to be done indirectly.

29. From the facts and circumstances of the case I am satisfied that the complaint with which we are concerned is not a bona fide one. It has been filed with a collateral purpose viz. to justify the unlawful detention of Schussler, in this country. It may be noted that in the first complaint filed by the Director of Enforcement, the allegation was that the Rayala Corporation and its Managing Agent, Pratap had contravened the provisions of the Foreign Exchange Regulation Act. When that complaint was pending trial, Schussler came to deplane in this country due to some engine trouble in the plane in which he was travelling. That occasion was availed to detain him illegally in this country. I am convinced that Schussler's detention in this country was unjustified.

30. Even if we accept all the facts stated in the complaint as correct, the same do not amount to an offence under Section 120-B of the Indian Penal Code. According to the complaint Pratap and Schussler "agreed to commit illegal acts namely acquisition by A-2 (Pratap) foreign exchange illicitly and retaining the same

abroad without surrendering the same to the Government of India and also to defraud the Government of India of foreign exchange thereby contravening Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964 and further that between August, 1963 and August 1966 A-1 (Schussler) and A-2 (Pratap) in pursuance of the said agreement did commit acts in contravention of Sections 4 (3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964 and thereby committed offence punishable under Section 120-B of the Indian Penal Code read with Ss. 4 (3), 5 (1) (e) and 9 of the F. E. R. Act and Rule 132-A of Defence of India (Amendment) Rules, 1964".

31. The material allegations made in the complaint read as follows:

"The Rayala Corporation Private Limited is a private Limited Company with headquarters at Madras, manufacturing 'Halda' typewriters out of materials imported from abroad. Originally they were importing raw materials through one A. B. Atvidabergs, Sweden, now known as Facit AB. The first accused has been working as the Export Manager of that concern. The raw material supplied by Atvidabergs was over-invoiced at the instance of the 2nd accused and thereby foreign exchange was illicitly acquired in Swedish Kronor to the tune of 7,56,529 by the 2nd accused Pratap before August 1963 with the full knowledge of the 1st accused.

Later in August 1963 the 2nd accused and the General Manager of Rayala Corporation Mr. Jagga Rao went to Sweden. There Jagga Rao, 2nd accused and the first accused met together at Stockholm and agreed to a plan regarding purchase of certain raw materials viz. steel alloy sheet directly from M/s. Associated Swedish Steels AB, Sweden, also known as ASSAB, instead of purchasing the same from M/s. Atvidabergs. The 2nd accused told the first accused that henceforth he would buy on behalf of his company raw materials from ASSAB. He informed him of the arrangements made with ASSAB people to over-invoice the value of the goods by 40% of the true value and that he should be paid the difference of 40% on account of aforesaid over-invoicing to his personal account. He also told the

1st accused that since under the laws of India this acquisition by him was unlawful, it had got to be kept a secret, without any mention in the official correspondence of M/s. Rayala Corporation with the Swedish firm. He requested the first accused to help him in opening an account in Swenska Handles Banken, Sweden in order not only to transfer the money lying to his credit in Atvidabergs but also to have further deposits to his personal account from ASSAB on account of the difference between the actual value and the over-invoiced value. A-1 agreed to act as requested by the second accused, A-2 also made arrangements with ASSAB to intimate to A-1 the various amounts credited to A-2's account and asked A-1 to keep a watch over the correctness of the account, which A-1 agreed to do so. A-2 also asked A-1 to intimate to him the account position from time to time through unofficial channels or whenever A-1 comes to India periodically. In fact A-1 was coming to India periodically once in six months, since he was also a Director of a company called Facit Asia Ltd., in Madras. In pursuance of this conspiracy between the two accused the 2nd accused arranged with ASSAB to have the difference between the over-invoiced price and the actual price credited to the personal account of the second accused in Swenska Handles Banken and the statement of account sent to A-1."

32. These allegations merely make out that Schussler was an accessory after the fact and not that he was a conspirator. If a person agreed with a robber to receive the stolen property and arrange for its safe keeping he does not become a co-conspirator with the robber in the commission of the offence of robbery. On the facts alleged it is clear that Schussler had nothing to do either with the acquisition of foreign exchange by Pratap or in the matter of Pratap's failure to repatriate the same to this country. The accusation against him is that he provided facility for its retention in Sweden.

33. In the result I allow these appeals and acquit the appellant.

ORDER

34. In accordance with the opinion of the majority these appeals are dismissed.

Appeals dismissed.

AIR 1970 SUPREME COURT 564
(V 57 C 122)

J. C. SHAH, S. M. SIKRI, J. M. SHELAT, V. BHARGAVA, G. K. MITTER, C. A. VAIDIALINGAM, K. S. HEGDE, A. N. GROVER, A. N. RAY, P. JAGANMOHAN REDDY AND I. D. DUA JJ.

1. Rustom Cavasjee Cooper (in W. Ps. Nos. 222 and 300 of 1969). 2. T. M. Guruswami (in W. P. No. 298 of 1969), Petitioners v. Union of India (in all the Petitions), Respondent.

States of: (1) Jammu and Kashmir, (2) Maharashtra, (3) Tamil Nadu, (4) Bihar, (5) Kerala, (6) Andhra Pradesh and (7) Orissa, Interveners.

Writ Petns. Nos. 222, 300 and 298 of 1969, D/- 10-2-1970.

(A) Constitution of India, Arts. 14, 19, 31 and 32 — Company and its shareholders — Banking Company taken over by State — Infringement of fundamental rights of company and shareholders — Distinction pointed out — Tests indicated — Companies Act (1956) Ss. 34, 41 — Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Preamble — Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (8 of 1969), Preamble.

A Company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Again a director of a Company is merely its agent for the purpose of management. The holder of a deposit account in a company is its creditor he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed. (Para 13)

By petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of habeas corpus and probably for infringement of the guarantee under Articles 17, 23 and 24, a shareholder may

seek relief in respect of his own rights and not of others. A measure, executive or legislative may impair the right of the shareholders as well as of the Company. In such a case jurisdiction of the Court to grant relief to shareholders cannot be denied. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative. (Para 14)

Where petitioner who claims to be a shareholder, director and holder of deposit and current accounts with the Bank claims that by Act 22 of 1969 and by the Ordinance 8 of 1969 the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution are impaired, that the Act and the Ordinance are without legislative competence in that they interfere with the guarantee of freedom of trade and are not made in the public interest; that the Parliament had no legislative competence to enact the Act and the President had no power to promulgate the Ordinance, because the subject matter of the Act and the Ordinance is (partially at least) within the State List; and that the Act and Ordinance are invalid because they vest the undertaking of the named banks in the new corporations without a public purpose and without setting out principles and the basis for determination and payment of a just equivalent for the property expropriated, and that in consequence of the hostile discrimination practised by the State the value of his investment in the shares is substantially reduced, his right to receive dividend from his investment has ceased, and he has suffered great financial loss, he is deprived of the right as a shareholder to carry on business through the agency of the Company, and that in respect of the deposits the obligations of the corresponding new banks not of his choice are substituted without his consent, the petition is maintainable. AIR 1954 SC 119 and AIR 1951 SC 41, Rel. on; AIR 1963 SC 1811 and AIR 1965 SC 40, Distinguished. (Para 15)

Where the petitioner does not seek to enforce the guarantee of freedom of trade and commerce in Art. 301 but claims that in enacting the Act the Parliament has violated a constitutional restriction imposed by Part XIII on its legislative power and that in determining the extent to which his fundamental freedoms are impaired, the statute which the Parliament is incompetent to enact must be ignored, the petition cannot be thrown out because

guarantee of freedom of trade does not occur in Part III. (Para 18)

Assuming that he is not entitled to set up his right to enforce his guaranteed rights as a director, the petition will not still fail. (Para 19)

(B) Constitution of India, Art. 123 — President's power to issue Ordinance — Satisfaction of President — Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (8 of 1969), Preamble — Question of its validity being academical not decided (Obiter).

Obiter (Per majority) — Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. One of the requirements for promulgation of an Ordinance is that the President is satisfied that circumstances exist which render it necessary for him to take immediate action. The satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final.

(Paras 21, 22)

Since the Ordinance 8 of 1969 has been repealed by Act 22 of 1969, the question of its validity is now academic. Since the Act, was found to be invalid the Supreme Court declined to express opinion in this case on the extent of the jurisdiction of the Court to examine whether the condition relating to satisfaction of the President was fulfilled.

(Para 27)

(C) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Ss. 5, 15 (2) (e) — Act is not ultra vires the powers of Parliament — Only 'banking' business taken over — Named Banks reserved right to carry on non-banking business, which was not taken over — Scope of the meaning of 'Banking' in Entry 45 in List I — Banking Regulation Act (1949), S. 5(b) — Acquisition of undertaking is covered by 'Property' in Entry 42 in List III, which includes not only assets but also liabilities and obligations of a going concern — Constitution of India, Sch. VII List I,

Entry 45, List II Entry 26, List III Entry 42.

The expression "banking" is not defined in any Indian Statute except in the Banking Regulation Act, 1949. By S. 5(b) of that Act "Banking" means "the accepting for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise, and withdrawable by cheque, draft or otherwise." The definition does not include other commercial activities which a banking institution may engage in. In modern times in India as elsewhere, to attract business, banking establishments render, and compete in rendering, a variety of miscellaneous services for their constituents. If the test for determining what "Banking" means in the constitutional Entry 45, List I, Sch. VII is any commercial activity which bankers at a given time engage in, great obscurity will be introduced in the content of that expression. The coverage of constitutional entry in a Federal Constitution which carves out a field of legislation must depend upon a more satisfactory basis. The legislative entry in List I of the Seventh Schedule is "Banking" and not "Banker" or "Banks". To include within the connotation of the expression "Banking" in Entry 45 List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in re-writing the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. But the field of "Banking" cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry 26 "trade and commerce" in List II. But this does not lend any practical support to the argument that Act 22 of 1969, to the extent it makes provisions in respect of the undertaking of the named banks relating to non-banking business, is ultra vires the Parliament. In the first instance there is no evidence that the named banks were before July, 19, 1969, carrying on non-banking business distinct and independent of the banking business, or that the banks held distinct assets for any non-

banking business, apart from the assets of the banking business. Again by Act 22 of 1969 the corresponding banks are entitled to engage in business of banking and non-banking which the named banks were engaged in or competent to engage in prior to July 19, 1969, and the named banks are entitled to engage in business other than banking as defined in S. 5(b) of the Banking Regulation Act, but not the business of banking. By enacting that the corresponding new banks may carry on business specified in S. 6(1) of the Banking Regulation Act and that then named banks shall not carry on banking business as defined in S. 5(b) of that Act, the impugned Act did not encroach upon any entry in the State List. By S. 15 (2) (e) of the impugned Act the named banks are expressly reserved the right to carry on business other than banking, and it is not claimed that thereby there is any encroachment upon the State List. Exercise of the power to legislate for acquisition of the undertaking of the named banks also does not trespass upon the State list. (Paras 33, 37, 38, 39)

Power to legislate for acquisition of property is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists. AIR 1954 SC 251, Ref.

(Para. 40)

Under that entry "property" can be compulsorily acquired. In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trade marks copyrights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. The expression "undertaking" in S. 4 of Act 22 of 1969 clearly means a going concern with all its rights, liabilities and assets as distinct from the various rights and assets which compose it. Power to legislate for acquisition of "property" in Entry 42 List III therefore includes the power to legislate for acquisition of an undertaking. The expression "property" in Entry 42 List III has a wide connotation, and it includes not only assets, but organisation, liabilities

and obligations of a going concern as a unit. A law may, therefore, be enacted for compulsory acquisition of an undertaking as defined in S. 5 of Act 22 of 1969. (Paras 40, 41)

The contention that the Parliament is incompetent to legislate for acquisition of the named banks in so far as it relates to assets of the non-banking business fails for two reasons — (i) that there is no evidence that the named banks held any assets for any distinct non-banking business and (ii) that the acquisition is not shown to fall within an entry in List II of the Seventh Schedule. (Para 42)

(D) Constitution of India, Arts. 19(1)(f) and 31(2) — Articles are not mutually exclusive — Acquisition must satisfy requirements of both the Articles, namely, there must be public purpose and reasonableness of restriction—Enquiry into reasonableness is not excluded. AIR 1950 SC 27 and AIR 1951 SC 270 and AIR 1955 SC 41 and AIR 1960 SC 1203 and (1967) 2 SCR 949, Overruled.

Per Majority, Ray, J. contra:

Clauses (1) and (2) of Art. 31 subordinate the exercise of the power of the State to the basic concept of the rule of law. Deprivation of a person of his property and compulsory acquisition may be effectuated by the authority of law. The law limiting the authority of the State must be within the competence of the Legislature enacting it, and not violative of a constitutional prohibition, nor impairing the guarantee of a fundamental right. A person may be deprived of his property by authority of a statute only if it does not impair the fundamental rights guaranteed to him. AIR 1960 SC 1080 and AIR 1963 SC 864 and AIR 1962 SC 821, Ref. (Para 48)

Protection of the guarantee is ensured by declaring that a person may be deprived of his property by authority of law; Article 31 (1) and that private property may be compulsorily acquired for a public purpose and by the "authority of a law" containing provisions fixing or providing for determination and payment of compensation; Art. 31(2). Exercise of either power by State action results in abridgement total or partial — of the right to property of the individual. Article 19(1)(f) is a positive declaration in the widest terms of the right to acquire, hold and dispose of property, subject to restrictions (which may assume the form

of limitations or complete prohibition) imposed by law in the interests of the general public. The guarantee under Art. 19(1)(f) does not protect merely an abstract right to property; it extends to concrete rights to property as well: AIR 1963 SC 864, Referred. (Para 44)

The constitutional scheme declares the right to property of the individual and then delimits it by two different provisions: Article 19(5) and cls. (1) and (2) of Art. 31. Limitations under Art. 19(5) and Art. 31 are not generically different, for the law authorizing the exercise of the power to take the property of an individual for a public purpose or to ensure the well-being of the community, and the law authorising the imposition of reasonable restrictions under Art. 19(5) are intended to advance the larger public interest. It is true that the guarantee against deprivation and compulsory acquisition operates in favour of all persons, citizens as well as non-citizens, whereas the positive declaration of the right to property guarantees the right to citizens. But a wider operation of the guarantee under Art. 31 does not alter the true character of the right it protects. Article 19(5) and Article 31 (1) and (2) operate to delimit the exercise of the right to hold property. (Para 45)

Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the article. (Para 46)

Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions. Article 19 (1) (f) and Art. 31 (2) are not mutually exclusive. AIR 1950 SC 27 and AIR 1951 SC 270 and AIR 1955 SC 41 and AIR

1960 SC 1203 and (1967) 2 SCR 949, Overruled; AIR 1951 SC 41 and AIR 1954 SC 92 and AIR 1960 SC 1080, Ref.

(Paras 46, 46A, 47, 56)

The theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions. (Para 57)

Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property, are, therefore, specific classes of limitations on the right to property falling within Art. 19(1)(f). Property may be compulsorily acquired only for a public purpose. Where the law provides for compulsory acquisition of property for a public purpose it may be presumed that the acquisition or the law relating thereto imposes a reasonable restriction in the interest of the general public. If there is no public purpose to sustain compulsory acquisition, the law violates Art. 31 (2). If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded. For instance if a tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f). (Paras 58, 60)

Article 31 (2) is not a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is liable to be tested in the light of the reasonableness of the restrictions, imposed thereby. The challenge to the validity of the provision for acquisition is not liable to be tested only on the ground of non-compliance with Art. 31 (2). Article 31 (2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that article. Formal compliance with the conditions under Art. 31 (2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the

guarantee of the rights in Part III. Articles 19 (1) (f) and 31 (2) are not mutually exclusive. (Para 62)

If property is compulsorily acquired for a public purpose, and the law satisfies the requirements of Articles 31 (2) and 31 (2A), the Court may readily presume that by the acquisition a reasonable restriction on the exercise of the right to hold property is impressed in the interests of the general public. But that is not because the claim to plead infringement of the fundamental right under Art. 19 (1) (f) does not avail the owner; it is because the acquisition imposes a permissible restriction on the right of the owner of the property compulsorily acquired. (Para 63)

The validity of law which authorises deprivation of property and a law which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. (Para 64)

Per Ray, J. Contra: Art. 19 (1) (f) does not have any application to acquisition or requisition of property for a public purpose under authority of a law which provides for compensation as mentioned in Article 31. In regard to property rights the State generally has power to take away property and justify such deprivation on the ground of reasonable restriction in the interest of the general public, but in case of deprivation of property by acquisition or requisition the Constitution has conferred power when the law passed provides compensation for the property acquired by the State. Therefore the acquisition or requisition for public purpose is a restriction recognised by the Constitution in regard to property rights. (Paras 156, 158)

(E) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969) Ss. 5, 6, 15 — Taking over by State, Banking business with assets etc. of named banks — Non-banking business not taken over but left to be carried out by named banks without name and assets — Restrictions held not reasonable within meaning of the first limb of Art. 19 (6) — Reasonableness of restrictions in respect of non-monopolies rights can be inquired into — (Constitution of India Art. 19(6)).

Per Majority, Ray J. Contra:

By S. 4 the entire undertaking of each named bank vests in the union, and the Bank is prohibited from engaging in the

business of banking in India and even in a foreign country, except where by the laws of a foreign country banking business owned or controlled by Government cannot be carried on, the named bank will be entitled to continue the business in that country. The business which the named banks carried on was (i) the business of banking as defined in S. 5(b) of the Banking Regulation Act, 1949, and business incidental thereto; and (ii) other business which by virtue of the Act 22 of 1969 they were not prohibited from carrying on, though not part of or incidental to the business of banking. By Act 22 of 1969 the named banks cannot engage in business of banking as defined in Section 5(b) of the Banking Regulation Act, 1949, but may engage in other forms of business. By the Act, however, the entire undertaking of each named bank is vested in the new corporation set up with a name identical with the name of that bank, and authorised to carry on banking business previously carried on by the named bank, and its managerial and other staff is transferred to the corresponding new bank. The newly constituted corresponding bank is entitled to engage in business described in S. 6(1) of the Banking Regulation Act, and for that purpose to utilise the assets, goodwill and business connections of the existing bank.

The named banks are declared entitled to engage in business other than banking; but they have not assets with which that business may be carried on, and since they are prohibited from carrying on banking business, by virtue of S. 7 of the Reserve Bank of India Act, they cannot, use in their title the words "Bank" or "Banking", and even engage in non-banking business in their names. A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and even its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, is not made immediately payable to it. (Paras 65, 66)

Validity of the provisions of the Act which transfer the undertaking of the named banks and prohibit those banks from carrying on business of banking and practically prohibit them from carrying on non-banking business falls to be considered in the light of Art. 19(1)(f) and Art. 19 (1) (g) of the Constitution. These rights are not absolute; they are subject

to the restrictions prescribed in the appropriate clauses of Art. 19. (Para 67)

By virtue of new clause (6) of Art. 19 that the validity of a law creating a State monopoly which indirectly impinges on any other right cannot be challenged on the ground that it imposes restrictions which are not reasonable restrictions in the interests of the general public. But if the law contains other incidental provisions which do not constitute an essential and integral part of the monopoly created by it the validity of those provisions is liable to be tested under the first part of Art. 19 (6). If they directly impair any other fundamental right guaranteed by Art. 19 (1), the validity of those provisions will be tested by reference to the corresponding clauses of Art. 19. AIR 1954 SC 728 and AIR 1963 SC 1047, Rel. on; AIR 1969 SC 1081 and AIR 1970 SC 129 and AIR 1969 SC 1100, Ref.

(Para 70)

Clause (6) of Art. 19 is however not restricted to laws creating State monopolies, and the rule enunciated in *Akadasi Padhan's case*, (1963) Supp 2 SCR 691 applies to all laws relating to the carrying on by the State of any trade, business, industry or service. By Art. 298 the State is authorised to carry on trade which is competitive, or excludes the citizens from that trade completely or partially. The basic and essential provisions of law which are "integrally and essentially connected" with the carrying on of a trade by the State will not be exposed to the challenge that they impair the guarantee under Art. 19 (1) (g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not must, however, satisfy the test of the main limb. (Para 70)

The law which prohibits after July 19, 1969, the named banks from carrying on banking business, being a necessary incident of the right assumed by the Union, is not liable to be challenged because of Art. 19 (6) (ii) in so far as it affects the right to carry on business. There is no satisfactory proof in support of the plea that the enactment of Act 22 of 1969 was not in the larger interest of the nation, but to serve political ends. Granting that the objectives laid down by the Reserve Bank were being carried out, it cannot be said that the Act was enacted in abuse of legislative power. (Para 71)

The Parliament has under Entry 45 List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto; it has the power to legislate for acquiring the undertaking of the named banks under Entry 42, List III. The Supreme Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry. (Para 72)

Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable.

If compensation paid is in such a form that it is not immediately available for restarting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and vests in the new banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff.

The restriction imposed upon the right of the named banks to carry on "non-banking" business is, plainly unreasonable. The Act which while theoretically declaring the right of the named banks to carry on "non-banking" business makes it impossible in a commercial sense for the banks to carry on any business. AIR 1954 SC 119 and AIR 1952 SC 115, Rel. on. (Paras 76, 77)

Per Ray, J. Contra:— The disputed businesses are the legitimate businesses of a banking company as mentioned in Section 6 (1) of the 1949 Act and are comprised in the undertaking of the bank and Article 19 (1) (f) is not attracted in case of acquisition or requisition of property dealt with by Article 31 (2). Article 19 (6) confers power on the State to have a valid monopoly business. Section 15 (2) of the 1969 Act allows the existing banks to carry on business other than banking. If as a result of acquisition, the bank will complain of lack of immediate resources to carry on these businesses the

Act provides compensation and the existing banks will devise ways and means for carrying on the business. Constitutionality of the Act cannot be impeached on the ground of lack of immediate resources to carry on business. In the present case, the acquisition is not unconstitutional and the bank is free to carry on all business other than banking. It cannot be suggested that after compensation has been provided for, the State will have to provide moneys to enable the existing banks to carry on these businesses. That would be asking for something beyond the limits of the Constitution. If the entire undertaking of a banking company is taken by way of acquisition the assets cannot be separated to distinguish those belonging to banking business from others belonging to non-banking business because assets are not in fact divided on any such basis. Furthermore, that would be striking at the root of acquisition of the entire undertaking. It would be strange to hold in the teeth of express provisions in the Act of 1969 permitting the banks to carry on business other than banking that the same will amount to a prohibition on the bank to carry on these businesses. A permissive provision allowing the banks to carry on these businesses other than banking does not become unreasonable. If that provision was not there the business could be carried on and the argument would not be available at all. The express making of the provision obviously for greater safety cannot change the position. (Para 180)

(F) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969) Ss. 2 (d), 15 (2) — Constitution of India Art. 14 — Class legislation — Validity — Tests for valid classification — Selection of Banks for being taken over — No opinion whether there is reasonable connection between differentia and object of Act, expressed in absence of data — Selection not struck down on ground of hostile discrimination — But S. 15 (2) struck down on ground that there was hostile discrimination against named banks in that they were prohibited from carrying on banking business and also in practice from carrying on non-banking business.

Per Majority, Ray J. Contra:—

Article 14 forbids class legislation, but not reasonable classification in making laws. The test of permissible classification lies in two cumulative conditions (i) classification under the Act must be found-

ed on an intelligible differentia distinguishing persons, transactions or things grouped together from others left out of the groups and (ii) the differentia has a rational relation to the object sought to be achieved by the Act; there must be a nexus between the basis of classification and the object of the Act. AIR 1951 SC 41 and AIR 1951 SC 318 and AIR 1952 SC 75 and AIR 1955 SC 191 and AIR 1958 SC 538 and AIR 1964 SC 1633, Ref. (Paras 78, 79)

By the definition of "existing bank" in S. 2(d) of the Act, fourteen named banks in the first Schedule are, out of many commercial banks engaged in the business of banking, selected for special treatment, in that the undertaking of the named banks is taken over, they are prevented from carrying on in India and abroad banking business and the Act operates in practice to prevent those banks engaging in business other than banking. (Para 80)

By reason of the transfer of the undertaking of the named banks, the interests of the banks and the share-holders are vitally affected. Investment in bank shares is regarded in India, especially in the shares of larger banks, as a safe investment on attractive terms with a steady return and fluidity of conversion. Since the taking over of the undertaking, there has resulted a steep fall in the ruling market quotations of the shares of a majority of the named banks. Dividend may no longer be distributed, for the banks have no liquid assets and they are not engaged in any commercial activity. It may take many years before the compensation payable to the banks may be finalised, and be available to the named banks for utilising it in any commercial venture open to the banks under the Act. Under the scheme of determination of compensation, the total payable to the banks will be a fraction of the value of their net assets, and that compensation will not be available to the banks immediately. The ground for selection of the 14 banks is that these banks held deposits, as shown in the return as on the last Friday of June 1969 furnished to the Reserve Bank under S. 27 of the Banking Regulation Act, 1949, of not less than rupees fifty crores. (Para 82)

The object of Act 22 of 1969 is according to the long title to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of

development of the economy in conformity with the national policy and objectives and for matters connected, therewith or incidental thereto. The national policy may be taken to be the policy contained in the directive principles of State policy, especially Arts. 38 and 39 of the Constitution. For achieving the needs of a developing economy in conformity with the national policy and objectives, the resources of all the banks—foreign as well as Indian—are inadequate. Of the total deposits with commercial banks 27 per cent are with the State Bank of India and its subsidiaries; the named commercial banks of which the undertaking is taken over hold approximately 56 per cent of the deposits. The remaining 17 per cent of the deposits are shared by the foreign banks and the other scheduled and non-scheduled commercial banks. 83 per cent of the total resources may obviously not meet wholly or even substantially the needs of development of the economy. (Para 83)

But in the absence of any reliable data, the Supreme Court did not think it necessary to express an opinion on the question whether selection of the undertaking of some out of many banking institutions, for compulsory acquisition, is liable to be struck down as hostile discrimination, on the ground that there is no reasonable relation between the differentia and the object of the Act which cannot be substantially served even by the acquisition of the undertakings of all the banks out of which the selection is made. (Para 84)

But the fourteen named banks are prohibited from carrying on banking business, a disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad, new banks may be floated for carrying on banking business, but the named banks are prohibited from carrying on banking business. When after acquiring the assets, undertaking, organization, goodwill and the names of the named banks they are prohibited from carrying on banking business, whereas other banks Indian as well as foreign are permitted to carry on banking business, a flagrantly hostile discrimination is practised. Section 15(2) of the Act is, therefore, liable to be struck down. Again, in considering the validity of S. 15 (2) (e) in its relation to the guarantee of freedom to carry on business other than banking the named banks are also, though theoretically competent in substance pro-

hibited from carrying on non-banking business. The restriction is unreasonable, it must also be held that the guarantee of equality is impaired by preventing the named banks carrying on the non-banking business. (Para 87)

Per Ray, J.:—Where the legislature finds that public need is great and these 14 banks will be able to supply that need for the development of national economy classification is reasonable and not arbitrary and is based on practical grounds and consideration supported by the large resources of over Rs. 50 crores of each of these 14 banks and their administration and management. Therefore the acquisition of the undertakings does not offend Article 14 because of intelligible differentia and its rational relation to the object to be achieved by the Act of 1969 and it follows that these banks cannot therefore be allowed to carry on banking business to nullify the very object of the Act. (Para 169)

(G) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Sections 4, 5, 68, Sch. II — Constitution of India, Article 31 (2) — Compensation must be just compensation — Method of valuation of undertaking must be reasonable — Several methods available — One adopted resulting in less compensation — Court will not interfere — Court will interfere if no method is laid down or if method laid down is not reasonable — Assets include good-will and it has to be valued — Unexpired term of lease has to be valued — Valuation of cash and secret reserve — Held that the Act adopted irrelevant principle by omitting important items — Act struck down as contravening Art. 31 (2).

Existence of a public purpose and provision for giving compensation for compulsory acquisition of property of an individual are conditions of the exercise of the power to acquire private property. If either condition be absent, the guarantee under Article 31 (2) is impaired, and the law providing for acquisition will be invalid. But jurisdiction of the Court to question the law on the ground that compensation provided thereby is not adequate is expressly excluded. (Para 88)

The law providing for acquisition must again either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given. The law which does not ensure the guarantee

will, except where the grievance only is that the compensation provided by the law is inadequate, be declared void.

(Para 90)

Article 31 (2) before and after it was amended guaranteed a right to compensation for compulsory acquisition of property and by giving to the owner, for compulsory acquisition of his property, compensation which was illusory, or determined by the application of principles which were irrelevant, the constitutional guarantee of compensation was not complied with.

(Para 99)

The principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognized principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. Case law Ref.

(Para 100)

The Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969) is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles. Section 4 of the Act transfers the undertaking of every named bank to and vests it in the corresponding new bank. Section 6 (1) provides for payment of compensation for acquisition of the undertaking, and the compensation is to be determined in accordance with the principles specified in the Second Schedule. Section 6 (2) then provides that though separate valuations are made in respect of the several matters specified in Sch. II of the Act, the amount of compensation shall be deemed to be a single compensation. Compensation being the equivalent in terms of money of the property compulsorily acquired, the principle for determination of compensation is intended to award to the expropriated owner the value of the property acquired. The scheme of valuation of property recognizes several principles or methods for determining the value to be paid as compensation to the owner for loss of his property: there are different methods applicable to different classes of property in the determination of the value to be paid as recompense for loss of his property. A method appropriate to the determination of value of one class of property may be wholly inappropriate in determining the value of another class of property. If an appropriate method or

principle for determination of compensation is applied, the fact that by the application of another principle which is also appropriate a different value is reached, the Court will not be justified in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature.

(Para 100)

But a principle specified by the Parliament for determining compensation of the property to be acquired is not conclusive. If that view be accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process the constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired. If several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles is not open to challenge, for the selection must be left to the wisdom of the Parliament.

(Para 101)

(Important methods of determining compensation indicated.) (Paras 103, 104)

The expression "property" in Article 31 (2) as in Entry 42 of List III is wide enough to include an undertaking, and an undertaking subject to obligation may be compulsorily acquired under a law made in exercise of power under Entry 42, List III. But when an undertaking is acquired as a unit, the principles for determination of compensation must be relevant and also appropriate to the acquisition of the entire undertaking. In determining the appropriate rate of the net profits the return from gilt-edged securities may, unless it is otherwise found unsuitable, be adopted.

(Para 105)

Compensation to be determined under the Act is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some only of the components, which constitute the undertaking, and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method for determination of compensation is prima facie not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a

unit of property acquired, especially when the property is a going concern, with an organized business. On that ground alone, acquisition of the undertaking is liable to be declared invalid, for it impairs the constitutional guarantee for payment of compensation for acquisition of property, of law. Even if it be assumed that the aggregate value of the different components will be equal to the value of the undertaking of the named bank as a going concern the principles specified, do not give a true recompense to the banks for the loss of the undertaking. In determining the compensation for undertaking — (i) certain important classes of assets are omitted from the heads (a) to (h); in Part I, Sch. II, (ii) the method specified for valuation of lands and buildings is not relevant to determination of compensation, and the value determined thereby in certain circumstances is illusory as compensation; and (iii) the principle for determination of the aggregate value of liabilities is also irrelevant.

(Paras 106, 107)

The undertaking of a banking company taken over as a going concern would ordinarily include the goodwill and the value of the unexpired period of long-term leases in the prevailing conditions in urban areas. But goodwill of the banks is not one of the items in the assets in the Schedule, and in Cl. (f) though provision is made for including a part of the premium paid in respect of leasehold properties proportionate to the unexpired period, no value of the leasehold interest for the unexpired period is given.

(Para 107)

Goodwill of a business is an intangible asset; it is the whole advantage of the reputation and connections formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features. Goodwill of an undertaking therefore is the value of the attraction to customers arising from the name, and reputation for skill, integrity, efficient business management, or efficient service. Business of banking thrives on its reputation for probity of its dealings, efficiency of the service it provides, courtesy and promptness of the staff, and above all the confidence it inspires among the customers for the safety of the funds entrusted. Existence

of these powers and exercise thereof by the Reserve Bank may and do ensure to a certain extent the safety of the funds entrusted to the Banks. But the business which a bank attracts still depends upon the confidence which the depositor reposes in the management. A banking establishment has a goodwill, and the value of the goodwill of a bank is not insignificant and cannot be ignored in valuing the undertaking as a going concern.

(Paras 108, 109)

There is no provision made for payment of compensation for the unexpired period of the leases. Having regard to the present day conditions it is clear that with rent control on leases operating in various States the unexpired period of leases has also a substantial value.

(Para 110)

The value determined by excluding important components of the undertaking, such as the goodwill and value of the unexpired period of leases, will not be compensation for the undertaking. (Para 111)

Under Clause (a) of Part I — Assets — the amount of cash in hand and with the Reserve Bank and the State Bank of India (including foreign currency notes which shall be converted at the market rate of exchange) are liable to be included. Cash in hand is not an item which is capable of being compulsorily acquired, not because it is not property, but because taking over the cash and providing for acquisition thereof, compensation payable at some future date amounts to levying a "forced loan" in the guise of acquisition. AIR 1952 SC 252 & AIR 1953 SC 328, Ref.

(Para 112)

(No opinion however was expressed on the question whether in adopting the method of determination of compensation, by aggregating the value of assets which constitute the undertaking, the rule that cash and choses in action are incapable of compulsory acquisition may be applied.)

(Para 112)

Provision for valuing land or building does not lay down a relevant principle of valuation of buildings. (Para 113)

Again in determining the compensation under clause (e), the annual rent is reduced by several outgoings and the balance is capitalized. The vice of items (v) and (vi) of clause (1) or Explanation 2 is that they provide for deduction of a capital charge out of the annual rental which according to no rational system of valuing property by capitalization of the rental method is admissible. The assets would

show a minus figure as value of the building, and on the liabilities side the entire amount of mortgage liability would be debited. The method provided by the Act permits the annual interest on the amount of the encumbrance to be deducted before capitalization, and the capitalized value is again reduced by the amount of encumbrance. In effect, a single debt is, in determining the compensation debited twice, first, in computing the value of assets and again, in computing the liabilities. (Para 114)

Item (e) does not specify a relevant principle for determination of compensation for lands and buildings. (Para 118)

A banking company is entitled to withhold from the balance-sheet its secret reserves but there must be some account in respect of these secret reserves. The expression "books of the Bank" may not be equated with the balance-sheets or the books of account only. Omission to value 'secret reserves' in valuing assets, is not a defect. (Para 120)

The expression "liabilities existing at the commencement of the Act" includes all debts due or to become due. The present value of the contingent liabilities at the date of the acquisition and not the total contingent liabilities may on any rational system of accounting be debited against the aggregate value of the assets. For instance, if a banking company is liable to pay to its employees gratuity, the present value of the liability to pay gratuity at the date of the acquisition made on actuarial calculation may alone be debited and not the total face value of the liability. (Para 121)

The Constitution guarantees a right to compensation an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation. (Para 122)

The Constitution guarantees that the expropriated owner must be given the value of his property, i.e., what may be regarded reasonably as compensation for loss of the property and that such compensation should not be illusory and not reached by the application of irrelevant principles. The determination of compensation to be paid for the acquisition of an undertaking as a unit after award-

ing compensation for some items which go to make up the undertaking and omitting important items amounts to adopting an irrelevant principle in the determination of the value of the undertaking, and does not furnish compensation to the expropriated owner. (Para 123)

By the method adopted for valuation of the undertaking, important items of assets have been excluded, and principles some of which are irrelevant and some not recognised are adopted. What is determined by the adoption of the method adopted in Sch. II does not award to the named banks compensation for loss of their undertaking. The ultimate result substantially impairs the guarantee of compensation, and on that account the Act is liable to be struck down. (Para 127)

Section 4 of the Act is a kingpin in the mechanism of the Act. Sections 4, 5 and 6 read with Sch. II provide for the statutory transfer and vesting of the undertaking of the named banks in the corresponding new banks and prescribe the method of determining compensation for expropriation of the undertaking. Those provisions are void as they impair the fundamental guarantee under Article 31 (2). Sections 4, 5 and 6 and Sch. II are not severable from the rest of the Act. The Act must, in its entirety, be declared void and action taken or deemed to be taken in exercise of the powers under the Act also must be declared unauthorized. (Para 132)

Per Ray, J., contra:—

If the quantum of compensation fixed by the legislature is not liable to be challenged before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of these principles is not a just equivalent. The right declared by the Constitution guarantees compensation before a person is compulsorily expropriated of the property for public purpose. Principles may be challenged on the ground that they are not relevant to the property acquired or the time of acquisition of the property but not on the plea that the principles are not relevant to the determination of a fair or just equivalent of the property acquired. A challenge to the statute that a principle specified by it does not provide or award a just equivalent will be a clear violation of the Constitutional declaration

that inadequacy of compensation provided for is not justiciable. (Para 201)

When principles are laid down in a statute for determination of compensation all that the Court will see is whether those principles are relevant for determination of compensation. The relevancy is to compensation and not to adequacy. It cannot be held that when the relevant principle set out is ascertained value, the petitioner could yet contend that market value should be the principle. It would really be going into adequacy of compensation by preferring the merits of the principle to those of the other for the oblique purpose of arriving at what is suggested to be just equivalent. It is unthinkable that the legislature after the Constitution Fourth Amendment Act intended that the word 'compensation' would mean just equivalent when the legislature put a bar on challenge to the adequacy of compensation. Just compensation cannot be inadequate and anything which is impeached as unjust or unfair is impinging on adequacy. Therefore, just equivalent cannot be the criterion in finding out whether the principles are relevant to compensation or whether compensation is illusory. If the amount fixed is not obviously and shockingly illusory or the principles are relevant to determination of compensation, namely, they are principles in relation to property acquired or are principles relevant to the time of acquisition of property there is no infraction of Article 31 (2) and the owner cannot impeach it on the ground of 'just equivalent' of the property acquired.

(Para 204)

If it be suggested that no compensation has been provided for any particular asset that will be questioning adequacy of compensation because compensation has been provided for the entire undertaking. The compensation provided for the undertaking cannot be called illusory because in the present case principles have been laid down. (Para 209)

Whether or not the goodwill has a saleable value, this question of fact is to be determined in each case. Upon sale of a business there may be restriction as to user of the name of the business sold. That is another aspect of sale of goodwill of a business. The 14 banks carried on business under licence by reason of Section 22 of the Act of 1949. The concept of sale in such a situation is unreal. Furthermore, the possibility of nationalisation of undertakings like banks cannot be

ruled out. Possibility of nationalisation will affect the value of goodwill. In the case of compulsory acquisition it is of grave doubt whether goodwill passes to the acquiring authority. No facts have been pleaded in the petition to show as to what goodwill the bank has. Goodwill is not shown in assets. In the present case the names of the 14 banks and the corresponding new banks are not the same and it cannot therefore be said that any goodwill has been transferred. The 14 banks will be able to carry on business other than banking in their names. Again under the Act compensation is being paid for the assets and secret reserves which are provided for by depreciating the value of assets will also be taken into account. Any challenge as to compensation for goodwill falls within the area of adequacy. (Para 217)

The principles which have been set out in the 1969 Act are relevant to the determination of compensation. When it is said that principles will have to be relevant to the compensation, the relevancy will not be as to adequacy of compensation but to the property acquired and the time of acquisition. It may be that adoption of one principle may confer lesser sum of money than another but that will not be a ground for saying that the principle is not relevant. (Para 220)

(H) Constitution of India, Art. 31 (2) — Compensation otherwise than in form of money i. e. in form of bond — Valuation of compensation — Principles laid down. (Obiter)

(Obiter) — Compensation may be provided under a statute, otherwise than in the form of money; it may be given as equivalent of money, e.g., a bond, but in judging whether the law provides for compensation, the money value at the date of expropriation of what is given as compensation, must be considered. If the rate of interest compared with the ruling commercial rate is low, it will reduce the present value of the bond. The Constitution guarantees a right to compensation an equivalent of the property expropriated and the right to compensation cannot be converted into a loan on terms which do not fairly compare with the prevailing commercial terms. If the statute in providing for compensation devises a scheme for payment of compensation by giving it in the form of bonds, and the present value of what is determined to be given is thereby substantially reduced, the statute impairs the guar-

antee of compensation. A scheme for payment of compensation may take many forms. If the present value of what is given reasonably approximates to what is determined as compensation according to the principles provided by the statute, no fault may be found. But if the law seeks to convert the compensation determined into a forced loan, or to give compensation in the form of a bond of which the market value at the date of expropriation does not approximate the amount determined as compensation, the Court must consider whether what is given is in truth compensation which is inadequate, or that it is not compensation at all. By giving to the expropriated owner compensation in bonds of the face-value of the amount determined maturing after many years and carrying a certain rate of interest, the constitutional guarantee is not necessarily complied with. If the market value of the bonds is not approximately equal to the face value, the expropriated owner may raise a grievance that the guarantee under Article 31 (2) is impaired. (Paras 125, 126)

(I) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Sections 1 (2), 29 — Retrospective operation of Act — Does not violate Article 31 (2) of the Constitution — (Constitution of India, Art. 31 (2) — (C. P. C. (1908), Preamble — Retrospective operation of expropriation statutes).

Per Ray, J.: There can be retrospective legislation affecting acquisition of property and such retrospective operation and validation of actions with regard to acquisition does not offend Article 31 (2) of the Constitution. The Act of 1969 which is retrospective in operation does not violate Article 31 (2) because it speaks of authority of a law without any words of limitation or restriction as to law being in force at the time. (Para 146)

(J) Words and Phrases — "Undertaking" — Meaning of — Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Section 5.

Per Ray, J.:— By the word 'undertaking' is meant the entire organisation. Company, whether it has a plant or whether it has an organisation, is considered as one whole unit and the entire business of the going concern is embraced within the word 'undertaking'. The word 'undertaking' is used in the Indian Electricity Act, the Air Corporation Act, 1953, the Imperial Bank of India Act, 1920 (Sec-

tions 3, 4, 6 and 7), the State Bank Subsidiaries Banks Act 1959 (Section 10 (1)) and the Banking Regulation Act, 1949 (Section 36 AE (1)). (Para 175)

(K) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Section 11 — Section does not suffer from excessive delegation — (Constitution of India, Articles 14, 245).

Per Ray, J.:—

Section 11 of the 1969 Act does not suffer from the vice of excessive delegation; there are guidelines for reaching the objectives set out in the Preamble of the Act. The Act of 1969 contains enough guidance. First, the Government may give directions only in regard to policy involving public interest; secondly, directions can only be given by the Central Government and no one else; thirdly, these directions can only be given by the Central Government after consultation with the Governor of the Reserve Bank; fourthly, directions given by the Government are in regard to matters involving public interest which means that this is objective and subject to judicial scrutiny and both the Central Government and the Governor of Reserve Bank are high authorities. (Paras 181, 182)

(L) Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969), Preamble — Article 305 of Constitution applies and not Articles 301 and 302 — (Constitution of India, Articles 305, 301, 302).

Per Ray, J.:—

Article 305 directly applies to a law relating to banking and all businesses necessarily incidental to it carried on by the State to the complete or partial exclusion of 14 banks. Article 302 can have no application in such a case. An individual cannot complain of violation of Article 301. Article 302 is an enabling provision and it has to be read in relation to Article 301. Acquisition of property by itself cannot violate Article 301 which relates to free trade, commerce throughout India. The object of acquisition is that the State shall carry on business to the exclusion, complete or partial of the 14 banks. (Paras 186, 187)

(M) Constitution of India, Article 123 — Satisfaction of President is subjective — Validity of Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (8 of 1969) cannot be challenged.

Per Ray, J.:—

The interpretation of Article 123 is to be made first on the language of the Arti-

cle and secondly the context in which that power is reposed in the President. When power is conferred on the President to promulgate Ordinances the satisfaction of the President is subjective.

(Para 227)

The only way in which the exercise of power by the President can be challenged is by establishing bad faith or mala fide and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He should affirm the state of facts. He is not only to allege the same but also to prove it. (Para 233)

The validity of the Ordinance of 1969 cannot be challenged by contending that the satisfaction of the President under Article 123 was open to challenge in a Court of law. (Para 223)

The fact that Parliament would be in session on 21st July, 1969 and that the Ordinance was promulgated on Saturday, 19th July, 1969, was not indicative of the fact that the Ordinance was not promulgated legitimately but in a hasty manner and the President should have waited. If the President has power when the House is not in session he can exercise that power when he is satisfied that there is an emergency to take immediate action. That emergency may take place even a short time before Parliament goes into session. It will depend upon the circumstances which were before the President. The fact that the Ordinance was passed shortly before the Parliament session began does not show any mala fide. It is not for the Union to furnish facts and information which were before President because first such information might be a State secret, secondly, it was for the party who alleged non-existence of circumstances to prove the same and thirdly, the State was not called upon to meet any case of mala fide. (Para 234)

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- M/s. N. A. Palkhivala and M. C. Chagla, Senior Advocates (Mr. A. J. Rana, Mrs. N. N. Palkhivala, M/s. R. N. Banerjee, S. Swarup and B. Datta, Advocates, and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co., with them), for Petitioner (In W. Ps. Nos. 222 and 300 of 1969); Mr. R. V. S. Mani, Advocate, for Petitioner (In W. P. 298 of 1969); Mr. Niren De, Attorney-General for India, Mr. Jagadish Swarup, Solicitor-General of India, M/s. M. C. Setalvad and C. K. Daphtary, Senior Advocates, (M/s. R. H. Dhebar, R. N. Sachthey and S. P. Nayar, Advocates, with them), for Respondent (In W. P. No. 222 of 1969); Mr. Niren De, Attorney-General for India, Mr. Jagadish Swarup, Solicitor-General of India, M/s. M. C. Setalvad, C. K. Daphtary, and N. S. Bindra, Senior Advocates, (M/s. R. H. Dhebar, R. N. Sachthey, S. P. Nayar and N. H. Hingorani, Advocates with them), for Respondent (In W. P. No. 300 of 1969); Mr. Niren De, Attorney-General for India, Mr. Jagadish Swarup, Solicitor-General of India, M/s. M. C. Setalvad, C. K. Daphtary and Dr. V. A. Seyid Muhammad, Senior Advocates (M/s. R. H. Dhebar, R. N. Sachthey and S. P. Nayar, Advocates, with them), for Respondent (In W. P. No. 298 of 1969); M/s. M. C. Setalvad and S. Mohan Kumaramangalam, Senior Advocates (M/s. R. K. Garg and S. C. Agarwal, Advocates of M/s. Ramamurthi and Co., and Mr. V. J. Francis, Advocates, with them), for Intervener No. 1; Mr. M. C. Setalvad, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with him), for Intervener No. 2; Mr. S. Mohan Kumaramangalam, Senior Advocate (Mr. A. V. Rangam, Advocate, with him), for Intervener No. 3; Mr. Lal Narain Sinha, Advocate-General for the State of Bihar (M/s.

R. K. Garg and D. P. Singh, Advocates, with him), for Intervener No. 4; Mr. V. K. Krishna Menon, Senior Advocate (M/s. M. R. Krishna Pillai and D. P. Singh, Advocates, with him), for Intervener No. 5; Mr. P. Ram Reddy Senior Advocate. (Mr. P. Parameswara Rao, Advocate, with him), for Intervener No. 6; Mr. M. C. Chagla, Senior Advocate (M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates, with him), for Intervener No. 7.

The following judgments of the Court were delivered by

SHAH, J. (For Majority): Rustom Cavasji Cooper—hereinafter called 'the petitioner'—holds shares in the Central Bank of India Ltd., the Bank of Baroda Ltd., the Union Bank of India Ltd., and the Bank of India Ltd., and has accounts—current and fixed deposit—with those Banks: he is also a Director of the Central Bank of India Ltd. By these petitions he claims a declaration that the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969 promulgated on July 19, 1969, and the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 which replaced the Ordinance with certain modifications impair his rights guaranteed under Articles 14, 19 and 31 of the Constitution, and are on that account invalid.

2. In India there was till 1949, no comprehensive legislation governing banking business and banking institutions. The Central Legislature enacted the Banking Companies Act 10 of 1949 (later called "The Banking Regulation Act") to consolidate and amend the law relating to certain matters concerning banking. By Section 5 (b) of that Act, "banking" was defined as meaning "the accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise"; and by Section 5 (c) a "banking company" meant "any company which transacts the business of banking in India". By Section 6 it was enacted that in addition to the business of banking as defined in Section 5 (b) a banking company may engage in one or more of the forms of business specified in clauses (a) to (o) of sub-s. (1). By sub-s. (2) of Section 6 banking companies were prohibited from engaging "in any form of business other than those referred to in sub-section (1)". The Act applied to commercial banks, and enacted provisions, amongst others, relating to prohibition of employment of managing agents and restrictions on certain forms

of employment; minimum paid up capital and reserves; regulation of voting rights of shareholders and election of Board of Directors; prohibition of charge on unpaid capital; restriction on payment of dividend; maintenance of a percentage of assets; return of unclaimed deposits; and accounts and balance-sheets. It also enacted provisions authorising the Reserve Bank to issue directions to and for trial of proceedings against the Banks and for speedy disposal of winding up proceedings of Banks.

3. The Banking Regulation Act was amended by Act 58 of 1968, to give effect to the policy of "social control" over commercial banks. Act 58 of 1968 provided for reconstitution of the Boards of Directors of commercial banks with a Chairman who had practical experience of the working of a Bank or financial, economic and business administration, and with a membership not less than 51 per cent consisting of persons having special knowledge or practical experience in accountancy, agriculture and rural economy, banking, co-operation, economics, finance, law and small-scale industry. The Act also provided that no loans shall be granted to any Director of the Bank or to any concern in which he is interested as Managing Director, Manager, employee, or guarantor or partner or in which he holds substantial interest. The Reserve Bank was invested with power to give directions to commercial banks and to appoint directors or observers in the interest of depositors or proper management of the Banking Companies, or in the interest of Banking policy (which expression was defined by Section 5 (ca)) as "any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources". The Reserve Bank was also invested with power to remove managerial and other personnel from office and to appoint additional directors, and to issue directions prohibiting certain activities in relation to Banking Companies. The Central Government was given power to acquire the business of any Bank if it failed repeatedly to comply with any direction issued by the Reserve Bank under certain specific provision in regard to any matter

concerning the affairs of the Bank and if acquisition of the Bank was considered necessary in the interest of the depositors or in the interest of the banking policy or for the better provision of credit generally or of credit to any particular section of the community or in a particular area.

4. During the last two decades the Reserve Bank reorganised the banking structure. A number of units which accounted for a small section of the banking business were amalgamated under directions of the Reserve Bank. The total number of commercial banking institutions was reduced from 566 in 1951 to 89

in 1969 — 73 scheduled and 16 non-scheduled.

5. In exercise of the authority conferred by the State Bank of India Act 23 of 1955 the undertaking of the former Imperial Bank of India was taken over by a public corporation controlled by the Central Government. The State Bank took over seven subsidiaries under authority conferred by Act 38 of 1959. There were in June 1969, 14 commercial banks operating in India each having deposits exceeding Rs. 50 crores. The following is an analysis of the commercial banking structure in India in June 1969:

	No. of Banks	No. of Offices	Deposits (in Crores)	Credit (in Crores)
State Bank of India	1	1,566	948	967
Subsidiaries of State Bank of India	7	888	291	219
Indian Scheduled Commercial Banks (each with deposit exceeding Rs. 50 Crores)	14	4,130	2,632	1,829
Banks incorporated in Foreign Countries	15*	130	478	385*
Other Indian Scheduled Banks	36	1,324	296	197
Non-scheduled Commercial Banks	16	216	28	16

*Only 13 were operating.

6. Late in the afternoon of July 19, 1969 (which was a Saturday) the Vice-President (acting as President) promulgated, in exercise of the power conferred by clause (1) of Article 123 of the Constitution, Ordinance 8 of 1969 transferring to and vesting the undertaking of 14 named commercial banks in corresponding new banks set up under the Ordinance. The long title of the Ordinance read as follows:

"An Ordinance to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with national policy and objectives and for matters connected therewith or incidental thereto."

By Section 2 "banking company" was defined as not including a foreign company within the meaning of Section 591 of the Companies Act, 1956. An "existing bank" was defined by Section 2 (b) as meaning "a banking company specified in column 1 of the First Schedule, being a company the deposits of which, as shown in the return as on the last Friday of June, 1969, furnished to the Reserve Bank under Section 27 of the Banking Regulation Act, 1949, were not less than rupees fifty crores". In the Schedule to the Act were

included the names of fourteen commercial banks:

- (1) The Central Bank of India Ltd.
- (2) The Bank of India Ltd.
- (3) The Punjab National Bank Ltd.
- (4) The Bank of Baroda Ltd.
- (5) The United Commercial Bank Ltd.
- (6) Canara Bank Ltd.
- (7) United Bank of India Ltd.
- (8) Dena Bank Ltd.
- (9) Syndicate Bank Ltd.
- (10) The Union Bank of India Ltd.
- (11) Allahabad Bank Ltd.
- (12) The Indian Bank Ltd.
- (13) The Bank of Maharashtra Ltd.
- (14) The Indian Overseas Bank Ltd.

These banks are hereinafter referred to as the named banks.

A "corresponding new bank" was defined in relation to an existing bank as meaning "the body corporate specified against such bank in column 2 of the First Schedule". By Section 2 (g) it was provided that the words and expressions used in the Ordinance and not defined, but defined in the Banking Regulation Act, 1949, had the meaning respectively assigned to them in that Act. Thereby the definitions of "banking" and "banking company" in Section 5 (b) and Section 5 (c) of the Banking Regulation Act were incorporated in the Ordinance.

7. The principal provisions of the Ordinance were. — (1) Corporations styled in the ordinance “corresponding new banks” shall be established, each such corporation having paid-up capital equal to the paid-up capital of the named bank in relation to which it is a corresponding new bank. The entire capital of the new bank shall stand vested in the Central Government. The corresponding new banks shall be authorised to carry on and transact the business of banking as defined in clause (b) of Section 5 of the Banking Regulation Act, 1949, and also to engage in one or more forms of business specified in sub-section (1) of Section 6 of that Act. The Chairman of the named bank holding office immediately before the commencement of the Ordinance shall be the Custodian of the corresponding new bank. The general superintendence and direction of the affairs and business of a corresponding bank shall be vested in the Custodian, who shall be the chief executive officer of that bank.

(2) The undertaking within or without India of every named bank on the commencement of the Ordinance shall stand transferred to and vested in the corresponding new bank. The expression “undertaking” shall include all assets, rights, powers, authorities and privileges, and all property, movable and immovable, cash balances, reserve fund investments and all other rights and interests arising out of such property as are immediately before the commencement of the Ordinance in the ownership, possession, power or control of the named bank in relation to the undertaking, including all books of accounts, registers, records and all other documents of whatever nature relating thereto. It shall also include all borrowings, liabilities and obligations of whatever kind then subsisting of the named bank in relation to the undertaking. If according to the law of any foreign country, the provisions of the Ordinance by themselves do not effectively transfer or vest any asset or liability situated in that country in the corresponding new bank the affairs of the named bank in relation to such asset or liability shall stand entrusted to the chief executive officer of the corresponding new bank with authority to take steps to wind up the affairs of that bank. All contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect immediately before the commencement of the Ordinance,

and to which the named bank is a party or which are in favour of the named bank shall be of as full force and effect against or in favour of the corresponding new bank, and be enforced or acted upon as fully and effectively as if in the place of the named bank the corresponding new bank is a party thereto or as if they are issued in favour of the corresponding new bank. In pending suits or other proceedings by or against the named bank, the corresponding new bank shall be substituted in those suits or proceedings. Any reference to any named bank in any law other than the Ordinance, or in any contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it.

(3) The Central Government shall have power to frame a scheme for carrying out the provisions of the Act, and for that purpose to make provisions for the corresponding new banks relating to capital structure, constitution of the Board of Directors, manner of payment of compensation to the shareholders, and matters incidental, consequential and supplemental. Corresponding new banks shall also be guided in the discharge of their functions by such directions in regard to matters of policy involving public interest as the Central Government may give.

(4) On the commencement of the Ordinance, every person holding office as Chairman, Managing Director, or other Director of a named bank, shall be deemed to have vacated office, and all officers and other employees of a named bank shall become officers or other employees of the corresponding new banks. Every named bank shall stand dissolved on such date as the Central Government may by notification in that behalf appoint.

(5) The Central Government shall give compensation to the named banks determined according to the principles set out in Second Schedule, that is to say,—

(a) where the amount of compensation can be fixed by agreement, it shall be determined in accordance with such agreement,

(b) where no such agreement can be reached, the Central Government shall refer the matter to the Tribunal within a period of three months from the date on which the Central Government and the existing bank fail to reach an agreement regarding the amount of compensation.

Compensation so determined shall be paid to each named bank in marketable

Central Government securities. For the purpose of determining compensation, Tribunals shall be set up by the Central Government with certain powers of a Civil Court.

(6) The Central Government shall have power to make such orders not inconsistent with the provisions of the Ordinance which may be necessary for the purpose of removing defects.

8. Under the Ordinance the entire undertaking of every named commercial bank was taken over by the corresponding new bank, and all assets and contractual rights and all obligations to which the named bank was subject stood transferred to the corresponding new bank. The Chairman and the Directors of the Banks vacated their respective offices. To the named banks survived only the right to receive compensation to be determined in the manner prescribed. Compensation, unless settled by agreement, was to be determined by the Tribunal, and was to be given in marketable Government securities. The entire business of each named bank was accordingly taken over, its Chief Executive Officer ceased to hold office and assumed the office of Custodian of the corresponding new bank, its directors vacated office; and the services of the administrative and other staff stood transferred to the corresponding new bank. The named bank had thereafter no assets, no business, and no managerial, administrative or other staff; it was incompetent to use the word "Bank" in its name, because of the provisions contained in Section 7 (1) of the Banking Regulation Act, 1949, and was liable to be dissolved by a notification of the Central Government.

9. Petitions challenging the competence of the President to promulgate the Ordinance were lodged in this Court on July 21, 1969. But before the petitions could be heard by this Court, a Bill to enact provisions relating to acquisition and transfer of undertakings of the existing banks was introduced in the Parliament, and was enacted on August 9, 1969, as "The Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969". The long title of the Act was in terms identical with the long title of the Ordinance. By sub-section (1) of Sec. 27 of the Act, Ordinance 8 of 1969 was repealed. In the First Schedule were included the names of the 14 banks named in the Ordinance in juxtaposition with the names of the corresponding new banks.

By sub-section (2) of Section 1, the Act came into force on July 19, 1969, and the undertaking of every named bank was deemed, with effect from that date, to have vested in the corresponding new bank. By Section 27 (2), (3) and (4) actions taken or things done under the Ordinance inconsistent with the provisions of the Act were not to be of any force or effect, and no right, privilege, obligation or liability was to be deemed to have been acquired, accrued or incurred under the Ordinance.

10. The general scheme of the Ordinance relating to the transfer to and vesting in the corresponding new bank of the undertaking of each named bank, payment of compensation, and management of the corresponding new bank, remained unaltered. The Act departed from the Ordinance in certain matters:

(1) Under the Act the named banks remain in existence for certain purposes and they are not liable to be dissolved by order of the Government. If under the laws in force in any foreign country it is not permissible for a Banking Company, owned or controlled by Government, to carry on the business of banking in that country, the assets, rights, powers, authorities and privileges and property, movable and immovable, cash balances and investments of any named bank operating in that country shall not vest in the corresponding new bank. The directors of the named banks shall remain in office and may register transfers or transmission of shares; arrive at an agreement about the amount of compensation payable under the Act or appearing before the Tribunal for obtaining a determination as to the amount of compensation; distribute to shareholders the amount of compensation received by the Bank under the Act for the acquisition of its undertaking; carrying on the business of banking in any country outside India if under the law in force in that country any bank, owned or controlled by Government, is prohibited from carrying on the business of banking there; and carry on any business other than the business of banking. The Central Government has power to authorise the corresponding new bank to advance the amount required by the named bank in connection with the functions which the directors may perform. Reference to any named bank in any law, or in any contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it, but not in cases where the named

bank may carry on any business and in relation to that business.

(2) Principles for determination of compensation and the manner of payment are modified. Interim compensation may be paid to a named bank if it agrees to distribute to its shareholders in accordance with their rights and interests. A major change is made in the principles for determining compensation set out in Sch. II. By Explanation I to Cl. (e) of Part I of Sch. II, the value of any land or buildings to be taken into account in valuing the assets is to be the market value of the land or buildings, but where such market value exceeds the "ascertained value", that "ascertained value" is to be taken into account, and by Explanation II the "ascertained value" of any building wholly occupied on the date of the commencement of the Act is to be twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let out from year to year, and reduced by one-sixth of the amount of the rent on account of maintenance and repairs, annual premium paid to insure the building against risk of damage or destruction, annual charge, if any, on the building, ground rent, interest on any mortgage or other capital charge on the building, interest on borrowed capital if the building has been acquired, constructed, repaired, renewed or re-constructed with borrowed capital, and the sums paid on account of land revenue or other taxes in respect of such building.

(3) The Central Government may re-constitute any corresponding new bank into two or more corporations; amalgamate any corresponding new bank or with another banking institution; transfer the whole or any part of the undertaking of a corresponding new bank to any other banking institution; or transfer the whole or any part of the undertaking of any other banking institution to a corresponding new bank. The Board of Directors of the corresponding new banks are to consist of representatives of the depositors of the corresponding new bank, employees of such banks, farmers, workers and artisans to be elected in the prescribed manner and of other persons as the Central Government may appoint.

(4) The profits remaining after making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds and all other matters for which provision is necessary under any law, the corresponding

new bank shall transfer the balance of profits to the Central Government.

(5) Provision of law relating to winding up of corporations do not apply to the corresponding new banks, and a corresponding new bank may be ordered to be liquidated only by the order of the Central Government.

11. The petitioner challenges the validity of the Ordinance and the Act on the following principal grounds:

I. The Ordinance promulgated in exercise of the power under Article 123 of the Constitution was invalid, because the condition precedent to the exercise of the power did not exist;

II. That in enacting the Act the Parliament encroached upon the State List in the Seventh Schedule of the Constitution, and to that extent the Act is outside the legislative competence of the Parliament;

III. That by enactment of the Act, fundamental rights of the petitioner guaranteed by the Constitution under Articles 14, 19 (1) (f) and (g) and 31 (2) are impaired;

IV. That by the Act the guarantee of freedom of trade under Article 301 is violated; and

V. That in any event retrospective operation given to Act 22 of 1969 is ineffective, since there was no valid Ordinance in existence. The provision in the Act retrospectively validating infringement of the fundamental rights of citizens was not within the competence of the Parliament. That sub-sections (1) and (2) of Section 11 and Section 26 are invalid.

12. The Attorney-General contended that the petitions are not maintainable, because no fundamental right of the petitioner is directly impaired by the enactment of the Ordinance and the Act, or by any action taken thereunder. He submitted that the petitioner who claims to be a shareholder, director and holder of deposit and current accounts with the Banks is not the owner of the property of the undertaking taken over by the corresponding new banks and is on that account incompetent to maintain the petitions complaining that the rights guaranteed under Articles 14, 19 and 31 of the Constitution were impaired.

13. A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association,

measured by a sum of money for the purpose of liability, and by a share in the profit. Again a director of a Company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor: he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed.

14. By a petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of habeas corpus and probably for infringement of the guarantees under Articles 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a Company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the contract contained in the Articles of Association. But on that account the petitions will not fail. A measure executive or legislative may impair the rights of the Company alone, and not of its shareholders; it may impair the rights of the shareholders and not of the Company: it may impair the rights of the shareholders as well as of the Company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.

15. The petitioner claims that by the Act and by the Ordinance the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution are impaired. He says that the Act and the Ordinance are without legislative competence in that they interfere with the guarantee of freedom of trade and are not made in the public interest; that the Parliament had no legislative competence to enact the Act and the President had no power to promulgate the Ordinance, because the subject-matter of the Act and the Ordinance is (partially at least) within the State List; and that the Act and Ordinance

are invalid because they vest the undertaking of the named banks in the new corporations without a public purpose and without setting out principles and the basis for determination and payment of a just equivalent for the property expropriated. He says that in consequence of the hostile discrimination practised by the State the value of his investment in the shares is substantially reduced, his right to receive dividend from his investment has ceased, and he has suffered great financial loss, he is deprived of the rights as a shareholder to carry on business through the agency of the Company, and that in respect of the deposits the obligations of the corresponding new banks not of his choice are substituted without his consent.

16. In *Dwarkadas Shrinivas v. The Sholapur Spinning and Weaving Co. Ltd.*, 1954 SCR 674 = (AIR 1954 SC 119) this Court held that a preference shareholder of a company is competent to maintain a suit challenging the validity of the "Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance" 2 of 1950 (which was later replaced by Act 27 of 1950), which deprived the Company of its property without payment of compensation within the meaning of Article 31. Mahajan, J., observed:

"The plaintiff and the other preference shareholders are in imminent danger of sustaining direct injury as a result of the enforcement of this Ordinance, the direct injury being the amount of the call that they are called upon to pay and the consequent forfeiture of their shares."

Das, J., in the same case examined the matter in some detail and observed at p. 722 (of SCR) = (at pp. 134-135 of AIR):

"The impugned Ordinance, * * * directly affects the preference shareholders by imposing on them this liability, or the risk of it, and gives them a sufficient interest to challenge the validity of the Ordinance, * * * Certainly he can show that the Ordinance under which these persons have been appointed was beyond the legislative competence of the authority which made it or that the Ordinance had not been duly promulgated. If he can, with a view to destroy the locus standi of the persons who have made the call raise the question of the invalidity of the Ordinance * * *, I can see no valid reason why, for the self-same purpose, he should not be permitted to challenge the validity of the Ordinance on the ground of its unconstitutionality

for the breach of the fundamental rights of the company or of other persons." A similar view was also taken in *Chiranjit Lal Chowduri v. Union of India*, 1950 SCR 869 = (AIR 1951 SC 41) by Mukherjea, J., at p. 899 (of SCR) = (at pp. 52-53 of AIR), by Fazl Ali, J., at p. 876 (of SCR) = (at p. 44 of AIR), by Patanjali Shastri, J., at p. 889 (of SCR) = (at p. 49 of AIR) and by Das, J., at p. 922 (of SCR) = (at pp. 61-62 of AIR).

17. The judgment of this Court in *State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam*, (1964) 4 SCR 99 = (AIR 1963 SC 1811) has no bearing on this question. In that case in a petition under Article 32 of the Constitution the State Trading Corporation challenged the infringement of its right to hold property and to carry on business under Article 19 (1) (f) and (g) of the Constitution, and this Court opined that the Corporation not being a citizen was incompetent to enforce the rights guaranteed by Article 19. Nor has the judgment in *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, (1964) 6 SCR 885 = (AIR 1965 SC 40) any bearing on the question arising in these petitions. In a petition under Article 32 of the Constitution filed by a Company challenging the levy of sales-tax by the State of Bihar, two shareholders were also impleaded as petitioners. It was urged on behalf of the shareholders that in substance the interests of the Company and of the shareholders were identical and the shareholders were entitled to maintain the petition. The Court rejected that contention, observing that what the Company could not achieve directly, it could not relying upon the doctrine of "lifting the veil" achieve indirectly. The petitioner seeks in this case to challenge the infringement of his own rights and not of the Banks of which he is a shareholder and a director and with which he has accounts — current and fixed deposit.

18. It was urged that in any event the guarantee of freedom of trade does not occur in Part III of the Constitution, and the petitioner is not entitled to maintain a petition for breach of that guarantee in this Court. But the petitioner does not seek by these petitions to enforce the guarantee of freedom of trade and commerce in Article 301: he claims that in enacting the Act the Parliament has violated a constitutional restriction imposed by Part XIII on its legislative power and in determining the extent to

which his fundamental freedoms are impaired, the statute which the Parliament is incompetent to enact must be ignored.

19. It is not necessary to consider whether Article 31A (1) (d) of the Constitution bars the petitioner's claim to enforce his rights as a director. The Act *prima facie* does not (though the Ordinance purported to) seek to extinguish or modify the right of the petitioner as a director: it seeks to take away expressly the right of the named Banks to carry on banking business, while reserving their right to carry on business other than banking. Assuming that he is not entitled to set up his right to enforce his guaranteed rights as a director, the petition will not still fail. The Preliminary objection raised by the Attorney-General against the maintainability of the petitions must fail.

I. Validity of Ordinance 8 of 1969—

20. Power to issue Ordinance is by Article 123 of the Constitution vested in the President. Article 123 provides:

"(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

21. Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. Who-

ther in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union; but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances.

22. Power to promulgate such Ordinance as the circumstances appear to the President to require is exercised — (a) when both Houses of Parliament are not in session; (b) the provision intended to be made is within the competence of the Parliament to enact; and (c) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. Exercise of the power is strictly conditioned. The clause relating to the satisfaction is composite: the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final.

(23) The Attorney-General contended that the condition of satisfaction of the President in both the branches is purely subjective and the Union of India is under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action. He relied upon the decisions of the Judicial Committee in *Bhagat Singh v. King Emperor*, 58 Ind App 169= (AIR 1931 PC 111); *King Emperor v. Benoari Lal Sharma*, 72 Ind App 57= (AIR 1945 PC 48); and upon a decision of the Federal Court in *Lakhi Narayan Das v. Province of Bihar*, 1949 FCR 693= (AIR 1950 FC 59) which interpreted the analogous provisions of the Government of India Act, 1935, conferring upon the Governor-General in the first two cases, and upon the Governor of a Province in the last case, power to issue Ordinances. He also relied upon the judgment of the Judicial Committee in *Hubli Electricity Co. Ltd. v. Province of Bombay*, 76 Ind App 57= (AIR 1949 PC 136).

24. The Attorney-General said that investment of legislative power upon the President being an incident of the division of sovereign functions of the Union and a "matter of high policy", the expression "the President is satisfied that circumstances exist which render it necessary for him to take immediate action" is incorporated as a guidance and not as a condition of the exercise of power. He invited our attention to the restraints inherent in the Constitution on the exercise of the power to promulgate Ordinance clauses (1) and (2) of Art. 74; clauses (3) and (4) of Article 75 and Article 361, and submitted that the rule applicable to the interpretation of Parliamentary Statutes conferring authority upon officers of the State to act in a prescribed manner on being satisfied about the existence of certain circumstances is inept in determining the true perspective of the power of the head of the State in situations of emergency.

25. On the other hand, Mr. Palkhivala contended that the President is not made by Article 123 the final arbiter of the existence of the conditions on which the power to promulgate an Ordinance may be exercised. Power to promulgate an Ordinance being conditional, counsel urged, this Court in the absence of a provision — express or necessarily implicit in the Constitution — to the contrary, is competent to determine whether the power was exercised not for a collateral purpose, but on relevant circumstances which, *prima facie*, establish the necessity to take immediate action. Counsel submitted that the rules applicable to the interpretation of statutes conferring power exercisable on satisfaction of the specified circumstances upon the President and upon officers of the State, are not different. The nature of the power to perform an official act where the authority is of a certain opinion, or that in his view certain circumstances exist or that he has reasonable grounds to believe, or that he has reasons to believe, or that he is satisfied, springing from a constitutional provision is in no manner different from a similar power under a Parliamentary Statute, and no greater sanctity may attach to the exercise of the power merely because the source of the power is in the Constitution and not in a Parliamentary Statute. There is, it was urged, nothing in the constitutional scheme which supports the contention that the clause relating to satisfaction is not a condition of the exercise of power.

26. Counsel relied upon the judgments of this Court in *Barium Chemical Ltd. v. Company Law Board*, 1966 Supp SCR 311= (AIR 1967 SC 295) and *Rohtas Industries Ltd. v. S. D. Agarwal*, AIR 1969 SC 707; upon the decisions of the House of Lords in *Padfield v. Minister of Agriculture, Fisheries and Food*, (1968) 1 All ER 694; and of the Judicial Committee in *Durayappah v. Fernando*, 1967 AC 337; *Nakkuda Ali v. M. F. De S. Jayarathne*, 1951 AC 66; *Ross-Clunis v. Papadopoulos*, 1958-2 All ER 23 and contended that the decisions of the Judicial Committee in *Bhagat Singh's case*, 58 Ind App 169= (AIR 1931 PC 111) and *Benoari Lal Sharma's case*, 72 Ind App 57= (AIR 1945 PC 48) interpreted a provision which was in substance different from the provision of Article 123, that the decision in *Lakhi Narayan Das's case*, 1949 FCR 693= (AIR 1950 FC 59) merely followed the two judgments of the Judicial Committee and since the status of the President under the Constitution qua the Parliament is not the same as the constitutional status of the Governor-General under the Government of India Act, 1935 the decisions cited have no bearing on the interpretation of Art. 123.

27. The Ordinance has been repealed by Act 22 of 1969, and the question of its validity is now academic. It may assume significance only if we hold that Act 22 of 1969 is valid. Since the Act is in our view invalid for reasons hereinafter stated, we accede to the submission of the Attorney-General that we need express no opinion in this case on the extent of the jurisdiction of the Court to examine whether the condition relating to satisfaction of the President was fulfilled.

II. Authority of Parliament to enact Act 22 of 1969—

28. On behalf of the petitioner it is urged that the Act is not within the legislative power of the Parliament and that, in any event, to the extent to which it vests in the corresponding new banks the assets of business other than banking, it trenches upon the authority of the State Legislature, and is on that account void. The relevant legislative entries in the Seventh Schedule and the constitutional provisions which have a bearing on the question of acquisition and taking over of undertaking of a bank may first be read.

29. The Parliament has exclusive legislative power with respect to "Banking" Entry 45 List I; "Incorporation, regulation and winding up of trading Corporations

including banking, insurance and financial corporations, but not including co-operative societies"; Entry 43 List I; and "Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including Universities"; Entry 44 List I.

30. The States have exclusive legislative authority with respect to the following subjects in List II:

Entry 26 — "Trade and commerce within the State, subject to the provisions of entry 33 of List III,"

Entry 30 — "Money-lending and money-lenders; relief of agricultural indebtedness."

31. The Parliament and the States have concurrent legislative authority with respect to the following subjects in List III:

Entry 33 — "Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oil-seeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute."

Entry 42 — "Acquisition and requisition of property."

32. The argument raised by Mr. Setalvad, intervening on behalf of the State of Maharashtra and the State of Jammu and Kashmir, that the Parliament is competent to enact Act 22 of 1969, because the subject-matter of the Act is "with respect to" regulation of trading corporations and matters subsidiary and incidental thereto, and on that account is covered in its entirety by Entries 43 and 44 of List I of the Seventh Schedule, cannot be upheld. Entry 43 deals with incorporation, regulation and winding up of trading corporations including banking companies. Law regulating the business of a corporation is not a law with respect to regulation of a corporation. In List I entries expressly relating to trade and commerce are Entries 41 and 42. Again several entries in List I relate to activities commercial in character. Entry 45 "Banking"; Entry 46 "Bills of exchange, cheques, promissory notes and other like

instruments"; Entry 47 "Insurance"; Entry 48 "Stock exchanges and future markets"; Entry 49 "Patents, inventions and designs". There are several entries relating to activities commercial as well as non-commercial in List II — Entry 21 "Fisheries"; Entry 24 "Industries x x x"; Entry 25 "Gas and Gas works"; Entry 26 "Trade and commerce"; Entry 30 "Money-lending and money-lenders"; Entry 31 "Inns and Inn-keeping"; Entry 33 "Theatres and dramatic performances, cinemas etc.". We are unable to accede to the argument that the State Legislatures are competent to legislate in respect of the subject-matter of those entries only when the commercial activities are carried on by individuals and not when they are carried on by Corporations.

32-A. The object of Act 22 of 1969 is to transfer the undertaking of each named bank and to vest it in the corresponding new bank set up with authority to carry on banking and other business. Each such corresponding new bank is controlled by the Central Government of which the entire capital is to stand vested in and allotted to the Central Government. The principal provisions of the Act which effectuate that object relate to setting up of "corresponding new banks" as statutory corporations to carry on and transact the business of banking as defined in Section 5 (b) of the Banking Regulation Act, 1949, and one or more other forms of business specified in Section 6 (1) of that Act, with power to acquire and hold property for the purpose of the business, and to dispose of the same; administration of the corresponding new banks as institutions carrying on banking and other business; the undertaking of each named bank in its entirety stands transferred to and vested in a new corporation set up for that purpose; principles for determination of compensation and method of payment thereof to each named bank for transfer of its undertaking; and that the named bank may not carry on banking business, but may carry out business other than banking.

32-B. Mr. Palkhivala submitted that the Parliament may legislate in respect of the business of banking as defined in Section 5 (b) of the Banking Regulation Act, 1949, and matters incidental thereto, and also for acquisition of that part of the undertaking of each named bank which relates to the business of banking, but not in respect of any other business not incidental to banking in which the

named bank was engaged prior to July 19, 1969, for the power to legislate in respect of such other business falls within Entry 26 of List II. As a corollary thereto, counsel submitted that power to legislate in respect of acquisition under Entry 42 of List III may be exercised by the Parliament only for effectuating legislation under a head falling in List I or List III of the Seventh Schedule.

32-C. It is necessary to determine the true scope of "banking" in Entry 45 List I, the meaning of the expression "property", and the limitations on the power of the Parliament to legislate in respect of acquisition of property in Entry 42, List III. Matters not in contest may be eliminated. Power to legislate for setting up corporations to carry on banking and other business and to acquire, hold and dispose of property and to provide for administration of the corporations is conferred upon the Parliament by Entries 43, 44 and 45 of the first list. Power to enact that the named banks shall not carry on banking business (as defined in Section 5 (b) of the Banking Regulation Act) is incidental to the power to legislate in respect of banking. Power to legislate for determination of compensation and method of payment of compensation for compulsory acquisition of the assets of the named banks, in so far as it relates to banking business is also within the power of the Parliament.

33. The expression "banking" is not defined in any Indian statute except the Banking Regulation Act, 1949. It may be recalled that by Section 5 (b) of that Act "banking" means "the accepting for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise, and withdrawable by cheque, draft or otherwise". The definition did not include other commercial activities which a banking institution may engage in.

34. In support of his contention Mr. Palkhivala relied upon the observation of Lord Porter in *Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 235 that banking consists of the creation and transfer of credit, the making of loans, purchase and disposal of investments and other kindred transactions; and upon the statement in Halsbury's *Laws of England*, 3rd Edn., Vol. 2, Article 270 at pp. 150 and 151 that:

"A 'banker' is an individual partnership or corporation, whose sole or predominant

ing business is banking, that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid by a customer",

and in the foot-note (g) at p. 151 that:

"Numerous other functions are undertaken at the present day by banks such as the payment of domiciled bills, custody of valuables, discounting bills, executor and trustee business, or acting in relation to stock exchange transactions, and banks have functions under certain financial legislation, x x x. These functions are not strictly banking business."

35. The Attorney-General said that the expression "banking" in Entry 45 List I means all form of business which since the introduction of western methods of banking in India, banking institutions have been carrying on in addition to banking as defined in Section 5 (b) of the Banking Regulation Act, and on that account all forms of business described in Section 6 (1) of the Banking Regulation Act in clauses (a) to (n) are, if carried on in addition to the "hard-core of banking", banking and the Parliament is competent to legislate in respect of that business under Entry 45, List I. In support of his contention that apart from the business of accepting money from the public for lending or investment, and withdrawable by cheque, draft or otherwise, banking includes many allied business activities which banking institutions engaged in, the Attorney-General invited our attention to clause 21 of the Charter of the Bank of Bengal (Act VI of 1839); Sec. 27 of Act 4 of 1862; to Sections 36 and 37 of the Presidency Banks Act XI of 1876; to Section 91 (15) of the British North America Act; to Paget's Law of Banking, 7th Edn., at p. 5; to the standard form of memorandum of association of a Banking Company in Palmer's Company Precedents Form 138; and to the Statement of Objects and Reasons in support of the Bill which was enacted as the Indian Companies (Amendment) Act, 1936.

36. The Charter of the Bank of Bengal, the Presidency Banks Act 4 of 1862, Ch. X-A of the Indian Companies Act, 1913, as incorporated by the Indian Companies (Amendment) Act, 1936, merely described the business which a banking institution could carry on. It was not intended thereby to include those activities within the expression "banking". The Acts enacted after the Bank-

ing Regulation Act, 1949, also support that inference. Under Section 33 of the State Bank of India Act, 1955, the State Bank is entitled to carry on diverse business activities beside banking. Similarly the Banks subsidiary to the State Bank were by Section 36 of Act 38 of 1959 to act as agents of the State Bank, and also to carry on and transact business of banking as defined in Section 5 (b) of the Banking Regulation Act, 1949, and were also competent to engage in such one or more other forms of business specified in Section 6 (1) of that Act. These provisions do not aid in construing the Entry "Banking" in Entry 45 List I.

37. In modern times in India as elsewhere, to attract business, banking establishments render and compete in rendering, a variety of miscellaneous services for their constituents. If the test for determining what "banking" means in the constitutional entry is any commercial activity which bankers at a given time engage in, great obscurity will be introduced in the content of that expression. The coverage of constitutional entry in a Federal Constitution which carves out a field of legislation must depend upon a more satisfactory basis.

38. The legislative entry in List I of the Seventh Schedule is "Banking" and not "Banker" or "Banks". To include within the connotation of the expression "Banking" in Entry 45 of List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in rewriting the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. But the field of "banking" cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II.

39. Rejection of the argument of the Attorney-General does not lend any practical support to the argument of Mr. Palkhivala that Act 22 of 1969, to the extent it makes provisions in respect of the undertaking of the named banks relating to non-banking business, is ultra vires the Parliament. In the first instance

there is no evidence that the named banks were before July 19, 1969, carrying on non-banking business distinct and independent of the banking business, or that the banks held distinct assets for any non-banking business, apart from the assets of the banking business. Again by Act 22 of 1969 the corresponding banks are entitled to engage in business of banking and non-banking which the named banks were engaged in or competent to engage in prior to July 19, 1969, and the named banks are entitled to engage in business other than banking as defined in Section 5 (b) of the Banking Regulation Act, but not the business of banking. By enacting that the corresponding new banks may carry on business specified in Section 6 (1) of the Banking Regulation Act and that the named banks shall not carry on banking business as defined in Section 5 (b) of that Act, the impugned Act did not encroach upon any entry in the State List. By Section 15 (2) (e) of the impugned Act the named banks are expressly reserved the right to carry on business other than banking, and it is not claimed that thereby there is any encroachment upon the State List. Exercise of the power to legislate for acquisition of the undertaking of the named banks also does not trespass upon the State List.

40. Before the Constitution (Seventh Amendment) Act, Entry 33, List I invested the Parliament with power to enact laws with respect to acquisition or requisitioning for the purpose of the Union, and Entry 36, List II, conferred upon the State Legislature the power to legislate with respect to acquisition or requisitioning for the remaining purposes. Those entries are now deleted, and a single Entry 42, List III invests the Parliament and the State Legislature with power to legislate with respect to "acquisition and requisitioning" of property. By Entry 42 in the Concurrent List power conferred upon the Parliament and the State Legislatures to legislate with respect to "Principles on which compensation for property acquired or requisitioned for the purpose of the Union or for any other public purpose is to be determined, and the form in which such compensation is to be given". Power to legislate for acquisition of property is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of a specific head of legislation in

any of the three lists: *Rajahmundry Electric Supply Corporation Ltd. v. State of Andhra*, 1954 SCR 779 at p. 785 = (AIR 1954 SC 251 at p. 253). Under that entry "property" can be compulsorily acquired. In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copy-rights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured". The expression "undertaking" in Section 4 of Act 22 of 1969 clearly means a going concern with all its rights, liabilities and assets — as distinct from the various rights and assets which compose it. In *Halsbury's Laws of England*, 3rd Edn., Vol. 6, Article 75 at p. 43, it is stated that "Although various ingredients go to make up an undertaking the term describes not the ingredients but the completed work from which the earnings arise."

41. Transfer of and vesting in the State Corporations of the entire undertaking of a going concern is contemplated in many Indian Statutes: e.g., *Indian Electricity Act*, 1910, Sections 6, 7 and 7A; *Air Corporation Act*, 1953, Sections 16 and 17; *Imperial Bank of India Act*, 1920, Sections 3 and 4, *State Bank of India Act*, 1955, Section 6 (2), (3) and (4); *State Bank of India (Subsidiary Banks) Act*, 1959; *Banking Regulation Act*, 1949, Section 36 AE; and *Cotton Textile Companies Act*, 1967, Ss. 5 (1) and (5) 1 (6) (1)? Power to legislate for acquisition of "property" in Entry 42, List III therefore includes the power to legislate for acquisition of an undertaking. But, says Mr. Palkhivala, liabilities of the banks which are included in the connotation of the expression "undertaking" cannot be treated as "property". It is however the assets, rights and obligations of a going concern which constitute the undertaking; the obligations and liabilities of the business form an integral part of the undertaking, and for compulsory acquisition cannot be divorced from the assets, rights and privileges. The expression "property" in Entry 42, List III has a wide connotation,

and it includes not only assets, but the organisation, liabilities and obligations of a going concern as a unit. A law may, therefore, be enacted for compulsory acquisition of an undertaking as defined in Section 5 of Act 22 of 1969.

42. The contention raised by Mr. Pal-khivala that the Parliament is incompetent to legislate for acquisition of the named banks in so far as it relates to assets of the non-banking business fails for two reasons — (i) that there is no evidence that the named banks held any assets for any distinct non-banking business; and (ii) that the acquisition is not shown to fall within an entry in List II of the Seventh Schedule.

III. Infringement of the fundamental rights of the petitioner—

43. Clauses (1) and (2) of Article 31 subordinate the exercise of the power of the State to the basic concept of the rule of law. Deprivation of a person of his property and compulsory acquisition may be effectuated by the authority of law. It is superfluous to add that the law limiting the authority of the State must be within the competence of the Legislature enacting it and not violative of a constitutional prohibition, nor impairing the guarantee of a fundamental right. This Court held in *Kavalappara Kottarathil Kochuni v. State of Madras*, (1960) 3 SCR 887 = (AIR 1960 SC 1080); *Swami Motor Transport Co. (P) Ltd. v. Sri Sankaraswamigal Mutt*, 1963 Supp 1 SCR 282 = (AIR 1963 SC 864) and *Maharana Shri Jayavantsinghji v. State of Gujarat*, 1962 Supp 2 SCR 411 at p. 438 = (AIR 1962 SC 821 at p. 833) that a person may be deprived of his property by authority of a statute only if it does not impair the fundamental rights guaranteed to him. It is again not contested on behalf of the Union that the law authorising acquisition of property must be within the competence of the law-making authority and must not violate a constitutional prohibition or impair the guarantee of any of the fundamental rights in Part III. But it is claimed that since Article 31 (2) and Article 19 (1) (f) while operating on the same field of the right to property are mutually exclusive, a law directly providing for acquisition of property for a public purpose cannot be tested for its validity on the plea that it imposes limitations on the right to property which are not reasonable.

44. By Articles 31 (1) and (2) the right to property of individuals is protected

against specific invasions by State action. The function of the two clauses — clauses (1) and (2) of Article 31 — is to impose limitations on the power of the State and to declare the corresponding guarantee of the individual to his right to property. Limitation on the power of the State and the guarantee of right are plainly complementary. Protection of the guarantee is ensured by declaring that a person may be deprived of his property by "authority of law": Article 31 (1); and that private property may be compulsorily acquired for a public purpose and by the "authority of a law" containing provisions fixing or providing for determination and payment of compensation: Article 31 (2). Exercise of either power by State action results in abridgement — total or partial — of the right to property of the individual. Article 19 (1) (f) is a positive declaration in the widest terms of the right to acquire, hold and dispose of property, subject to restrictions (which may assume the form of limitations or complete prohibition) imposed by law in the interests of the general public. The guarantee under Article 19 (1) (f) does not protect merely an abstract right to property: It extends to concrete rights to property as well: *Swami Motor Transport Co. (P) Ltd's case*, 1963 Supp 1 SCR 282 = (AIR 1963 SC 864).

45. The constitutional scheme declares the right to property of the individual and then delimits it by two different provisions: Article 19 (5) authorizing the State to make laws imposing reasonable restrictions on the exercise of that right, and clauses (1) and (2) of Article 31 recognizing the authority of the State to make laws for taking the property. Limitations under Article 19 (5) and Article 31 are not generically different, for the law authorizing the exercise of the power to take the property of an individual for a public purpose or to ensure the well-being of the community, and the law authorising the imposition of reasonable restrictions under Article 19 (5) are intended to advance the larger public interest. It is true that the guarantee against deprivation and compulsory acquisition operates in favour of all persons, citizens as well as non-citizens, whereas the positive declaration of the right to property guarantees the right to citizens. But a wider operation of the guarantee under Article 31 does not alter the true character of the right it protects. Article 19 (5)

and Article 31 (1) and (2), in our judgment, operate to delimit the exercise of the right to hold property.

46. Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Constitution. In this Court, there is, however, a body of authority that the nature and extent of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual, but by its object. Thereby the constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted fields fundamental got blurred and gave impetus to a theory that certain Articles of the Constitution enact a code dealing exclusively with matters dealt with therein, and the protection which an aggrieved person may claim is circumscribed by the object of the State action.

46-A. Protection of the right to property or personal freedom is most needed when there is an actual threat. To argue that State action which deprives a person permanently or temporarily of his right to property or personal freedom, operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. Again to hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions.

47. But this Court has held in some cases to be presently noticed that Arti-
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cle 19 (1) (f) and Article 31 (2) are mutually exclusive.

48. Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In *A. K. Gopalan v. State of Madras*, 1950 SCR 88= (AIR 1950 SC 27) a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act 4 of 1950 applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C. J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19 (1) (d) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than according to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to protection of distinct rights.

49. Kania, C. J., proceeded on the theory that different articles guarantee distinct rights. He observed at p. 100 (of SCR)= (at p. 35 of AIR):

".....it (Article 19) * * means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not

directly in respect of any of these subjects, but as a result of the operation of other legislation, * * * the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

The learned Chief Justice also observed that Article 19 (1) (d) had nothing to do with detention, preventive or punitive, and the concept of personal liberty in Article 21 being entirely different from the concept of the right to move freely throughout the territory of India, Article 22 was a complete code dealing with preventive detention.

50. Patanjali Sastri, J., observed at p. 191 (of SCR) = (at pp. 69-70 of AIR):

"..... article 19 seems * * to presuppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests. * * Article 19 guarantees to the citizens the enjoyment of certain civil liberties while they are free, while articles 20-22 secure to all persons—citizens and non-citizens—certain constitutional guarantees in regard to punishment and prevention of crime."

51. Mahajan J., was of the view that Article 22 was "self-contained in respect of laws on the subject of preventive detention." Mukherjea, J., observed (at p. 254) (of SCR) = (at p. 93 of AIR) that there was no conflict between Article 19 (1) (d) and Article 22, for the former did not contemplate freedom from detention either punitive or preventive, but speaks of a different aspect or phase of civil liberty. In his view Articles 20 to 22 embodied the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty with regard to substantive as well as procedural law. He proceeded to observe at p. 261 (of SCR) = (at p. 96 of AIR):

"..... by reason of preventive detention, a man may be prevented from exercising the right of free movement within the territory in India * * *, but that is merely incidental to or consequential upon loss of liberty resulting from the order of detention."

But the learned Judge observed at p. 263 (of SCR) = (at p. 97 of AIR):

"It may not, I think, be quite accurate to state that the operation of Arti-

cle 19 of the Constitution is limited to free citizens only and that the rights have been described in that article on the pre-supposition that the citizens are at liberty. The deprivation of personal liberty may entail as a consequence the loss or abridgement of many of the rights described in Article 19, but that is because the nature of these rights is such that free exercise of them is not possible in the absence of personal liberty."

52. Das, J., observed at p. 304 (of SCR) = (at p. 113 of AIR):

"Therefore, the conclusion is irresistible that the rights protected by Article 19 (1), in so far as they relate to rights attached to the person i.e., the rights referred to in sub-clauses (a) to (e) and (g), are rights which only a free citizen, who has the freedom of his person unimpaired, can exercise."

The learned Judge further observed:

"..... a lawful detention, whether punitive or preventive, does not offend against the protection conferred by Article 19 (1) (a) to (e) and (g), for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights end where the lawful detention begins. So construed, Article 19 and Article 21 may, therefore, easily go together and there is, in reality, no conflict between them."

53. Fazl Ali, J., struck a different note: he observed at p. 148 (of SCR) = (at pp. 52-53 of AIR):

"the scheme of the Chapter dealing with the fundamental rights does not contemplate * * that each article is a code by itself and is independent of the others. * * * The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19 (1) (d)."

At p. 149 (of SCR) = (at p. 53 of AIR) the learned Judge observed:

"The words used in Article 19 (1) (d) must be construed as they stand, and we have to decide upon the words themselves whether in the case of preventive detention the right under Article 19 (1) (d) is or is not infringed. But, * * *, however, literally we may construe the words used in Article 19 (1) (d) and how-

ever restricted may be the meaning we may attribute to those words, there can be no escape from the conclusion that preventive detention is a direct infringement of the right guaranteed in Article 19 (1) (d)."

At p. 170 (of SCR) = (at p. 61 of AIR) he observed:

"..... this Article (Article 22) * * does not exclude the operation of Articles 19 and 21, and it must be read subject to those two articles, in the same way as Articles 19 and 21 must be read subject to Article 22. The correct position is that Article 22 must prevail in so far as there are specific provisions therein regarding preventive detention, but, where there are no such provisions in that Article, the operation of Articles 19 and 21 cannot be excluded. The mere fact that different aspects of the same right have been dealt with in three different Articles will not make them mutually exclusive except to the extent I have indicated."

The view expressed in A. K. Gopalan's case, 1950 SCR 88 = (AIR 1950 SC 27) was re-affirmed in Ram Singh v. State of Delhi, 1951 SCR 451 = (AIR 1951 SC 270).

54. The principle underlying the judgment of the majority was extended to the protection of the freedom in respect of property, and it was held that Article 19 (1) (f) and Article 31 (2) were mutually exclusive in their operation. In A. K. Gopalan's case, 1950 SCR 88 = (AIR 1950 SC 27), Das, J., suggested that if the capacity to exercise the right to property was lost, because of lawful compulsory acquisition of the subject of that right, the owner ceased to have that right for the duration of the incapacity. In Chiranjit Lal Chowduri's case, 1950 SCR 869 = (AIR 1951 SC 41), Das, J., observed at p. 919 (of SCR) = (at p. 60 of AIR):

"..... the right to property guaranteed by Article 19 (1) (f) would * * * continue until the owner was under Article 31 deprived of such property by authority of law."

In State of West Bengal v. Subodh Gopal 1954 SCR 587 = (AIR 1954 SC 92) the same learned Judge observed that "Article 19 (1) (f) read with Article 19 (5) presupposes that the person to whom the fundamental right is guaranteed retains his property over or with respect to which alone that right may be exercised." The principle so stated was given a more concrete

shape in a later decision: State of Bombay v. Bhanji Munji, 1955-1 SCR 777 = (AIR 1955 SC 41). In Bhanji Munji's case 1955-1 SCR 777 = (AIR 1955 SC 41), speaking for a unanimous Court, Bose, J., observed:

"..... it is enough to say that Article 19 (1) (f) read with clause (5) postulates the existence of property which can be enjoyed, and over which rights can be exercised because otherwise the reasonable restrictions contemplated by Clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose of it, and as Clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which the rights are to be exercised."

Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) was accepted without any discussion in Babu Barkya v. State of Bombay, (1961) 1 SCR 128 = (AIR 1960 SC 1203); Smt. Sitabati Debi v. State of West Bengal, 1967-2 SCR 949 and other cases. In these cases it was held that the substantive provisions of a law relating to acquisition of property were not liable to be challenged on the ground that they imposed unreasonable restrictions on the right to hold property.

55. Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41), it must be remembered, arose under Article 31 before it was amended by the Constitution (Fourth Amendment) Act. It was held by this Court that Clauses (1) and (2) of Article 31 as they then stood dealt with the same subject-matter i. e., compulsory acquisition of property: see Subodh Gopal's case, 1954 SCR 587 = (AIR 1954 SC 92) and Dwarkadas Shrinivas's case, 1954 SCR 674 = (AIR 1954 SC 119). But since the amendment by the Constitution (Fourth Amendment) Act it has been held that Clauses (1) and (2) deal with different subject-matters. In Kavalappara Kottarrathil Kochuni's case, 1960-3 SCR 887 = (AIR 1960 SC 1080), Subba Rao, J., delivering the judgment of the majority of the Court observed that Cl. (2) of Article 31 alone deals with compulsory acquisition of property by the State for a public purpose, and not Article 31 (1), and he proceeded to hold that the expression "authority of law" means authority of a valid law, and on that account

validity of the law seeking to deprive a person of his property is open to challenge on the ground that it infringes other fundamental rights, e. g., under Article 19 (1) (f). It was broadly observed that Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) after the Constitution (Fourth Amendment) Act "no longer holds the field". But Kavalappara Kottarathil Kochuni's case, 1960-3 SCR 887 = (AIR 1960 SC 1080) did not deal with the validity of a law relating to compulsory acquisition. With the decision in Kavalappara Kottarathil Kochuni's case, 1960-3 SCR 887 = (AIR 1960 SC 1080) there arose two divergent lines of authority: (1) "authority of law" in Art. 31 (1) is liable to be tested on the ground that it violates other fundamental rights and freedoms including the right to hold property guaranteed by Article 19 (1) (f); and (2) "authority of a law" within the meaning of Article 31 (2) is not liable to be tested on the ground that it impairs the guarantee of Article 19 (1) (f) in so far as it imposes substantive restrictions — though it may be tested on the ground of impairment of other guarantees. The expression "law" in the two clauses had therefore different meanings. It was for the first time (obiter dicta apart) in *State of Madhya Pradesh v. Ranojirao Shinde*, 1968-3 SCR 489 = (AIR 1968 SC 1053) this Court opined that the validity of law in Clause (2) of Article 31 may be adjudged in the light of Article 19 (1) (f). But the Court in that case did not consider the previous catena of authorities which related to the inter-relation between Article 31 (2) and Article 19 (1) (f).

56. We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the ob-

ject of the Legislature nor by the form of the action, but by its direct operation upon the individuals rights.

57. We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions. Article 19 (1) (f) enunciates the right to acquire, hold and dispose of property: Clause (5) of Article 19 authorizes imposition of restrictions upon the right. Article 31 assures the right to property and grants protection against the exercise of the authority of the State. Clause (5) of Article 19 and Clauses (1) and (2) of Article 31 prescribe restrictions upon State action, subject to which the right to property may be exercised. Article 19 (5) is a broad generalization dealing with the nature of limitations which may be placed by law on the right to property. The guarantees under Article 31 (1) and (2) arise out of the limitations imposed on the authority of the State by law to take over the individual's property. The true character of the limitations under the two provisions is not different. Clause (5) of Article 19 and clauses (1) and (2) of Article 31 are parts of a single pattern. Article 19 (1) (f) enunciates the basic right to property of the citizens and Article 19 (5) and Clauses (1) and (2) of Article 31 deal with limitations which may be placed by law subject to which the rights may be exercised.

58-60. Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property are, therefore, specific classes of limitations on the right to property falling within Article 19 (1) (f). Property may be compulsorily acquired only for a public purpose. Where the law provides for compulsory acquisition of property for a public purpose it may be presumed that the acquisition or the law relating thereto imposes a reasonable restriction in the interest of the general public. If there is no public purpose to sustain compulsory acquisition, the law violates Article 31 (2). If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded. For instance if a tribunal is authorised by an

Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19 (1) (f).

61. In dealing with the argument that Article 31 (2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29 (1), 30 (1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22 (1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19 (1) and 19 (2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e. g., Articles 31 (1) and 31 (2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights.

62. We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31 (2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Art. 31 (2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature and does not impair the guarantee of the rights in Part III. We are unable, therefore, to

agree that Articles 19 (1) (f) and 31 (2) are mutually exclusive.

63. The area of protection afforded against State action by the freedom under Article 19 (1) (f) and by the exercise of the power of the State to acquire property of the individual without his consent must still be reconciled. If property is compulsorily acquired for a public purpose, and the law satisfies the requirements of Articles 31 (2) and 31 (2A), the Court may readily presume that by the acquisition a reasonable restriction on the exercise of the right to hold property is imposed in the interests of the general public. But that is not because the claim to plead infringement of the fundamental right under Article 19 (1) (f) does not avail the owner; it is because the acquisition imposes a permissible restriction on the right of the owner of the property compulsorily acquired.

64. We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in *A. K. Gopalan's* case, 1950 SCR 88 = (AIR 1950 SC 27) that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of "law" which authorises deprivation of property and "a law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public. It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purpose may be presumed to impose reasonable restrictions in the interests of the general public.

65. Whether the provisions of Sections 4 and 5 of Act 22 of 1969 and the other related provisions of the Act im-

pair the fundamental freedoms under Article 19 (1) (f) and (g) now falls to be considered. By Section 4 the entire undertaking of each named bank vests in the Union, and the Bank is prohibited from engaging in the business of banking in India and even in a foreign country, except where by the laws of a foreign country banking business owned or controlled by Government cannot be carried on, the named bank will be entitled to continue the business in that country. The business which the named banks carried on was—(1) the business of banking as defined in Section 5 (b) of the Banking Regulation Act, 1949, and business incidental thereto; and (2) other business which by virtue of Section 6 (1) they were not prohibited from carrying on, though not part of or incidental to the business of banking. It may be recalled that by Act 22 of 1969 the named banks cannot engage in business of banking as defined in Section 5 (b) of the Banking Regulation Act, 1949, but may engage in other forms of business. By the Act, however, the entire undertaking of each named bank is vested in the new corporation set up with a name identical with the name of that Bank, and authorised to carry on banking business previously carried on by the named bank, and its managerial and other staff is transferred to the corresponding new bank. The newly constituted corresponding bank is entitled to engage in business described in Section 6 (1) of the Banking Regulation Act, and for that purpose to utilize the assets, goodwill and business connections of the existing bank.

66. The named banks are declared entitled to engage in business other than banking; but they have no assets with which that business may be carried on, and since they are prohibited from carrying on banking business, by virtue of Section 7 of the Reserve Bank of India Act, they cannot use in their title the words "Bank" or "Banking", and even engage in "non-banking business" in their old names. A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, is not made immediately payable to it.

67. Validity of the provisions of the Act which transfer the undertaking of the

named banks and prohibit those banks from carrying on business of banking and practically prohibit them from carrying on non-banking business falls to be considered in the light of Article 19 (1) (f) and Article 19 (1) (g) of the Constitution. By Article 19 (1) (f) right to acquire, hold and dispose of property is guaranteed to the citizens and by Art. 19 (1) (g) the right to practise any profession, or to carry on any occupation, trade or business is guaranteed to the citizens. These rights are not absolute: they are subject to the restrictions prescribed in the appropriate clauses of Article 19. By Cl. (5) it is provided, *inter alia*, that nothing in sub-cl. (f) of Cl. (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law, imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by that sub-clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Clause (6) as amended by the Constitution (First Amendment) Act, 1951, reads:

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making law relating to—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation-owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise." Clause (6) of Article 19 consists of two parts: (1) the right declared by sub-cl. (g) is not protected against the operation of any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by that sub-clause; and (2) in particular sub-cl. (g) does not affect the operation of any law relating, *inter alia*, to carrying on by the State or by a corporation-owned or controlled by the State, of any trade, business, industry or service whether or not

such law provides for the exclusion, complete or partial, of citizens.

68. According to Mr. Palkhivala it was intended by the use of the expression "in particular" to denote a special class of trade, business, industry or service out of the general class referred to in the first part, and on that account a law which relates to the carrying on by the State of any particular business, industry or service, to the exclusion—complete or partial—of citizens or otherwise, is also subject to the enquiry whether it imposes reasonable restrictions on the exercise of the right in the interests of the general public. Counsel urged that the law imposing restrictions upon the exercise of the right to carry on any occupation, trade or business is subject to the test of reasonable restrictions imposed in the interests of the general public, likewise, the particular classes specified in the second part of the Article must also be regarded as liable to be tested in the light of the same limitations. Counsel strongly relied upon the decision of the House of Lords in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing and Local Government*, (1952) 1 All ER 509. The House of Lords in that case did not lay down any general proposition. They were only dealing with the meaning of the words "in particular" in the context in which they occurred and it was held that the expression "in particular" was not intended to confer a separate and distinct power wholly independent of that contained in the first limb. It cannot be said that the expression "in particular" used in Article 19 (1) (g) is intended either to particularise or to illustrate the general law set out in the first limb.

69. It was observed in *Saghir Ahmed v. State of U. P.*, 1955-1 SCR 707 = (AIR 1954 SC 728) by Mukherjea, J., at p. 727 (of SCR) = (at p. 739 of AIR):

"The new clause—Article 19 (6)—has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a court of law, and no objection could be taken to it on the ground that it is an infringement of the rights guaranteed

under Article 19 (1) (g) of the Constitution."

70. In dealing with the validity of a law creating a State monopoly in *Akadasi Padhan v. State of Orissa*, 1963 Supp 2 SCR 691 = (AIR 1963 SC 1047), this Court unanimously held, that the validity of a law creating a State monopoly which "indirectly impinges on any other right" cannot be challenged on the ground that it imposes restrictions which are not reasonable restrictions in the interests of the general public. But if the law contains other incidental provisions which do not constitute an essential and integral part of the monopoly created by it, the validity of those provisions is liable to be tested under the first part of Article 19 (6). If they directly impair any other fundamental right guaranteed by Article 19 (1), the validity of those provisions will be tested by reference to the corresponding clauses of Article 19. The Court also observed that the essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created. They will depend upon the nature of the commodity, the nature of trade in which it is involved and other circumstances. At p. 707 (of SCR) = (at p. 1054 of AIR) Gajendragadkar, J., speaking for the Court, observed:

" 'A law relating to' a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the first part of Article 19 (6)." He also observed at p. 705 (of SCR) = (at p. 1054 of AIR):

"...the amendment (First Amendment) clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of general public, so far as Article 19 (1) (g) is concerned."

This was reiterated in *Rasbihari Panda v. State of Orissa*, Civil Appeals Nos. 1472-1474 of 1968, D/- 16-1-1969 = (reported in AIR 1969 SC 1081); *Vrajlal Manilal and Co. v. State of Madhya Pradesh*, Civil Appeal No. 2262 of 1966, D/- 25-4-1969 = (reported in AIR 1970 SC 129) and *Municipal Committee, Amritsar v. State of Punjab*, Writ Petn. No. 295 and other Petns. of 1968, D/- 30-1-1969 = (reported in AIR 1969 SC 1100). These cases dealt with the validity of laws creating monopolies in the State. Clause (6) is however not restricted to laws creating State monopolies, and the rule enunciated in *Akadasi Padhan's case*, 1963 Supp (2) SCR 691 = (AIR 1963 SC 1047) applies to all laws relating to the carrying on by the State of any trade, business, industry or service by Art. 298 the State is authorized to carry on trade which is competitive, or excludes the citizens from that trade completely or partially. The "basic and essential" provisions of law which are "integrally and essentially connected" with the carrying on of a trade by the State will not be exposed to the challenge that they impair the guarantee under Article 19 (1) (g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not must, however, satisfy the test of the main limb.

71. The law which prohibits after July 19, 1969, the named banks from carrying on banking business, being a necessary incident of the right assumed by the Union, is not liable to be challenged because of Article 19 (6) (ii) in so far as it affects the right to carry on business.

71-A. There is no satisfactory proof in support of the plea that the enactment of Act 22 of 1969 was not in the larger interest of the nation, but to serve political ends, i.e. not with the object to ensure better banking facilities, or to make them available to a wider public, but only to take control over the deposits of the public with the major banks, and to use them as a political lever against industrialists who had built up industries by decades of industrial planning and careful management. It is true that social control legislation enacted by the Banking Laws (Amendment) Act 58 of 1968 was in operation and the named banks were subject to rigorous control

which the Reserve Bank was competent to exercise and did in fact exercise. Granting that the objectives laid down by the Reserve Bank were being carried out, it cannot be said that the Act was enacted in abuse of legislative power. Our attention was invited to a mass of evidence from the speeches of the Deputy Prime Minister, and of the Governor and the Deputy Governor of the Reserve Bank, and also extracts from the Reserve Bank Bulletins issued from time to time and other statistical information collected from official sources in support of the thesis of the petitioner that the performance of the named banks exceeded the targets laid down by the Reserve Bank in its directives; that the named banks had effectively complied with the requirements of the law; that they had served the diverse interests including small-scale sector, and had been instrumental in bringing about an increasing tempo of industrial and commercial activity; that they had discouraged speculative holding of commodities; and had followed essential priorities in the economic development of the nation coupled with a vigorous programme of branch development in the rural sector, bringing about a considerable expansion in deposits, and large advances to the small-scale business and industry. Mr. Palkhivala urged that under the scheme of social control the commercial banks had achieved impressive results comparing favourably with the performance of the State Bank of India and its subsidiaries in the public sector, and that the performance of the named banks could not be belittled by referring to the banking structure and development in highly developed countries like Canada, Japan, France, United States and the United Kingdom. On the other hand, the Attorney-General said that the commercial banks followed a conservative policy because they had to look primarily to the interests of the shareholders, and on that account could not adopt bold policies or schemes for financing the needy and worthy causes; that if the resources of the banking industry are properly utilised for the weaker sections of the people economic regeneration of the nation may be speedily achieved, that 28 per cent of the towns in India were not served by commercial banks; that there had been unequal development of facilities in different parts of the country and deserving sections were deprived of the benefit of important national resources resulting in economic

disparities, especially because the major banks catered to the large-scale industries.

72. This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural areas, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies. The Parliament has under Entry 45 List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under Entry 42 List III. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry.

73. By Section 15 (2) (e) of the Act the Banks are entitled to engage in business other than banking. But by the provisions of the Act they are rendered practically incapable of engaging in any busi-

ness. By the provisions of the Act, a named bank cannot even use its name, and the compensation which is to be given will, in the absence of agreement, be determined by the Tribunal and paid in securities which will mature not before ten years. A named bank may, if it agrees to distribute among the shareholders the compensation which it may receive, be paid in securities an amount equal to half the paid-up share capital, but obviously the fund will not be available to the Bank. It is true that under Section 15 (3) of the Act the Central Government may authorise the corresponding new banks to make advances to the named banks for any of the purposes mentioned in Section 15 (2). But that is a matter which rests only upon the will of the Central Government and no right can be founded upon it.

74. Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable. In *Mohammad Yasin v. Town Area Committee, Jalalabad*, 1952 SCR 572= (AIR 1952 SC 115) this Court observed that under Article 19 (1) (g) of the Constitution a citizen has the right to carry on any occupation, trade or business and the only restriction on this right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in Clause (6) of that Article as amended by the Constitution (First Amendment) Act, 1951. In *Mohammad Yasin's case*, 1952 SCR 572= (AIR 1952 SC 115) by the bye-laws of the Municipal Committee, it was provided that no person shall sell or purchase any vegetables or fruit within the limits of the municipal area of Jalalabad, wholesale or by auction, without paying the prescribed fee. It was urged on behalf of a wholesale dealer in vegetables that although there was no prohibition against carrying on business in vegetables by anybody, in effect the bye-laws brought about a total stoppage of the wholesaler's business in a commercial sense, for he had to pay prescribed fee to the contractor, and under the bye-laws the wholesale dealer could not charge a higher rate of commission than the contractor. The wholesale dealer, therefore, could charge the growers of vegetables and fruit only the commission permissible under the bye-laws, and he had to make over the entire commission to the contractor without retain-

ing any part thereof. The wholesale dealer was thereby converted into a mere tax-collector for the contractor or the Town Area Committee without any remuneration. The bye-laws in this situation were struck down as impairing the freedom to carry on business.

75. In *Dwarkadas Shrinivas's case*, 1954 SCR 674= (AIR 1954 SC 119) the Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance II of 1950 and Act 28 of 1950 passed by the Parliament to replace the Ordinance were challenged. Under the Ordinance the managing agent and the elected directors were dismissed and new directors were appointed by the State. The Company was denuded of possession of its property and all that was left to the Company was a bare legal title. In an appeal arising out of a suit challenging the validity of the Ordinance and the Act which replaced it this Court held that the Ordinance and the Act violated the fundamental rights of the Company and of the plaintiff a preference shareholder upon whom a demand was made for payment of unpaid calls. This Court held that the Ordinance and the Act in effect deprived the Company of its property within the meaning of Article 31 without compensation. It was observed by Mahajan, J., that practically all incidents of ownership were taken over by the State and nothing was left with the Company but the mere husk of title, and on that account the impugned statute had overstepped the limits of legitimate social control legislation.

76. If compensation paid is in such a form that it is not immediately available for restarting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and vests in the new banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff.

77. The restriction imposed upon the right of the named banks to carry on "non-banking" business is, in our judgment, plainly unreasonable. No attempt is made to support the Act which while theoretically declaring the right of the named banks to carry on "non-banking" business makes it impossible in a commercial sense for the banks to carry on any business.

Protection of Article 14—

78. By Article 14 of the Constitution the State is enjoined not to deny any person equality before the law or the equal protection of the laws within the territory of India. The Article forbids class legislation, but not reasonable classification in making laws. The test of permissible classification under an Act lies in two cumulative conditions: (i) classification under the Act must be founded on an intelligible differentia distinguishing persons, transactions or things grouped together from others left out of the group; and (ii) the differentia has a rational relation to the object sought to be achieved by the Act: there must be a nexus between the basis of classification and the object of the Act: *Chiranjit Lal Chowdhuri's case*, 1950 SCR 869= (AIR 1951 SC 41); *State of Bombay v. F. N. Balsara*, (1951) SCR 682= (AIR 1951 SC 318); *State of West Bengal v. Anwar Ali Sarkar*, 1952 SCR 284= (AIR 1952 SC 75); *Budhan Choudhry v. State of Bihar*, (1955) 1 SCR 1045= (AIR 1955 SC 191); *Ram Krishna Dalmia v. S. R. Tendolkar*, 1959 SCR 279 at p. 300= (AIR 1958 SC 538 at p. 542); and *State of Rajasthan v. Mukandchand*, (1964) 6 SCR 903 at p. 910 = (AIR 1964 SC 1633 at p. 1635).

79. The Courts recognize in the Legislature some degree of elasticity in the matter of making a classification between persons, objects and transactions. Provided the classification is based on some intelligible ground, the Courts will not strike down that classification, because in the view of the Court it should have proceeded on some other ground or should have included the class selected for special treatment some other persons, objects or transactions which are not included by the Legislature. The Legislature is free to recognize the degree of harm and to restrict the operation of a law only to those cases where the need is the clearest. The Legislature need not extend the regulation of a law to all cases it may possibly reach, and may make a classification founded on practical grounds of convenience. Classification to be valid must, however, disclose a rational nexus with the object sought to be achieved by the law which makes the classification. Validity of a classification will be upheld only if that test is independently satisfied. The Court in examining the validity of a statute challenged as infringing the equality clause makes an assumption that there is a reasonable classification and that the classification has

a rational relation to the object sought to be achieved by the statute.

80. By the definition of existing bank in Section 2 (d) of the Act, fourteen named banks in the First Schedule are, out of many commercial banks engaged in the business of banking, selected for special treatment, in that the undertaking of the named banks is taken over, they are prevented from carrying on in India and abroad banking business and the Act operates in practice to prevent those banks engaging in business other than banking.

81. By reason of the transfer of the undertaking of the named banks, the interests of the banks and the shareholders are vitally affected. Investment in bank-shares is regarded in India, especially in the shares of larger banks, as a safe investment on attractive terms with a steady return and fluidity of conversion. Mr. Palkhivala has handed in a statement setting out the percentage return of dividend on market rates in 1968. The rate works out at more than 10 per cent in the case of the shares of Bank of Baroda, Central Bank of India, Dena Bank, Indian Bank, United Bank and United Commercial Bank; and at more than 9 per cent in the case of shares of Bank of India, Bank of Maharashtra, Canara Bank, Indian Bank, Indian Overseas Bank and United Bank of India. In the case of Allahabad Bank it worked out at 5 per cent, and in the case of shares of Punjab National Bank and Syndicate Bank the rates are not available. This statement is not challenged. Since the taking over of the undertaking, there has resulted a steep fall in the ruling market quotations of the shares of a majority of the named banks. The market quotations have slumped to less than 50 per cent in the case of Bank of India, Central Bank, Bank of Baroda and even at the quoted rates probably there are no transactions. Dividend may no longer be distributed, for the banks have no liquid assets and they are not engaged in any commercial activity. It may take many years before the compensation payable to the banks may even be finalized, and be available to the named banks for utilising it in any commercial venture open to the banks under the Act. Under the scheme of determination of compensation, the total amount payable to the banks will be a fraction of the value of their net assets, and that compensation will not be available to the Banks immediately.

82. The ground for selection of the 14 banks is that those banks held depo-

sits, as shown in the return as on the last Friday of June 1969, furnished to the Reserve Bank under Section 27 of the Banking Regulation Act, 1949, of not less than rupees fifty crores.

83. The object of Act 22 of 1969 is according to the long title to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with the national policy and objectives and matters connected therewith or incidental thereto. The national policy may reasonably be taken to be policy contained in the directive principles of State policy, especially Articles 38 and 39 of the Constitution. For achieving the needs of a developing economy in conformity with the national policy and objectives, the resources of all the banks — foreign as well as Indian — are inadequate. Of the total deposits with commercial banks 27 per cent are with the State Bank of India and its subsidiaries; the named commercial banks of which the undertaking is taken over hold approximately 56 per cent of the deposits. The remaining 17 per cent of the deposits are shared by the foreign banks and the other scheduled and non-scheduled commercial banks. 83 per cent of the total resources may obviously not meet wholly or even substantially the needs of development of the economy.

84. In support of the plea that there is a reasonable relation between the differentia — ground for making the distinction between the named banks and the other banks — Indian and foreign — and the object of the Act, it is urged that the policy of the Union is to control the concentration of private economic resources to ensure achievement of the directive principles of State policy, and for that purpose, selection has been made "with an eye, inter alia, to the magnitude and concentration of the economic resources of such enterprises for inclusion in such law as would be essential or substantially conducive to the achievement of the national objectives and policy." It is apparently claimed that the object of the Government — not of the statute — is to acquire ultimately all banking institutions, but the 14 named banks are selected for acquisition because they have "larger business and wider coverage" in comparison with other banks not selected, and had also larger organization, better managerial resources and employees

better trained and equipped. These are primarily grounds for classification and not for explaining the relation between the classification and the object of the Act. But in the absence of any reliable data, we do not think it necessary to express an opinion on the question whether selection of the undertaking of some out of many banking institutions, for compulsory acquisition, is liable to be struck down as hostile discrimination, on the ground that there is no reasonable relation between the differentia and the object of the Act which cannot be substantially served even by the acquisition of the undertakings of all the banks out of which the selection is made.

85. It is claimed that the depositors with the named banks have also a grievance. Those depositors who had made long-term deposits, taking into account the confidence they had in the management of the banks and the service they rendered, are now called upon to trust the management of a statutory corporation not selected by them, without an opportunity of being placed in the same position in which they would have been if they were permitted to transfer their deposits elsewhere. The argument is based on several imponderables and does not require any detailed consideration.

86. But two other grounds in support of the plea of impairment of the guarantee of equality clause require to be noticed. The fourteen named banks are prohibited from carrying on banking business — a disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad: new banks may be floated for carrying on banking business, but the named banks are prohibited from carrying on banking business. Each named bank had, even as claimed on behalf of the Union, by its superior management established an extensive business organization, and each bank had deposits exceeding Rs. 50 crores. The undertakings of the banks are taken over and they are prohibited from doing banking business. In the affidavit filed on behalf of the Union no serious attempt is made to explain why the named banks should be specially selected for being subjected to this disability.

87. The petitioner also contended that the classification is made on a wholly irrational ground, viz., penalizing efficiency and good management, for the major fourteen banks had made a sustained effort and had exceeded the Reserve

Bank target and had fully complied with the directives under the social control legislation. This, it is said, is a reversal of the policy underlying Section 36AE of the Banking Regulation Act under which inefficient and recalcitrant banks are contemplated to be taken over by the Government. We need express no opinion on this part of the argument. But the petitioner is on firm ground in contending that when after acquiring the assets, undertaking, organization, goodwill and the names of the named banks they are prohibited from carrying on banking business, whereas other banks — Indian as well as foreign — are permitted to carry on banking business, a flagrantly hostile discrimination is practised. Section 15 (2) of the Act which by the clearest implication prohibits the named banks from carrying on banking business is, therefore, liable to be struck down. It is immaterial whether the entire sub-section (2) is struck down or as suggested by the Attorney-General that only the words "other than the business of banking" in Section 15 (2) (e) be struck down. Again, in considering the validity of Section 15 (2) (e) in its relation to the guarantee of freedom to carry on business other than banking, we have already pointed out that the named banks are also, (though theoretically competent) in substance prohibited from carrying on non-banking business. For reasons set out by us for holding that the restriction is unreasonable, it must also be held that the guarantee of equality is impaired by preventing the named banks carrying on the non-banking business.

Protection of the guarantee under Article 31 (2) —

88. The guarantee under Article 31 (2) arises directly out of the restrictions imposed upon the power of the State to acquire private property, without the consent of the owner for a public purpose. Upon the exercise of the power to acquire or requisition property, by clause (2) two restrictions are placed: (a) power to acquire shall not be exercised save for a public purpose; and (b) that it shall not be exercised save by authority of a law which provides for compensation for the property acquired or requisitioned, and fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. Sub-clause (2A) in substance provides a definition of "compulsory acquisition or requisitioning of property". Existence of a public pur-

pose and provision for giving compensation for compulsory acquisition of property of an individual are conditions of the exercise of the power. If either condition be absent, the guarantee under Article 31 (2) is impaired, and the law providing for acquisition will be invalid. But jurisdiction of the Court to question the law on the ground that compensation provided thereby is not adequate is, expressly excluded.

89. In the case before us we need not express any opinion on the question whether a composite undertaking of two or more distinct lines of business may be acquired where there is a public purpose for acquisition of the assets of one or more lines of business, but not in respect of all the lines of business. As we have already observed, there is no evidence that the named banks carried on non-banking business, distinct from banking business, and in respect of such non-banking business the banks owned distinct assets apart from the assets of the banking business.

90. The law providing for acquisition must again either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be determined and given. The owner whose property is compulsorily acquired is guaranteed the right to receive compensation and the amount of compensation must either be fixed by the law or be determined according to the principles and in the manner specified by the law. The law which does not ensure the guarantee will, except where the grievance only is that the compensation provided by the law is inadequate, be declared void.

91. The petitioner says that the expression "compensation" means a "just equivalent" in money of the property acquired and that the law providing for compulsory acquisition must "aim" at a just equivalent to the expropriated owner: if the law so aims at, it will not be deemed to impair the guarantee merely on the ground that the compensation paid to the owner is inadequate. The Attorney-General on the other hand says that "compensation" in Article 31 (2) does not mean a just equivalent, and it is not predicated of the validity of a law relating to compulsory acquisition that it must aim at awarding a just equivalent, for, if the law is not confiscatory, or the principles for determination of compensation are not irrelevant, "the Courts

cannot go into the propriety of such principles or adequacy or reasonableness of the compensation".

92. Two questions immediately arise for determination. What is the true meaning of the expression "compensation" as used in Article 31 (2), and what is the extent of the jurisdiction of the Court when the validity of a law providing for compulsory acquisition of property for a public purpose is challenged?

92-A. In its dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage. In all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property.

93. By the 5th Amendment in the Constitution of the U. S. A. the right of eminent domain is expressly circumscribed by providing "Nor shall private property be taken for public use, without just compensation". Such a provision is to be found also in every State Constitution in the United States: Lewis' Eminent Domain, 3rd Edn., (pp. 28-50). The Japanese Constitution, 1946, by Article 25 provides a similar guarantee. Under the Commonwealth of Australia Constitution, 1900, the Commonwealth Parliament is invested with the power of acquisition of property on "just terms": Section 57 (XXXI).

94. Under the Common Law of England, principles for payment of compensation for acquisition of property by the State are stated by Blackstone in his "Commentaries on the Laws of England", 4th Edn., Vol. 1, at p. 109:

"So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. * * * Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases, the legislature alone can, and indeed frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with

an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possession for a reasonable price: " " " "

The British Parliament is supreme and its powers are not subject to any constitutional limitations. But the British Parliament has rarely, if at all, exercised power to take property without payment of the cash value of the property taken. In *Attorney-General v. De Keyser's Royal Hotel*, 1920 AC 508, the House of Lords held that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the land or building of a subject for administrative purposes in connection with the defence of the realm, without compensation for their use and occupation.

95. Under the Government of India Act, 1935, by Section 299 (2) it was enacted that:

"Neither the Federal or a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined." Article 31 (2) before it was amended by the Constitution (Fourth Amendment) Act, 1955, followed substantially the same pattern.

96. Prior to the amendment of Article 31 (2) this Court interpreted the expression "compensation" as meaning "full indemnification". Patanjali Sastri, C. J., in *State of West Bengal v. Mrs. Bela Banerjee*, (1954) SCR 558 = (AIR 1954 SC 170) in interpreting the guarantee under Article 31 (2), speaking on behalf of the Court observed:

"While it is true that the legislature is given the discretionary powers of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative

judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court."

In the view of the learned Chief Justice the expression "just equivalent" meant "full indemnification" and the expropriated owner was on that account entitled to the market value of the property on the date of deprivation of the property. This case was decided under a statute enacted before the Constitution (Fourth Amendment) Act 1955. The principle of that case was approved in *N. B. Jeejeebhoy v. Asst. Collector, Thana Prant, Thana*, (1965) 1 SCR 636 = (AIR 1965 SC 1096) — a case under the Land Acquisition (Bombay Amendment) Act, 1948, and invoking the guarantee under Section 299 (2) of the Government of India Act, 1935; in *Union of India v. Kamla-bai Harjiwandas*, (1968) 1 SCR 463 = (AIR 1968 SC 377) — a case under the Requisitioning and Acquisition of Immovable Property Act, 1952; and in *State of Madras v. D. Namasivaya Mudaliar*, (1964) 6 SCR 936 = (AIR 1965 SC 190) — a case arising under the Madras Lignite Acquisition of Land Act, 1953.

97. Article 31 (2) was amended with effect from April 27, 1955, by the Constitution (Fourth Amendment) Act, 1955. By sub-clause (2A) a definition of acquisition or requisitioning of properties was supplied and certain other formal changes were also made, with the important reservation that "no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate". In cases arising under statutes enacted after April 27, 1955, this Court held that the expression "compensation" in Article 31 (2) as amended continued to mean "just equivalent" as under the unamended clause: *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras*, (1965) 1 SCR 614 = (AIR 1965 SC 1017) — under the Land Acquisition (Madras Amendment) Act 23 of 1961; *Union of India v. Metal Corporation of India Ltd.*, (1967) 1 SCR 255 = (AIR 1967 SC 637) under the Metal Corporation of India (Acquisition of Undertakings) Act 44 of 1955; *Lachhman Dass v. Municipal Committee, Jalalabad*, AIR 1969 SC 1125 under Sec. 20B of the Displaced Persons (Compensation and Rehabilitation) Act 1954, as amended by Act

2 of 1960. In Ranojirao Shinde's case, (1968) 3 SCR 489= (AIR 1968 SC 1053) dealing with a case under the Madhya Pradesh Abolition of Cash Grants Act 16 of 1963 it was observed that the compensation referred to in Article 31 (2) is a just equivalent of the value of the property taken. But this Court in *State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 634 observed that compensation payable for compulsory acquisition of property is not, by the application of any principles, determinable as a precise sum, and by calling it a "just" or "fair" equivalent, no definiteness could be attached thereto; that valuation of lands, buildings and incorporeal rights has to be made on the application of different principles, e.g., capitalization of net income at appropriate rates, reinstatement, determination of original value reduced by depreciation, break-up value of properties which had outgrown their utility; that the rules relating to determination of value of lands, buildings, machinery and other classes of property differ, and the application of several methods or principles lead to widely divergent amounts, and since compensation is not capable of precise determination by the application of recognized rules, by qualifying the expression "compensation" by the adjective "just", the determination was made more controversial. It was observed that the Parliament amended the Constitution by the Fourth Amendment Act declaring that adequacy of compensation fixed by the Legislature as amended according to the principles specified by the Legislature for determination will not be justiciable. It was then observed that:

"The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. What is fixed as compensation by statute; or by the application of principles specified for determination of compensation is guaranteed; it does not mean, however, that something fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts for, to do so, would be to grant charter of arbitrariness and permit a device to defeat the constitutional guarantee. But compensation fixed or determined on principles specified by the Legislature cannot be permitted to be challenged on the somewhat indefinite plea that it is not a just or fair equivalent. Principles may be challenged

on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable.

98. This Court held in *Mrs. Bela Banerjee's case*, 1954 SCR 558= (AIR 1954 SC 170) that by the guarantee of the right to compensation for compulsory acquisition under Article 31 (2), before it was amended by the Constitution (Fourth Amendment) Act, the owner was entitled to receive a "just equivalent" or "full indemnification". In *P. Vajravelu Mudaliar's case*, (1965) 1 SCR 614= (AIR 1965 SC 1017) this Court held that notwithstanding the amendment of Article 31 (2) by the Constitution (Fourth Amendment) Act, and even after the addition of the words "and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate", the expression "compensation" occurring in Article 31 (2) after the Constitution (Fourth Amendment) Act continued to have the same meaning as it had in Section 299 (2) of the Government of India Act, 1935, and Article 31 (2) before it was amended, viz., "just equivalent" or "full indemnification".

99. There was apparently no dispute that Article 31 (2) before and after it was amended guaranteed a right to compensation for compulsory acquisition of property and that by giving to the owner, for compulsory acquisition of his property, compensation which was illusory, or determined by the application of principles which were irrelevant, the constitutional guarantee of compensation was not complied with. There was difference of opinion on one matter between the decisions in *P. Vajravelu Mudaliar's case*, (1965) 1 SCR 614= (AIR 1965 SC 1017) and *Shantilal Mangaldas's case*, AIR 1969 SC 634. In the former case it was observed that the constitutional guarantee was satisfied only if a just equivalent of the property was given to the owner: in the latter case it was held that "compensation" being itself incapable of any precise determination, no definite connotation could be attached thereto by calling it "just equivalent" or "full indemnification", and under Acts enacted after the

amendment of Article 31 (2) it is not open to the Court to call in question the law providing for compensation on the ground that it is inadequate, whether the amount of compensation is fixed by the law or is to be determined according to principles specified therein. It was observed in the judgment in *Shantilal Mangaldas* case, AIR 1969 SC 634 at p. 651:

"Whatever may have been the meaning of the expression 'compensation' under the unamended Article 31 (2), when the Parliament has expressly enacted under the amended clause that 'no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate', it was intended clearly to exclude from the jurisdiction of the Court an enquiry that what is fixed or determined by the application of the principles specified as compensation does not award to the owner a just equivalent of what he is deprived."

In *P. Vajravelu Mudaliar*'s case, (1965) 1 SCR 614= (AIR 1965 SC 1017) again the Court in dealing with the effect of the amendment observed (at p. 627) (of SCR)= (at p. 1024 of AIR):

"Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. To illustrate a law is made to acquire a house; its value at the time of acquisition has to be fixed; there are many modes of valuation, namely, estimate by an engineer, value reflected by comparable sales, capitalisation of rent and similar others. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value. But nonetheless they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy. On the other hand, if a law lays down principles which are not relevant to the property acquired, or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31 (2) of the Constitution."

The Court then applied that principle to the facts of the case and held that the Land Acquisition (Madras Amendment) Act, 1961, which provided that — (i) the owner of land acquired for housing shall get only the value of the land at the date of the notification under Section 4 (1) of the Land Acquisition Act, 1894, or an amount equivalent to the average market value of the land during the last five years immediately preceding such date, whichever was less; (ii) the owner shall get a solatium of only 5 per cent, and not 15 per cent, and (iii) in valuing the land acquired any increase in its suitability or adaptability for any use other than the use to which the land was put at the date of the notification under Section 4 (1) of the Land Acquisition Act, 1894, shall not be taken into consideration did not impair the right to receive compensation. The Court observed at p. 631 (of SCR)= (at p. 1026 of AIR):

"In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining the compensation. One of the elements that should properly be taken into account in fixing the compensation is omitted: it results in the adequacy of the compensation. * * *. We, therefore, hold that the Amending Act does not offend Article 31 (2) of the Constitution."

The compensation provided by the Madras Act, according to the principles specified, was not the full market value at the date of acquisition. It did not amount to "full indemnification" of the owner: the Court still held that the law did not offend the guarantee under Article 31 (2) as amended, because the objection was only as to the adequacy of compensation. In *Shantilal Mangaldas* case, AIR 1969 SC 634, the Court held that the Constitution (Fourth Amendment) Act, Article 31 (2) guarantees a right to receive compensation for loss of property compulsorily acquired, but compensation does not mean a just equivalent of the property. If compensation is provided by law to be paid and the compensation is not illusory or is not determinable by the application of irrelevant principles, the law is not open to challenge on the ground that compensation fixed or determined to be paid is inadequate.

100. Both the lines of thought which converge in the ultimate result, support

ing of the word 'chemical'. It is also defined as 'pertaining to chemistry' (2). This is indeed the popular meaning of the word. And by this definition, sodium silicate will be classed as a chemical.

14. In sum, having regard to the differing purposes and differing environments of science and Sales Tax Act and two meanings of the term 'chemical' in science itself I cannot persuade myself to agree that the term should be given the stricter meaning. On the other hand, having regard to the principles of interpretation concerning Sales Tax Acts, the word should be construed in the commercial sense. And so construed, it will certainly comprehend sodium silicate. Sodium silicate is described under the heading of inorganic compounds in the Handbook of Chemistry and Physics. (3) It is mentioned under the heading of 'Fine and Pharmaceutical Chemicals' in the General Catalogue issued by E. Merck (4) under the heading of 'Organic and Inorganic Chemicals for Laboratory Use' in the Laboratory Chemicals Catalogue issued by the British Drug Houses Ltd., (5) and under the heading of 'Organic and Inorganic Chemicals' in the Catalogue issued by Vora Brothers. (6).

15. It is manifest from these catalogues that sodium silicate is regarded as a chemical by dealers in chemicals in the U. S. A., Germany, England and India. Their opinion is in accord with the dictionary meaning of the word 'chemical'. According to Shorter Oxford Dictionary 'chemical' means anything obtained or used in chemistry. The word has been judicially construed in the U. S. A. There it means a substance used for producing a chemical effect or produced by a chemical process. (*) Judged by these meanings sodium silicate is a chemical for it is produced by fusing together sodium carbonate and silicate.

16. The passage which I have extracted from the decision of the Judge (Revisions) shows two errors in his reasoning. Firstly, the use of a substance in a chemical process or chemical industry is not the sole test of it being a chemical. I do not know if lithnem bicarbonate is used in any chemical process or chemical industry but it is undisputedly a chemical. Secondly, he is also wrong in thinking that sodium silicate is not used as a detergent in soap industry. These errors are

2. Hack's Chemical Dictionary edited by Grant (III Edn) page 187.

3. Edited by Charles D. Hodgman, 40th Edn. page 658.

4. 1959 Edn. page 180.

5. 1962 Export Edn., page 204.

6. 1968 Edn., page 32.

*Words and Phrases (Permanent Edition) Volume 6, Page 740.

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adequately exposed in the Banaras Chemical's case, 1967-20 STC 246 (All) and it is not necessary to repeat what has already been said there.

17. I have already pointed out the flaw in the question referred to us. I shall accordingly reframe the question as follows:—

"Whether sodium silicate is included in 'chemicals of all kinds' in Item No. 7 of Notification No. ST-905/X, dated March 31, 1956?"

18. My answer to the question, so re-framed, is in the affirmative.

19. PATHAK J. :— The assessee manufactures and deals in sodium silicate and washing soap. He was assessed to sales tax for the assessment year 1958-59 on a turnover of sodium silicate amounting to Rs. 98,028.00. The turnover was taxed at the rate of one anna per rupee on the footing that sodium silicate fell under the head 'chemicals of all kinds' appearing at Item No. 7 of Notification No. ST-905/X, dated March 31, 1956. The Assistant Commissioner (Judicial) Sales Tax, on appeal by the assessee took the same view. But the Additional Revising Authority, Sales Tax, exercising his revisional jurisdiction, held that sodium silicate is not a chemical when used in the soap industry. At the instance of the Commissioner of Sales Tax this reference has been made on the following question:

"Whether sodium silicate as used in the manufacture of soap is included in 'chemicals of all kinds' appearing at Item 7 of the notification No. ST-905/X dated March 31, 1956?"

20. A similar question was raised in 1967-20 STC 246 (All) where a Division Bench of this Court expressed the view that sodium silicate was a chemical within the meaning of the entry in the aforesaid Notification. When the present reference came before a Bench consisting of two of us (Pathak and Gulati, JJ.) it was urged that as the question framed is limited to the use of sodium silicate in the manufacture of soap, then having regard to that use it must be held that sodium silicate is not a chemical. As it appeared, on the submissions then made, that the point decided in Banaras Chemicals, 1967-20 STC 246 (All) (Supra) called for further consideration the case was referred to a larger Bench.

21. Section 3 of the U. P. Sales Tax Act charges tax for each assessment year on the turnover of every dealer at the rate specified therein. Section 3 is open to a construction under which every sale of an article in a series of sales by successive dealers attracts the tax. Section 3-A was then enacted. It empowers the State Government to specify that the tax will be levied only at such single point in the series of sales by successive dealers as the State Government may specify. It con-

fers the further power upon the State Government to declare the rate of tax in respect of such turnover. Under Sec. 3-A the State Government made Notification No. ST-905/X, dated March 31, 1956, declaring the single point at which the turnover of certain goods would be liable to sales tax and further declaring that the rate of tax would be one anna per rupee. The goods were specified in a List made part of the Notification. As examination of the List shows that some entries refer to specific commodities, such as "cigars, cigarettes and pipe tobacco", while other entries mention a general head or class of goods capable of including a number of commodities falling within it, as for example 'electrical goods' and 'jute goods'.

22. Not infrequently, the question arises whether a commodity sold by a dealer can be said to be covered within an entry in the Notification. The principles on which the question must be resolved are, I think, now well settled. The U. P. Sales Tax Act provides for the levy of a tax on the sale or purchase of goods. The tax is levied on a dealer, and a 'dealer' has been defined by Section 2 (c) of the Act as a person buying or selling goods. I think it to be beyond dispute that as the U. P. Sales Tax Act is a fiscal statute providing for the levy of a tax on the dealer, reference to the goods or class of goods mentioned in the sections of the Act or the Notification made under it must be understood in the sense in which a dealer carrying on the business of buying or selling those goods would understand it. What is relevant is how such reference should be understood in the commercial sense.

23. In *Ramavatar Budhaiprasad v. Assistant Sales Tax Officer*, AIR 1961 SC 1325 = 1962-1 SCR 279 the Supreme Court, considering whether betel leaves were 'vegetables' within the meaning of that expression in the Schedule to the C. P. and Berar Sales Tax Act, 1947, held that the expression 'vegetables'.

".....must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning 'that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it.' It is to be understood as used in common language."

The Court held the expression 'vegetables' to refer to the class of vegetables which are grown in a kitchen garden or in a farm and are used for the table. Reference was made by the Supreme Court to 1951 CLR (Ex) 122 where Cameron, J. of the Exchequer Court of Canada observed:

"..... the rule is that the particular words used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense, 'for the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists.' A perusal of the consumption or sales tax sections of the Act (Part XIII) and of the list of exemptions set out in Schedule III is sufficient to indicate that Parliament, in enacting the sections and the schedule, was not using words which were applied to any particular science or art, and that, therefore, the words used are to be construed as they are understood in common language. To the words 'fruit' and 'vegetables', therefore, there must be given the meaning which they would have when used in the popular sense — that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. Now the statute affects nearly everyone, the producer or manufacturer, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax. Parliament would not suppose it as Act of this character that manufacturers, producers, importers, consumers and others who would be affected by the Act, would be botanists. The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, therefore, it is not the botanist's conception as to what constitutes a 'fruit' or 'vegetables' which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such."

24. The point was considered recently by the Supreme Court in AIR 1967 SC 1454 and the Supreme Court reiterated that while interpreting items in statutes like the Sales Tax Acts resort must be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense.

25. So, how is the entry "chemicals of all kinds" in the Notification of March 31, 1956 to be construed? It is to be construed in its commercial sense, that is, according to the general usage and known denominations of trade. It is the sense in which a dealer carrying on the business of selling chemicals and a purchaser buying them would understand the expression "chemicals of all kinds". A dealer selling chemicals offers them for sale because he considers them saleable. They are saleable because they can be the subject of

use of consumption or profit to a prospective buyer, and that depends upon their properties. A commodity is offered for sale as a chemical because of its chemical properties. Therefore, the entry "chemicals of all kinds" refers to those commodities which because of their chemical properties prompt a dealer to offer them for sale and induce a purchaser to buy them.

26. It has been contended that a commodity is a chemical if it is the product or result of a chemical process or a chemical reaction. It seems to me that while that test may afford a basis to the chemist or scientist for the purpose of classifying a substance it would hardly be relevant in an activity where the primary actors, a dealer selling and a purchaser buying, are principally interested in its properties.

27. In Thorpe's Dictionary of Applied Chemistry (7) the varied uses of which sodium silicate is capable have been outlined. It is pointed out that the adhesive properties of sodium silicate solutions are similar to those of many organic colloids and have the advantages of being odourless, heatproof and of becoming eventually insoluble. The cardboard and paper industries use sodium silicate for production of corrugated and high finished printing papers. The textile industry also makes extensive use of sodium silicate. When used for silk-wetting, the silicate strengthens the fibre of the article. Mercerising of cotton is found to be improved by substituting sodium silicate for sodium hydroxide. Many articles of clothing are treated with silicates to reduce fire hazard. Its adhesive and wetting properties allow the use of sodium silicate as a binding material for numerous materials. It is used as a mordant and fixing agent in the dyeing and printing industry, and as a constituent of lead-free enamels for glazing pans. Small water systems can be protected from corrosion by sodium silicate. It is now finding application in the welding and degreasing industries. Plastics from sodium silicate and phenol, suitable for coating paper and cloth, have been made. As an anti-pyrogenic in coal mines, sodium silicate is used in conjunction with calcium chloride and sodium bicarbonate in decreasing the oxygen absorbed by coal dust. A familiar domestic application of sodium silicate is its use as an egg preservative. Sodium silicate may be used in medicine as a therapeutic against tuberculosis. The use of sodium silicate in the soap industry is well established. During the Second World War its use for this purpose was greatly increased owing to the shortage of fats. It not only replaces the fat, but in some respect improves the quality of the soap. It is nearly always used whenever an inorganic detergent is required.

28. It may be possible to say that the detergent action of sodium silicate may be attributed to its physical properties rather than to its chemical properties and, therefore, in that sense, when used in the manufacture of soap it may not be regarded as a chemical. But that is not the only use to which sodium silicate is employed commercially. It is capable of a large number of uses, some of which have been mentioned above, and it is apparent from what has been said above that it has many chemical qualities which make it a valuable commodity for sale in the market. The Additional Revising Authority limited the enquiry to the application of sodium silicate in the manufacture of soap. In my opinion, he was not justified in doing so. Whether a commodity can be described as a 'chemical' for the purpose of the entry in the Notification must be determined not by the use for which a particular purchaser buys it but with reference to the general properties which make it saleable to the entire range of prospective buyers. Upon that view of the matter, sodium silicate, in my opinion, is a chemical within the meaning of the expression 'chemicals of all kinds' mentioned at item No. 7 in the Notification No. ST-905/X, dated March 31, 1956.

29. I reframe the question as follows: "Whether sodium silicate is included in 'chemicals of all kinds' appearing at Item No. 7 of Notification No. ST-905/X, dated 31-3-1956?"

and answer the question so reframed in the affirmative.

30. The Commissioner of Sales Tax is entitled to his costs, which I assess at Rs. 100. Counsel's fee is assessed in the same figure.

31. GULATI J.:— I have had the advantage of reading the judgment prepared by brother Dwivedi, J. While I agree with the final answer to the question proposed by brother Dwivedi, I feel it necessary to add a few words by way of elucidation.

32. The question which has been referred to us for our opinion reads thus:

"Whether Sodium Silicate as used in the manufacture of soap is included in "chemicals of all kinds" appearing at item 7 of the notification dated 31-3-1956."

33. The question as framed is not as to whether sodium silicate is a chemical, but whether sodium silicate would be a chemical when used in the manufacture of soap. The answer to this question would depend upon as to whether sodium silicate when used in the manufacture of soap undergoes or brings about a chemical process. This is purely a technical question. A chemical process must necessarily involve a chemical change or a chemical reaction represented by a chemical equation resulting in the production of a

chemical compound. All these are technical terms. In the Concised Dictionary of Sciences by F. Gaynor some of these

technical words have been defined as under:

"Chemical Change:

"A rearrangement of atoms or molecules into chemically different structures, the substances undergoing such a change as to lose their original identity."

Chemical re-action:

"Any chemical change or transformation of molecules of one kind into molecules of another kind brought about by the rearrangement of atoms when two or more elements or compounds are brought into contact under given conditions."

Chemical equation:

"A symbolic representation of a chemical reaction showing the relation between the substances and their products, e.g. $\text{Zn} + 2\text{HCl} = \text{Zinc Chloride} + \text{Hydrogen}$."

Chemical Exchange Reaction:

"A process in which an atom of a certain chemical substance exchanges place with a similar atom in a different substance."

Chemical compound:

"A substance composed of two or more elements combined in definite proportions by weight, the individual properties of the constituents having disappeared and the later being inseparable by physical means."

34. Sodium silicate, in the manufacture of soap, is used either as a filler or as a detergent or both. It undergoes no chemical process, brings about no chemical change nor does it produce any chemical compound. The part that it plays in the manufacture of soap is purely mechanical.

35. In Thorpe's dictionary of Applied Chemistry' it is mentioned:

"The detergent action is a mechanical process by which dirt is removed by detergent solution which becomes attached to the oil globules and helps them float off the fibre."

Obviously, therefore, the question as framed is capable of only one answer, namely, that sodium silicate is not a chemical when used in the manufacture of soap.

36. In (1967) 20 STC 246 (All) the question was identically worded and the answer to that question could not have been in the affirmative. That is why I and brother Pathak felt that the case of the Benaras Chemicals, 1967-20 STC 246 (All) (Supra) requires reconsideration.

37. But, sodium silicate has variety of uses and its use in the manufacture of soap as a filler or detergent is only one of its uses. Item No. 7 of notification No. S. T. 905/X dated 31st March, 1956 contains no reference to the use of a particular chemical. The real question, therefore, was as to whether sodium silicate would fall within the expression 'chemicals of all kinds' as occurring in the notification of March 31, 1956. A question like that could not be circumscribed as has been

done in the instant case. The meaning given to sodium silicate should be such as would be applicable in all circumstances, otherwise the result would be that sodium silicate would be a chemical in one case, but it would not be a chemical in another case. That would not be the correct way of answering a question of this nature. I therefore, agree with brother Dwivedi that the question should be reframed so as to exclude therefrom the reference to the use of sodium silicate in the manufacture of soap.

38. Now, the U. P. Sales Tax Act is concerned primarily with the (business community because) it seeks to levy tax on the total sales during a year of a dealer which, according to the definition given in the Act, means a person who carries on the business of buying and selling goods. Any entry in a notification issued under the U. P. Sales Tax Act, therefore, has to be interpreted in a sense in which it would be understood in the commercial world. I am, therefore, of opinion that the expression "chemicals of all kinds" has to be given not any technical or scientific meaning but a meaning which this term has in the commercial world. The term 'chemical' according to the books of chemistry has a very wide connotation inasmuch as anything that pertains to chemistry is regarded as a chemical. But that obviously is not the sense in which this term has been used in the notification in question because otherwise articles like gold, silver, iron and even plain water would be chemicals which

admittedly are not regarded as chemicals in the popular sense.

39. The assessee M/s. Prayag Chemical Works, as its name suggests, is a dealer in chemicals. It deals in imported sodium silicate and also manufactures in its own factory sodium silicate which is popularly known as "soda silicate". Sodium silicate is manufactured by fusing together sand and soda-ash under high temperature. This process is definitely chemical, even though the chemical composition of the resultant product viz., sodium silicate is not always uniform; but that is immaterial because having a fixed chemical composition is not the only attribute of a chemical. From the order of the Judge (Appeals) dated 10-4-1961 it appears that the assessee admitted before him that it manufactures sodium silicate by chemical process. According to one of the definitions of the word "chemical" any substance which is produced by a chemical process is regarded as a chemical. As already stated above, the assessee manufactures sodium silicate by chemical process and sells it as a chemical. The mere fact that sodium silicate does not take part in a chemical reaction in the manufacture of soap does not make it anyhowless chemical. I would, therefore, reframe the question to read:

"Whether sodium silicate is included in "chemicals of all kinds" appearing at item No. 7 of notification No. S. T. 905/X dated 31st March, 1956."

40. BY THE COURT:— Our answer to the question, as reframed by us, is in the affirmative.

41. The Commissioner, Sales Tax, shall get costs which we assess at Rs. 100. Counsel's fee is assessed in the same figure.

Order accordingly.

AIR 1970 ALLAHABAD 197 (V 57 C 28) FULL BENCH

JAGDISH SAHAI, D. D. SETH,
YASHODA NANDAN, R. L. GULATI
AND C. D. PAREKH JJ.

Asharfi Lal, Appellant v. Firm Thakur Pd. Kishori Lal and others, Respondents.

F. A. F. O. No. 66 of 1964, D/- 19-5-1969 from Judgment and final Decree of Munsif, Gorakhpur, D/- 23-2-1963.

Court-fees and Suits Valuations—Court-fees Act (1870) (U. P. Amendment), Section 7 (i) and (iv) (b) — Suit for accounts — Defendant appealing against final decree should pay court-fee on amount of decree passed against him.

The defendant appealing against final decree passed against him in a suit for ac-

counts should pay ad valorem court-fee on the amount of decree determined after accounting. AIR 1941 Bom 242 & AIR 1938 Mad 435 (FB) & AIR 1929 Cal 815, Rel. on; AIR 1949 All 382 (FB), Dist.

(Para 10)

Properly analysed a suit for accounts is nothing but a suit for recovery of money but only after the amount has been determined. Consequently it cannot be said that a suit for accounts would always remain a suit for accounts even though the purpose for which accounting is held, i.e. to obtain a decree for the recovery of a specific amount of money, has been achieved and the sum recoverable specified. (Para 8)

Cases referred: Chronological Paras

(1949) AIR 1949 All 382 (V 36) =	
1949 All LJ 90 (FB), Ghalib Rasool v. Mangulal	10
(1941) AIR 1941 Bom 242 (V 28) =	
ILR (1941) Bom 477, Kashiram Senu v. Ranglal Motilal	10
(1938) AIR 1938 Mad 435 (V 25) =	
ILR (1938) Mad 598 (FB), In re, Dhanukodi Nayakkar	10
(1929) AIR 1929 Cal 815 (V 16) =	
ILR 57 Cal 463, Kanti Chandra v. Radha Raman	10
V. B. Khare, for Appellant; Standing Counsel, for Respondents.	

JAGDISH SAHAI J.:— On a reference made by our brothers Broome and G. S. Lal, JJ. this appeal under Section 6-A of the Court-fees Act (U. P. Amendment) has been laid before us.

2. The respondent firm Thakur Prasad Kishori Lal brought the suit giving rise to this appeal for accounting and for the recovery of the sum found due after accounting to the plaintiff respondent from the defendant appellant Asharfi Lal. In the plaint the suit was valued at Rs. 300. Paragraph 10 of the plaint, which deals with the valuation of the suit reads:

"Yeh ki tayun maliyat dawa bagarz akhtiyar samayat wa adaya court-fees mublig 300 rupaiye kayam kiya jata hai, Baad kitab jis kadar rakam yaftani mudaiyyan jimmgi mudalaham ayad ho us per mudaiyyan rasum sarkari ada karenge."

3. The relief claimed in the plaint reads thus:

"(a) Basadur digri infsakh sarakhat darmiyan farikain saakatdari fiks kar di jawe aur mudalaham ko hukum di jawe ki hisab kitab samjha de aur hisab kitab darmiyan farikain kara diya jawe aur jo rakam mudaiyyan jimmgi mudalaham sabit ho uski digri khilaf mudalaham sadir ki jawe.

(b) Kharcha Mudaiyyan mudalaham se mile.

(c) Yeh ki alaba ya bajay ya basamul dadrasi majkoorwale ke ham mudaiyyan aur jis digar dadrasi ke mustahak badanist adalat karar pawe uske bhi digri bahaq

mudaiyyan bahaq mudalaham sadir ki jawe."

4. On accounting it was found that a sum of Rs. 11, 825/50 was due to the plaintiff respondent from the defendant appellant but before the trial Court decreed the suit and passed a formal decree or signed it made the plaintiff respondent deposit ad valorem court-fee on the sum of Rs. 11,825/50.

5. Dissatisfied with the decree passed by the trial Court the defendant appellant appealed before the District Judge. In the memorandum of appeal the valuation was shown at Rs. 300 and Court fee was paid on that amount. The Munsarim of the District Judge's Court made an endorsement that the court-fee paid was sufficient and the appeal was registered but the plaintiff respondent made an application to the District Judge stating therein that the correct valuation of the appeal was Rs. 11,825/50 on which amount ad valorem court-fee was payable by the defendant appellant. The learned Additional District Judge agreeing with the contention made by the plaintiff respondent passed an order directing the defendant appellant to pay ad valorem court-fee on Rs. 11,825/50 and make good the deficiency to the extent to which the Court fee already paid was deficient.

6. The defendant appellant appealed to this Court under Section 6-A of the Court Fees Act (U. P. Amendment) and, as already stated earlier, the matter has come to this Full Bench on a reference made by two learned Judges of this Court.

7. We have heard Sri V. B. Khare for the defendant appellant and Sri S. N. Sahai for the plaintiff respondent. The only controversy between the parties is as to whether Section 7 (i) of the Court Fees Act (U. P. Amendment) or Sec. 7 (iv) (b) would be applicable. Sri. V. B. Khare contends that clearly the suit was one for accounts and inasmuch as there is a specific provision relating to accounts in the shape of Section 7 (iv) (b) the general provision contained in Section 7 (i) would not apply on the principle that the special would exclude the general. Sri S. N. Sahai, on the other hand, contends that inasmuch as a decree now has been passed for the recovery of a specific amount, i.e., the sum of Rs. 11,825/50 the special provision that will be applicable will be clause (1) of Section 7 of the Court Fees Act (U. P. Amendment).

8. We are not impressed by the submission of Sri V. B. Khare that a suit of accounts always remains a suit for accounts even though a money decree is passed after accounting has been done. Properly analysed a suit for accounts is nothing but a suit for recovery of money but only after the amount has been deter-

mined. Consequently we find no justification for the submission that a suit for accounts would always remain a suit for accounts even though the purpose for which accounting is held, i.e., to obtain a decree for the recovery of a specific amount of money, has been achieved and the sum recoverable specified.

9. We have seen the decree passed in this case. It is clearly one for recovery of the sum of Rs. 11,825/50. As pointed out earlier, the rendition or the taking of accounts is only incidental or ancillary and for the sole purpose of determining the exact amount due to the aggrieved party.

10. No direct authority has been brought to our notice which deals with the question raised before us. However, we find no difficulty in coming to the conclusion to which we have arrived, as stated above, on the basis of first principles. In circumstances similar to those before us it has been held by several High Courts on the basis of similar provisions that ad valorem court-fee would be payable on the amount determined after accounting. We may refer to only some of those cases e. g. Kashiram Senu v. Ranglal Motilal, AIR 1941 Bom 242; In re, Dhanukodi Nayakkar, AIR 1938 Mad 435 (FB) and Kanti Chandra v. Radha Raman, AIR 1929 Cal 815. The decision in Ghalib Rasool v. Mangu Lal, 1949 All LJ 90 = (AIR 1949 All 382) (FB) was also brought to our notice but in our opinion the facts of that case are entirely different from those before us and the decision is distinguishable.

11. From the reasons mentioned above we are of the opinion that the order passed by the learned Additional District Judge demanding from the defendant appellant ad valorem court-fee on the sum of Rupees 11,825/50 is correct. The appeal is, therefore, dismissed.

Appeal dismissed.

AIR 1970 ALLAHABAD 198 (V 57 C 29) FULL BENCH

W. BROOME, B. D. GUPTA AND
G. C. MATHUR, JJ.

Khurkhur, Applicant v. State through the Asst. Engineer, P. W. D., Opposite Party.

Criminal Revn. No. 1492 of 1966, D/- 14-2-1969 against order of Addl. Dist. Magistrate (J.) Varanasi, D/- 25-7-1966.

(A) U. P. Roadside Land Control Act (10 of 1945), Ss. 13 (1), 3 — That area to which declaration under S. 3 (1) relates is a controlled area — Validity of, on ground of non-compliance with procedure prescribed by S. 3 (2) to (6) can be challenged by accused.

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It is open to an accused person to question the validity of the declaration under sub-section (1) of S. 3 on the ground that the procedure prescribed by sub-sections (2) to (6) has not been followed, even though sub-section (7) makes the declaration conclusive evidence of the fact that the area to which it relates is a controlled area. (Para 6)

The presumption under Section 3 (7) can only arise when the "declaration made under sub-section (1)" referred to therein is a valid declaration made in accordance with law. A declaration made without following the procedure laid down in sub-sections (2) to (6) will not be a legally or duly made declaration; and only a declaration duly made will attract the application of sub-section (7). Since Section 3 (7) does not state that the publication of the declaration under sub-s. (1) shall be conclusive evidence of the fact that the declaration has been made in accordance with the provisions of the Act, it cannot be held to shut out enquiry into the question whether the provisions of sub-sections (2) to (6) were complied with or not before making the declaration. AIR 1966 SC 693, Dist. (Paras 3, 4)

(B) U. P. Roadside Land Control Act (10 of 1945), S. 3 — Declaration under sub-section (1) — Whether procedure prescribed under sub-sections (2) to (6) was followed — Proof of.

Where the declaration under sub-section (1) of S. 3 has been made and the accused person does not raise the question that the procedure prescribed by sub-sections (2) to (6) was not followed before making the declaration, it is not necessary for the prosecution to establish that the provisions of these sub-sections have been complied with. (Para 7)

Once a Gazette notification embodying the declaration is produced before the Court, the presumption can legitimately be drawn that all the procedure required by law to be followed with regard to the said notification has in fact been followed, vide illustration (e) to Section 114 of the Evidence Act. It is only in two classes of cases that the prosecution is called upon to produce evidence to prove that sub-sections (2) to (6) have been complied with: (1) cases in which the accused challenges the validity of the declaration, specifying the alleged non-compliance; and (2) cases in which for some special reason the Court refuses to draw the presumption permitted by Section 114 of the Evidence Act. (Para 6)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 693 (V 53) =
1966-1 SCR 950, Municipal Board
Hapur v. Raghavendra Kripal 4

Sankatha Rai, for Applicant; Sushil Kumar, D. G. A., for Opposite Party.

BROOME J.: Khurkhur, the petitioner in this criminal revision, has been convict-

ed by the S. D. M. of Varanasi under Section 13 (1) of the U. P. Roadside Land Control Act, 1945, and has been sentenced to pay a fine of Rs. 200, with a further recurring fine of Rs. 20 per day in case of continuing contravention. He filed a revision in the Court of the A. D. M. (J.) Varanasi, and there for the first time raised the plea that the Gazette notification dated 29-12-1951, relied upon by the prosecution for the purpose of showing that the area in question was a "controlled area", had not been made in accordance with law, because the State Government had not published a preliminary declaration in two vernacular newspapers, as required by sub-section (2) of S. 3 of the Act. The learned A. D. M. (J.) repelled this argument on the ground that under sub-section (7) of S. 3 the notification was conclusive evidence that the area was a "controlled area" and that the prosecution was under no obligation to produce evidence to show that the procedure prescribed in sub-section (2) had been complied with before the notification was issued. Thereafter the present revision was filed in this Court and came up for hearing before S. D. Singh J., who being of opinion that it was desirable to obtain an authoritative interpretation of the scope of sub-section (7) of S. 3 of the Act, referred the following two questions to a larger Bench for decision:—

"(1) Whether it is open to an accused person to question the validity of a declaration made under sub-section (1) of Section 3 of the U. P. Roadside Land Control Act, 1945 on the ground that procedure prescribed under sub-sections (2) to (6) of Section 3 of the Act was not gone through at all or in some material respect, even though the aforesaid declaration is made conclusive evidence under sub-section (7) of the same section of the fact that the area to which it relates is a controlled area.

(2) In case this question is answered in the affirmative, will it be for the prosecution to establish in every case that the procedure prescribed under sub-sections (2) to (6) of S. 3 of the Act was gone through before a declaration was made under sub-section (1) of S. 3 of the Act or the necessary onus to establish the want of compliance will lie on the accused." The questions propounded by S. D. Singh, J. came up before a Division Bench of this Court; but that Bench, having discussed various rulings bearing on question of whether the provisions of sub-section (2) of S. 3 regarding publication in two vernacular newspapers were directory or mandatory, felt that consideration by a still larger Bench was required and that is how this revision has come before us.

2. As a matter of fact this whole controversy is totally unnecessary and pointless. On the face of it, it seemed to us

highly unlikely that the State Government would have deliberately omitted to follow the procedure laid down in a section of the Act itself and accordingly we inquired from the learned Government Advocate what the factual position was; and the affidavit that was filed on 17-12-1968 in response to this query shows that in actual fact sub-section (2) of Section 3 of the Act has been fully complied with, inasmuch as the required notification was duly published in two vernacular newspapers, the 'Aaj' and the 'Qaumi Awaz', on 24-2-1950 and 23-2-1950 respectively. Copies of the newspapers in question, showing the publication of the notification, are appended to the affidavit.

3. However, as the questions have been referred to us for decision, we proceed to give our answers thereto. The first question relates to the scope of sub-sections (1) and (7) of S. 3 of the U. P. Roadside Land Control Act, which run as follows:—

3. Declaration of Controlled Area— (1) The State Government may, by notification in the official Gazette, declare any land within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act:

(Provided that in the case of a national highway, the highway itself shall not be deemed to be a controlled area).

... ..
(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

At first sight it might seem that sub-section (7) was meant to endow the Gazette notification under sub-section (1) with special sanctity, preventing it from being challenged on any ground whatsoever. We are satisfied, however, that the presumption under sub-section (7) can only arise when the "declaration made under sub-section (1)" referred to therein is a valid declaration made in accordance with law. Sub-section (2) of S. 3 provides:

"3 (2)— Not less than three months before making a declaration under Section (1) the State Government shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that they propose to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made and copies of every such notification or of the substance thereof shall be published by the Collector in such manner as he thinks fit at his office and at such other places as he considers necessary within the said boundaries."

Sub-section (3) provides for the filing of objections by a person interested. Sub-sections (4) to (6) provide for the disposal

of objections. The Act empowers the State Government to make the declaration under sub-section (1) of S. 3 only after complying with the procedure prescribed by sub-sections (2) to (6). A declaration made without following the procedure laid down in these sub-sections will not be a legally or duly made declaration; and only a declaration duly made will attract the application of sub-section (7).

4. Sub-section (7) does not make the declaration under sub-section (1) conclusive evidence of the fact that it has been made in accordance with the provisions of sub-sections (2) to (6), nor does it shut out enquiry by the Courts into the legality of the declaration. In this respect the language of sub-section (7) may be contrasted with the language used in sub-section (3) of S. 135 of the U. P. Municipalities Act, which says:—

135 (3) — A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

Section 135 (3) purports to shut out a challenge to the legality of the imposition on the ground that it has not been made in accordance with the provisions of the Act. Even in respect of this provision the Supreme Court has held in *Municipal Board, Hapur v. Raghuvendra Kripal*, AIR 1966 SC 693 that the rule of conclusive evidence in this section does not shut out all enquiries by Courts into the validity of the notification under Section 135 (2), though defects in respect of directory provisions may have its protection. However, since the language of the two provisions is different, the decisions in respect of Section 135 (3) of the U. P. Municipalities Act are not particularly helpful in interpreting Section 3 (7) of the U. P. Roadside Land Control Act. Provisions analogous to those of Section 3 (7) are to be found in Section 6 (3) of the Land Acquisition Act, which provides, in respect of a declaration under Section 6 (1), that

"the said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be,"

It has never been contended, nor has it been held by any Court that S. 6 (3) bars the declaration under Section 6 (1) from being challenged on the ground that it was made without following the procedure laid down in the Land Acquisition Act for making it. The rule of conclusive evidence in such cases applies only if the declaration has been legally and duly made. Since Section 3 (7) of the U. P. Roadside Land Control Act does not state that the publication of the declaration under sub-section (1) shall be conclusive evidence of the fact that the declaration has been made in accordance with the provisions of the

Act, it cannot be held to shut out enquiry into the question whether the provisions of sub-sections (2) to (6) were complied with or not before making the declaration.

5. This conclusion will clearly be a sufficient answer to the first question referred to us for decision and we see no necessity to embark on a discussion of whether any of the provisions of sub-sections (2) to (6) of Section 3 of the Act are mandatory or directory since in our opinion that would be outside the scope of the question in the form in which it has been framed.

6. Having answered the first question in the affirmative, we have now to deal with the second. Learned Counsel for the petitioner has attempted to argue that in each and every case, whether or not the accused challenges the validity of the declaration made under sub-section (1), the prosecution is bound to place all the necessary material before the Court to show that the procedural requirements of sub-sections (2) to (6) have been complied with and that the declaration has been validly made in accordance with law. But we are unable to accept this sweeping proposition. Once a Gazette notification embodying the declaration is produced before the Court, the presumption can legitimately be drawn that all the procedure required by law to be followed with regard to the said notification has in fact been followed—vide illustration (e) to S. 114 of the Evidence Act. It is only in two classes of cases that the prosecution is called upon to produce evidence to prove that sub-sections (2) to (6) have been complied with: (1) cases in which the accused challenges the validity of the declaration, specifying the alleged non-compliance; and (2) cases in which for some special reason the Court refuses to draw the presumption permitted by Section 114 of the Evidence Act.

7. Our answers to the questions propounded by the learned Single Judge therefore, are:—

1. It is open to an accused person to question the validity of the declaration under sub-section (1) to S. 3 of the U. P. Roadside Land Control Act on the ground that the procedure prescribed by sub-ss. (2) to (6) has not been followed, even though sub-section (7) makes the declaration conclusive evidence of the fact that the area to which it relates is a controlled area.
2. Where the declaration under sub-section (1) of S. 3 has been made and the accused person does not raise the question that the procedure prescribed by sub-sections (2) to (6) was not followed before making the declaration, it is not necessary for the prosecution to establish that the

provisions of these sub-sections have been complied with.

Reference answered accordingly.

AIR 1970 ALLAHABAD 201 (V 57 C 30)

FULL BENCH

V. G. OAK, C. J., SATISH CHANDRA AND A. K. KIRTY JJ.

Behari Lal and another, Appellants v. Keshri Nandan, Respondent.

Ex. First Appeals Nos. 32 and 51 of 1969, D/- 4-4-1969 against judgment and decree of Addl. Civil J., Mirzapur, D/- 16-11-1968.

(A) Constitution of India, Arts. 111 & 357 (1) (a) — Passing of U. P. Civil Laws Amendment Act (35 of 1968) by President by virtue of power conferred upon him under Art. 357 (1) (a) — Fact that it is not assented by President as required under Art. 111 does not make it invalid.

(Para 6)

(B) U. P. Civil Laws Amendment Act (35 of 1968), S. 3 — Bengal, Agra and Assam Civil Courts Act (12 of 1887), Section 21 (1) (a) and (1-A) — Enhancement of pecuniary jurisdiction of District Court upto Rs. 20,000 by amendment — No violation of Art. 133 of Constitution — (Constitution of India, Art. 133).

The amendment of Section 21 of the Civil Courts Act by Section 3 of the Civil Laws Amendment Act by which pecuniary jurisdiction of District Court is raised upto Rs. 20,000 does not violate Art. 133 of the Constitution.

(Para 13)

There is no indication in Art. 133 that in cases of valuation of Rs. 20,000 the High Court is required to record its independent findings on questions of fact. Whether a decision of a High Court would be on question of fact or on question of law depends upon the manner in which the matter comes before the High Court. A statutory provision prescribing that in certain matters the High Court can deal with questions of law only would not be in conflict with Art. 133 of the Constitution.

(Para 9)

Article 133 does not confer an absolute right of filing an appeal to the Supreme Court. Firstly, even if the valuation of the suit is Rs. 20,000, the condition laid down in the latter part of Cl. (1) of Article 133 has to be satisfied. Secondly, if the decision is by one Judge of a High Court, Cl. (3) of Art. 133 precludes the High Court from granting any certificate.

AIR 1964 SC 907 & AIR 1966 SC 430, Foll.

(Para 12)

It is true that the Supreme Court would not have the benefit of any finding on question of fact by the High Court but the difficulty will arise only in a small

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class of cases where valuation of the suit is exactly Rs. 20,000. If the valuation of the suit is below Rs. 20,000, the case will not be covered by Art. 133 (1) (a) of the Constitution. If the valuation exceeds Rs. 20,000 Section 3 of the Act 35 of 1968 will have no effect. Secondly even in a suit of valuation of Rs. 20,000 there is no clear conflict with Art. 133 of the Constitution. A party applying for a certificate can obtain it only within the limits prescribed by Art. 133. (Para 13)

(C) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 (1) (a) and (1-A) (as amended by S. 3 of U. P. Civil Laws Amendment Act 35 of 1968) — Nature of — Section is retrospective — Effect — High Court can transfer to District Court appeals filed even before commencement of Act 35 of 1968.

On examining the language of Cl. (a) of Sub-section (1) of Section 21 of Civil Courts Act and Sub-section (1-A) of Section 21, Civil Courts Act (as inserted by the U. P. Civil Laws Amendment Act) it becomes clear that the legislature was anxious to give retrospective effect to the amended Section 21 of the Civil Courts Act. The amendment is effective even as regards a suit instituted before the commencement of the U. P. Civil Laws Amendment Act and hence, the High Court can transfer to District Court an appeal filed in the High Court even before the commencement of the Act 35 of 1968.

(Para 25)

It is true that litigants have got vested right of appeal the moment a suit is instituted. But it is open to the appropriate legislature to take away such vested right. AIR 1966 SC 1953 & AIR 1957 SC 540 & AIR 1970 All 15, Foll.; AIR 1964 SC 489, Disting.

(Para 25)

(D) U. P. Civil Laws Amendment Act (35 of 1968), S. 3 — Raising of appellate jurisdiction of District Courts upto Rupees Twenty thousand — No violation of Art. 14 — Constitution of India, Articles 14, 357 (1) (a) and Bengal, Agra and Assam Civil Courts Act (12 of 1887), Section 21 (1-A).

Whereas the limit of appellate jurisdiction of District Courts is Rs. Five thousand or Rupees Ten Thousand in certain States, merely because the President, by enacting Act 35 of 1968 in exercise of powers, which would ordinarily be exercised by the Legislature of Uttar Pradesh, has raised the limit upto Rupees Twenty thousand in Uttar Pradesh, the Act does not become unconstitutional on ground of discrimination. It is open to a State Legislature to adopt special machinery for special needs of the State. (Para 14)

Cases Referred: Chronological Paras
(1970) AIR 1970 All 15 (V 57) =
1969 All LJ 244, Pratap Narain
Agarwal v. Ragho Prasad 21

(1966) AIR 1966 SC 1953 (V 53) =
1965-3 SCR 708, Sree Bank Ltd.
v. S. D. Roy & Co.

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(1966) AIR 1966 SC 430 (V 53) =
1966-1 SCR 574, Mohd. P. Meera
v. Thirumalaya Gounder

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(1964) AIR 1964 SC 489 (V 51) =
1964-1 SCR 362, Lakshmi Narain
v. First Addl. Dist. Judge
Allahabad

19, 20

(1964) AIR 1964 SC 907 (V 51) =
1964-1 SCR 495, Ittyavira Mathai
v. Varkey Varkey

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(1957) AIR 1957 SC 540 (V 44) =
1957 SCR 488, Garikapati Veeraya
v. Subbiah Chowdhury

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A. Banerji, for Appellants.

OAK, C. J. :— These are two execution First appeals. Initially, they came up on 11-2-1969 for admission before a Division Bench of this Court. It was noticed that in each case valuation of the appeal and valuation of the suit in which the appeal arose was below Rs. 20,000. By Act No. 35 of 1968, which came into force on 2-12-1968, appellate jurisdiction of District Judges has been raised to Rs. 20,000. The question, therefore, arose whether these appeals lie to the High Court or to the District Court. It was urged for the appellants that, in spite of the passing of Act No. 35 of 1968, these appeals lie to the High Court. In support of this contention, two reasons were advanced on behalf of the appellants. Firstly, it was argued that Act No. 35 of 1968 is unconstitutional. Secondly, even if it is assumed that the Act is constitutional, the present appeals are not governed by Act No. 35 of 1968. These questions are of great importance. The two appeals were, therefore, referred to a Full Bench.

2. Facts, which are relevant on the question of jurisdiction, are these. Execution first appeal No. 32 of 1969 arises out of original suit No. 12 of 1957. Valuation of the suit was Rs. 14,000. The suit was decreed on 7-11-1968. The decree-holder applied for execution. Certain property was sold in execution, and was purchased by Devi Prasad, decree-holder. Keshri Nandan, judgment-debtor filed an objection. The objection was allowed by the Additional Civil Judge, Mirzapur on 16-11-1968. Execution first appeal No. 32 of 1969 has been filed by the legal representatives of Devi Prasad. The appeal was filed on 23-1-1969. Valuation of the appeal is Rs. 14,000.

3. Execution first appeal No. 51 of 1969 has arisen out of original suit No. 55 of 1967. Valuation of the suit was Rupees 13,657.14. During execution proceedings an objection was filed by the judgment-debtor. The objection was allowed by the Civil Judge, Aligarh on 3-1-1969. The execution first appeal is directed against that order. This appeal was filed in this Court on 6-2-1969. Valuation of the ap-

deal is Rs. 13,657.14. It will be noticed that in each case valuation of the suit was below Rs. 20,000; and valuation of the appeal is also below Rs. 20,000.

4. The question of jurisdiction has to be discussed with reference to Act No. 35 of 1968, which was enacted by the President of India (hereafter referred to as the President's Act). It will be convenient to trace the history of legislation, which culminated in the passing of the President's Act. The Bengal, Agra and Assam Civil Courts Act, 1887 (hereafter referred to as the Civil Courts Act) deals with jurisdiction of Civil Courts. The Civil Courts Act has been amended from time to time. Section 21 of the Civil Courts Act deals with appellate jurisdiction of the High Court and District Judges. According to S. 21 (1) (a), Civil Courts Act, as it originally stood, the maximum limit of jurisdiction of District Judges was Rupees 5,000. By the U. P. Civil Laws (Reforms and Amendment) Act, 1954 (U. P. Act No. 24 of 1954), the limit of jurisdiction of District Courts was raised from Rupees 5,000 to Rs. 10,000.

5. Part XVIII of the Constitution of India contains emergency provisions. Under Art. 356 of the Constitution, the President may issue a Proclamation in case of failure of constitutional machinery in States. Sub-clause (b) of Cl. (1) of Art. 356 provides for a declaration that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. Art. 357 provides for exercise of legislative powers under Proclamation issued under Art. 356. Article 357 states:

"(1) Where by a Proclamation Issued under Cl. (1) of Art. 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws....."

By virtue of power conferred on it by Art. 357 (1) (a) read with Art. 356 (1) (b), Parliament enacted the U. P. State Legislature (Delegation of Powers) Act, 1968 (Act No. 7 of 1968). Section 3 of Central Act No. 7 of 1968 ran thus:—

"(1) The power of the Legislature of the State of Uttar Pradesh to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President....."

By virtue of the power conferred on him by Section 3 of Central Act No. 7 of 1968, the President enacted Act No. 35 of 1968.

6. The President's Act (No. 35 of 1968) made amendments in a number of statutes. Section 21 of the Civil Courts Act was amended by Section 3 of the President's

Act. Section 3 of the President's Act runs thus:—

"In Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887, as amended in its application to Uttar Pradesh (hereinafter referred to as the Bengal, Agra and Assam Civil Courts Act), for sub-section (1), the following sub-sections shall be substituted, namely:—

'(1) Save as aforesaid, an appeal from a decree or order of a Civil Judge shall lie—

(a) to the District Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made, whether instituted or commenced before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1968, did not exceed twenty thousand rupees, and

(b) to the High Court in any other case. (1-A) An appeal from a decree or order of a Civil Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made exceeded ten thousand rupees but did not exceed twenty thousand rupees instituted in the High Court before the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1968, may be transferred by the High Court for disposal to any District Judge or Additional Judge subordinate to it."

Mr. A. Banerji appearing for the appellants in execution first appeal No. 32 of 1969 challenged the validity of the President's Act on a variety of grounds. It was urged that the Bill never received assent of the President as prescribed by Art. 111 of the Constitution. Article 111 of the Constitution states:—

"When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill or that he withholds assent therefrom....."

Article 111 comes into operation, when a Bill has been passed by Houses of Parliament. On examining the circumstances under which Act No. 35 of 1968 was passed, it will be noticed that in this case no Bill was passed by Houses of Parliament. The Act was passed by the President alone by virtue of power conferred upon him by Art. 357 of the Constitution. Since this is an enactment by the President himself, there was no occasion for presenting a Bill to the President. Article 111 of the Constitution has no application in the present case.

7. The main contention of Mr. A. Banerji as regards constitutionality of the President's Act is that the Act is in conflict with Art. 133 of the Constitution. It was pointed out that in suits of valuation of Rs. 20,000 a litigant has the right to approach the Supreme Court under Article 133 (1) (a) of the Constitution. It was

suggested for the appellants that this constitutional right or vested right has been taken away or abridged by the President's Act. It was pointed out that in a suit of valuation of Rs. 20,000 the first appeal lay formerly to the High Court. Under Section 3 of the President's Act first appeals would now lie to the District Court. The case can of course be taken to the High Court in second appeal. But the High Court would be bound by findings of fact recorded by the District Judge in appeal.

8. Mr. Jagdish Swarup, who appeared an amicus curiae before the Division Bench, put forward his argument thus:

".....intention of the makers of the Constitution is that the High Court should be the first Court of appeal in a case which is valued at rupees twenty thousand. But the substituted provision makes the High Court a second Court of appeal.....There is.....an incongruity. If the District Judge decides a first appeal valued at twenty thousand rupees in accordance with the substituted Section 21, Civil Courts Act, second appeal will lie to the High Court on questions of law only and not on questions of fact. Where the High Court reverses the judgment of the District Judge, an appeal shall lie to the Supreme Court as of right under Art. 133 (1) (a). In that case the Supreme Court will not have the benefit of any findings on questions of fact by the High Court."

9. I am unable to accept this reasoning. There is no indication in Art. 133 of the Constitution that the founding fathers contemplated that in cases of valuation of Rs. 20,000 the High Court would be competent to record its independent findings on questions of fact. Whether a decision of a High Court would be on questions of fact or on questions of law would depend upon the manner in which the matter comes before the High Court. A statutory provision prescribing that in certain matters the High Court can deal with questions of law only would not be in conflict with Art. 133 of the Constitution.

10. In *Ittyavira Mathai v. Varkey*, Varkey, AIR 1964 SC 907 a suit was instituted before the repeal of Travancore High Court Act, (No. 4 of 1099). An appeal was filed after the repeal of that Act by Act No. 5 of 1125. At the time of filing the appeal Section 25 of the former Act providing that a Full Bench would hear appeals from decrees of District Courts in which the amount of the subject-matter exceeded Rs. 5,000 stood repealed. The appellants contended that their appeal could be heard only by a Bench of three Judges as provided by Section 11 (1) of Act No. 4 of 1099. It was held that the contention was untenable. In the first place, the High Court of Travancore was itself abolished, and a new High Court came into being. Secondly, an appeal lay to a High Court, and whether it is to be

heard by one, two or a larger number of Judges is merely a matter of procedure. No party has a vested right to have his appeal heard by a specified number of Judges.

11. In *Mohd. P. Meera v. Thirumalaya*, AIR 1966 SC 430 facts were these. A suit was instituted in February, 1950 in a District Court. The suit was decreed in July, 1958. A number of appeals were filed against that decision. At the time the suit was instituted the Travancore Cochin High Court Act (No. 5 of 1125) was in force. Under Section 20 of that Act read with Section 21 all appeals to the High Court valued at an amount exceeding Rs. 1,000 had to be heard by a Division Bench consisting of two Judges of the High Court. The suit was valued at Rs. 3,000. So, according to the law as it stood on the date of institution of the suit, the appeals ought to have been heard by a Division Bench of two Judges. That Act was repealed by Kerala High Court Act, 1958. The appeals to the High Court were placed for hearing before a single Judge. It was held that the appeals were properly disposed of by a single Judge. Once it is held that no party has a vested right to have his appeal heard by more than one Judge of the Court, no right to prefer an appeal under Art. 133 can be said to vest in him, merely because under the Travancore Cochin Act the appeal could be heard by a Division Bench.

12. Somewhat similar considerations arise with reference to a suit of valuation of Rs. 20,000 instituted in Uttar Pradesh before 2-12-1968. Article 133 does not confer an absolute right of filing an appeal to the Supreme Court. Firstly, even if the valuation of the suit is Rupees 20,000, the condition laid down in the latter part of Cl. (1) of Art. 133 has to be satisfied. Secondly, if the decision is by one Judge of a High Court, Cl. (3) of Article 133 precludes the High Court from granting any certificate.

13. The appellants' contention based on Art. 133 has to be rejected for two reasons. Firstly, the difficulty mentioned by the appellants' counsel will arise only in a small class of cases where valuation of the suit is exactly Rs. 20,000. If the valuation of the suit is below Rs. 20,000, the case will not be covered by Art. 133 (1) (a) of the Constitution. If the valuation exceeds Rs. 20,000, Section 3 of Act No. 35 of 1968 will have no effect. Secondly, even in a suit of valuation of Rs. 20,000 there is no clear conflict with Art. 133 of the Constitution. A party applying for a certificate can obtain a certificate only within the limits prescribed by Art. 133 of the Constitution.

14. It was faintly suggested that the President's Act is discriminatory. It was urged that in certain States the limit of

appellate jurisdiction of District Courts is Rs. 5,000 or Rs. 10,000, whereas the limit in Uttar Pradesh is now Rs. 20,000. Now, Act No. 35 of 1968 is applicable to Uttar Pradesh only. The President has exercised powers, which would ordinarily be exercised by the Legislature of Uttar Pradesh. It is open to a State Legislature to adopt special machinery for special needs of the State. There is no force in the contention based on Art. 14 of the Constitution. The President's Act is constitutional.

15. The next question for consideration is whether the President's Act is applicable to the present appeals. It has been pointed out for the appellants that in both the cases the suits were instituted before the President's Act came into force. It was contended that parties had a vested right of filing appeals to the High Court under Section 21 of the Civil Courts Act; and this right has remained intact in spite of the passing of the President's Act.

16. In *Garikapati Veeraya v. Subbiah Chowdhary*, AIR 1957 SC 540 it was held that the right of appeal is not a mere matter of procedure, but is a substantive right. The institution of a suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right, and such a right to enter the superior Court accrues to the litigant and exists as on and from the date of its commencement, and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

17. In *Sree Bank Ltd. v. S. D. Roy & Co.*, AIR 1966 SC 1953 their Lordships of the Supreme Court quoted with approval on page 1955 the following passage from an English decision:

"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided, without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

18. The learned Chief Standing Counsel did not seriously dispute the position that the appellants had a vested right of appeal, when the two suits were filed.

The question remains whether that vested right has been taken away by the President's Act.

19. In *Lakshmi Narain v. First Addl. Dist. Judge, Allahabad*, AIR 1964 SC 489 the Supreme Court had to decide whether certain appeals pending before Allahabad High Court could be transferred to the District Court. It was held that in the face of Section 3 (1) of the U. P. Civil Laws (Reforms and Amendment) Act (U. P. Act No. 24 of 1954), it is impossible to hold that the District Courts were competent to hear appeals of the valuation of Rs. 10,000 or less in suits decided before the Act came into force, and appeals from which were pending before the High Court.

20. *Lakshmi Narain's case*, AIR 1964 SC 489 was decided by the Supreme Court with reference to U. P. Act No. 24 of 1954. That Act contained a saving clause. The saving clause ran thus:—

".....any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such Court."

There is no corresponding saving clause in the President's Act. *Lakshmi Narain's case*, AIR 1964 SC 489 is, therefore, of little assistance for interpretation of Section 3 of the President's Act.

21. In *Pratap Narain Agarwal v. Raghu Prasad*, 1969 All LJ 244 = (AIR 1970 All 15) it was held by a Full Bench of this Court that where an execution proceeding is commenced after the enforcement of the U. P. Civil Laws (Reforms and Amendment) Act, 1954, for executing a decree passed after the commencement of the said Act in a suit instituted in 1934 and valued at less than Rs. 10,000 but more than Rs. 5,000, an appeal from an order passed in such an execution proceeding lies in the Court of the District Judge and not in the High Court.

22. Reasons for the enactment (Act No. 35 of 1968) were published in the Gazette of India Extraordinary dated 2-12-1968. Clause 2 of the reasons ran thus:

"It is further proposed to amend the Bengal, Agra and Assam Civil Courts Act, 1887, for increasing the pecuniary appellate jurisdiction of the District Judges from Rs. 10,000 to Rs. 20,000 with a view to reducing arrears in the High Court. The fall in the value of the rupee since 1887 (when the limit of Rs. 5,000 was fixed) also justifies further increase in the appellate jurisdiction of District Judges."

23. We have seen that by Section 3 of the President's Act limit of jurisdiction of District Judges has been raised to Rupees 20,000. Clause (a) of sub-section (1) of S. 21 of Civil Courts Act (as now amended) reads thus:—

"to the District Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made, whether instituted or commenced before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1968, did not exceed twenty thousand rupees....."

It is common ground that the words "whether instituted or commenced before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1968", refer to the original suit. The words "before or after" indicate that the Legislature was anxious that the amendment should be effective even in a case where the suit was instituted before the President's Act came into force.

24. Again, sub-section (1-A) of S. 21, Civil Courts Act (inserted by the President's Act) empowers the High Court to transfer to a District Judge an appeal filed in the High Court before the commencement of the President's Act where the valuation of the suit exceeded Rs. 10,000. It would be anomalous if appeals filed in the High Court several years before the commencement of the President's Act can be transferred to District Judges, but District Judges are held incompetent to deal with similar appeals filed after the commencement of the President's Act.

25. It is true that litigants have got vested right of appeal the moment a suit is instituted. But it is open to the appropriate Legislature to take away such vested right. On examining the language of Cl. (a) of sub-section (1) of S. 21, Civil Courts Act and sub-section (1-A) of S. 21, Civil Courts Act (as inserted by the President's Act), it becomes clear that the Legislature was anxious to give retrospective effect to amended Section 21 of the Civil Courts Act. In other words, the amendment will be effective even as regards a suit instituted before 2-12-1968.

26. Mr. A. Banerji pointed out that the period of limitation for filing an appeal to the District Court is shorter than the period of limitation for filing an appeal to the High Court. Under Art. 116 of the Limitation Act, 1963, the period of limitation for filing an appeal to the District Court is only 30 days as against the period of limitation of 90 days for filing an appeal to a High Court. In some cases a difficulty might have arisen where a party was expecting to file an appeal to the High Court, but was unable to file any appeal within time as a result of the passing of the President's Act. But no such difficulty arises in the instant case. In execution first appeal No. 32 of 1968 the impugned order was passed on 16-11-1968. The President's Act came into force on 2-12-1968. There was nothing to prevent the appellants from lodging an appeal before the District Court at any time between 2-12-1968 and 16-12-1968. In execution

first appeal No. 51 of 1969 the impugned order was passed on 3-1-1969—after the commencement of the President's Act. It will be seen that in neither case was the appellant likely to be prejudiced by the mere fact that the period of limitation for filing an appeal has been reduced as a result of the passing of the President's Act.

27. The President's Act (No. 35 of 1968) is constitutional and valid. It will have retrospective effect as regards appeals arising out of suits instituted before 2-12-1968. These appeals, therefore, lie to the District Court, and not to the High Court. In my opinion, in each of the two cases the memorandum of appeal should be returned to the appellant for presentation to proper Court.

28. SATISH CHANDRA J.:— I entirely agree with my Lord the Chief Justice.

29. A. K. KIRTY J.:— I agree and have nothing to add.

Order accordingly.

AIR 1970 ALLAHABAD 206 (V 57 C 31)
FULL BENCH

**K. B. ASTHANA, S. D. KHARE AND
H. SWARUP, JJ.**

Dhapai, Applicant v. Dalla and others,
Opposite Parties.

Civil Revn. No. 1024 of 1965, D/-2-4-1969 against judgment of Temp. Civil and Sessions, J., Basti, D/- 27-4-1965.

(A) Limitation Act (1908), Art. 120 — Applicability — Article is residuary in nature — Applies when no other Article is applicable. AIR 1965 All 590 (FB), Foll. (Para 5)

(B) Limitation Act (1908), Arts. 115, 113 — Plaintiff obtaining theka of Fishery rights in certain tank for complete year — Defendants agreeing to pay half of theka money to plaintiff in return of half of fishery rights in tank — Suit by plaintiff for recovery of amount after defendants working out their theka in respect of their share — Held, suit was for recovery of amount and not for specific performance of contract — Suit was governed by Art. 115 and not Art. 113. (Paras 8, 10)

(C) Limitation Act (1908), Arts. 115, 120 — Word "compensation" in Art. 115 — Includes money due under contract — Suit to recover such amount is governed by Art. 115 and not Art. 120. AIR 1962 All 438, Overruled.— (Contract Act (1872), S. 73) — (Words and Phrases — Word "Compensation").

The word 'compensation' used in Article 115 has the same meaning as it has under Section 73 of Contract Act and it denotes a sum of money payable to a person on account of the loss or damage

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caused to him by the breach of contract.
(Para 18)

Where the sum sought to be recovered was due to the plaintiff under a contract by which the defendant had bound himself to pay certain amount within the specified time and the suit was brought by the plaintiff for recovery of the amount because there had been a breach of the contract on the part of the defendant the Article applicable to the suit would be Art. 115 and not Art. 120. AIR 1962 All 438, Overruled. Case law discussed.

(Paras 22, 23)

Cases Referred: Chronological Paras

- (1965) AIR 1965 All 590 (V 52) =
1965 All LJ 221 (FB), Zila Parishad
v. Sm. Shanti Devi 5
- (1964) AIR 1964 Ori 189 (V 51) =
ILR (1964) Cut 164, Govinda Sabat
v. State of Orissa 21
- (1962) AIR 1962 All 438 (V 49) =
1962 All LJ 55, Town Area Com-
mittee, Rava v. Budh Sen 4, 22
- (1962) AIR 1962 J & K 12 (V 49),
Municipal Council v. Mohd. Shaban 20
- (1937) AIR 1937 Pat 360 (V 24) =
ILR 16 Pat 302, Chairman and
Commrs. Chaibassa Municipality
v. Govind Sao 19
- (1922) AIR 1922 Lah 198 (V 9) =
ILR 2 Lah 376 (FB), Mahomed
Ghasita v. Sirajuddin 18
- (1916) AIR 1916 PC 182 (V 3) =
ILR 44 Cal 759, Tricomdas
Cooverji Bhoja v. Shri Gopinath
Jiu 14, 16
- (1881) ILR 3 All 600 (FB), Hussain
Ali Khan v. Hafiz Ali Khan 14, 15
- Jagdish Misra, for Applicant.

S. D. KHARE, J.:— The question which has been referred for the consideration of this Full Bench is as follows:—

"On the facts of the present case which Article of the Limitation Act applies."

2. The facts of this case are very simple. The suit was for the recovery of Rs. 850 from the defendants. On 12th January, 1959, the plaintiff had taken the theka of fishery rights in a certain tank

for the year 1959, and had paid the full theka money of Rs. 1,700. He did not find it possible to work the entire theka, and, therefore, he took the defendants as his partners. The shares of all the defendants separately defined, aggregated to one-half of the theka and therefore, they were required to pay half the theka money to the plaintiff. According to the allegations made in the plaint the time fixed for payment was upto 31st July, 1959. However, the finding of the learned Munsif was that the defendants had agreed to pay their share of the theka money by 31st January, 1959. The learned Munsif, applying Article 115 of the First Schedule to the Limitation Act held that the suit, which was instituted on 26th July, 1962, was barred by time.

3. The plaintiff preferred an appeal, and the learned Civil Judge, who heard the appeal, allowed it on the finding that Art. 120 of the First Schedule to the Limitation Act applied, and under that Article the limitation was six years. The learned Civil Judge neither confirmed nor disturbed the findings of fact arrived at by the learned Munsif regarding the date on which the money became payable.

4. The revision filed against the appellate Court judgment was heard by a learned single Judge of this Court. It was contended before him that the case of Town Area Committee, Rava v. Budh Sen, AIR 1962 All 438 relied upon by the learned Civil Judge, had not been correctly decided, because neither Art. 115 nor Art. 120 of the First Schedule to the Limitation Act could apply to the facts of the case and the suit should have been governed by Art. 113.

5. Article 120 is a residuary Article, and in case Art. 113 or Art. 115 of the First Schedule to the Indian Limitation Act could apply it is obvious that Art. 120 will not apply (vide Full Bench case of Zila Parishad v. Sm. Shanti Devi, AIR 1965 All 590).

6. Articles 113, 115 and 120 read as follows:

Description of suit.	Period of limitation.	Time from which period begins to run.
113. For specific performance of contract.	Three years	The date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided.	Three years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.

7. It has been contended by the learned counsel for the applicant that Art. 113 of the First Schedule to the Limitation Act should apply, as the claim is nothing but for specific performance of a contract.

8. In our opinion there is no force in this argument. It is true that there was a contract between the parties inasmuch as the plaintiff gave to the defendants one-half of the fishery rights in the tank on the condition that they would pay him half the theka money. The allegations made in the plaint show that the defendants had already worked out the theka in respect of their share of it. All that remained to be done was to pay the proportionate theka money to the plaintiff. In such circumstances no suit for specific performance of contract could be filed; only a suit to enforce the agreement so far as it related to the payment of the proportionate theka money could be, and has been filed.

9. The relevant portion of Section 12 of the Specific Relief Act (Act 1 of 1877) reads as follows:

".....the specific performance of any contract may in the discretion of the Court be enforced—

(a) When the act agreed to be done is in the performance, wholly or partially, of a trust;

(b) When there exists no standard for ascertaining the actual damages caused by the non-performance of the act agreed to be done;

(c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief, or

(d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done....."

10. A suit for the recovery of a specified sum under a contract cannot be said to be a suit of the nature where pecuniary compensation would not afford adequate relief. We are, therefore, of the opinion that the suit out of which this civil revision arises cannot be said to be a suit for the specific performance of a contract and will not be governed by Art. 113 of the First Schedule to the Indian Limitation Act, 1908.

11. The learned counsel for the applicant has further contended that in case it is held that Art. 113 cannot apply, the Article of the First Schedule to the Limitation Act which should have been applied was Art. 53, which reads as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
53. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.

12. Again, looking to the facts of the case we find that the suit is not for the price of goods sold and delivered, but for the recovery of money which was agreed to be paid as proportionate share of the theka money. The plaintiff, by this suit, sought to enforce the agreement. He did not sell or deliver any goods, and, therefore, Art. 53 could not apply.

13. We now proceed to consider why Art. 115 of the First Schedule to the Limitation Act should apply to the facts of the present case. Article 115 applies when there is a breach of contract and the suit is for compensation for the loss suffered by the innocent party. A breach of contract "occurs where a party repudiates or fails to perform one or more of the obligations imposed upon him by the contract": (vide *Cheshire and Fifoot*, p. 484). "If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise—a right of action conferred upon the party injured by the breach": (vide *Anson's Law of Contract*, p. 412). Admittedly in the present case there was a

contract and according to the plaintiff and the findings of the Court a breach of contract had occurred inasmuch as the defendants failed to pay the stipulated amount upon the date fixed under the contract.

14. Difficulty can, however, be caused by the word "compensation" used in Article 115. It can be argued that the words "compensation for breach of contract" point rather to a claim for unliquidated damages than to the payment of a certain sum, and, therefore, where the suit is for the recovery of a specified sum, and not for the determination of unliquidated damages, this Article should not apply. In our opinion this contention would be wholly untenable because it was not accepted by this Court in the Full Bench case of *Husain Ali Khan v. Hafiz Ali Khan*, (1881) ILR 3 All 600 (FB) and by the Privy Council in the case of *Tricomdas Cooverji Bhoja v. Sri Gopinath Jiu*, AIR 1916 PC 182. In the case of *Husain Ali Khan*, (1881) ILR 3 All 600 (FB), Art. 116 of Schedule II of the Limitation Act (Act 15 of 1877) was the subject of interpretation. Articles 115 and 116 of Sch. II of

Act 15 of 1877 have been reproduced verbatim in the Indian Limitation Act, 1908. Article 115 deals with the breach of contracts not in writing and registered while Art. 116 provided for breach of contracts in writing and registered. It is, therefore, obvious that the meaning which has to be given to the words "compensation for breach of contract" occurring in both the Articles will have to be the same.

15. The question for consideration in the case of Husain Ali Khan, (1881) ILR 3 All 600 (FB) (Supra) was whether in a case for the recovery of money on the basis of a bond Art. 59 (providing for three years' limitation) or Art. 116 (providing for six years' limitation) should apply. There is nothing in Art. 59 to indicate that it could not apply to the case of a registered bond. However, if Article 116 could also apply to the case of a registered bond the Courts could say that because the latter Article speaks about registration it should be the appropriate Article to be applied in the case of the breach of the contract contained in a registered money bond. The question whether a registered money bond comes under Art. 116 of Sch. II of Act 15 of 1877 was answered by the Full Bench of this Court in the affirmative.

16. In the case of Tricomdas Cooverji Bhoja, AIR 1916 PC 182 (Supra) the argument that the words "compensation for breach of a contract" point rather to a claim of unliquidated damages than to the claim of payment of certain sum was not accepted because the word "compensation" has been used in the Indian Contract Act in a very wide sense.

The relevant portion of Section 73 of the Indian Contract Act (No. 9 of 1872) reads as follows:—

"73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.....

Illustrations

... ..

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest upto the day of payment."

It is, therefore, clear that the word "compensation" has been used in Section 73 of the Indian Contract Act in a very wide sense and the present case would be covered by it.

17. We see no reason why the words "compensation for breach of contract" as used in Art. 115 should be given a meaning different from the same words as used in Art. 116. Article 115 being a residuary article for suits based on breach of contract, it is obvious that the suit out of which this revision arises would be governed by the said Article.

18. Other High Courts in India have also interpreted the words "compensation for breach of contract" occurring in these Articles in the wider sense of the term "compensation." The Lahore High Court in the Full Bench case of Mahomed Ghasita v. Siraj-ud-din, AIR 1922 Lah 198 (FB) held that the word "compensation" in Art. 115 as well as in Art. 116 has the same meaning as it has in Section 73 of the Indian Contract Act and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract.

19. The Patna High Court in the Division Bench case of Chairman and Commissioners of Chaibassa Municipality v. Govind Sao, AIR 1937 Pat 360 held that Art. 115 and not Art. 120 of the Limitation Act applied to the suit brought by the Municipality for the recovery of the balance of money due under a contract by which the right to collect the tolls in the market was settled.

20. The view of the Patna High Court was followed by the High Court of Jammu and Kashmir in the case of Municipal Council v. Mohd. Shaban, AIR 1962 J & K 12. Article 86 of the Jammu and Kashmir Limitation Act corresponded exact to Article 115 of the First Schedule to the Indian Limitation Act, 1908. It was held by the Jammu and Kashmir High Court in that case that the word "compensation" used in Article 86 of the Jammu and Kashmir Act has wide meaning and it includes a claim for money which has become due to a party after the contract has been breached.

21. The Orissa High Court held in the case of Govinda Sabat v. State of Orissa, AIR 1964 Ori 189 that where the District Board had leased out the right to collect tolls in the market of a village to the defendant and the defendant had failed to pay three-fourths of the money due; which was to be paid in three equal instalments on due dates, the suit by the Government against the contractor for the recovery of the balance due was a suit for compensation for breach of contract, governed by Art. 115.

22. With great respect we are, therefore, of the opinion that the case of AIR

1962 All 438 (Supra) which was for the enforcement of the agreement to pay theka money payable in instalments and to which Art. 120 of the First Schedule to the Indian Limitation Act was applied was not decided correctly.

23. Our answer to the question framed by the Division Bench, therefore, is—

“On the facts of the present case Article 115 of the First Schedule to the Indian Limitation Act, 1908, would apply.”

24. The record of the revision case will now be sent back to the learned single Judge with the above answer to the question referred.

Reference answered
accordingly.

AIR 1970 ALLAHABAD 210 (V. 57 C 32)

M. H. BEG, J.

New Victoria Mills Co. Ltd., Petitioner v. Presiding Officer, Labour Court and others, Opposite Parties.

Civil Misc. Writ No. 1492 of 1966, D/- 12-7-1968.

(A) Criminal P. C. (1898), Ss. 242, 251-A, 254, 537 and 246 — Scope — Slight mistake in stating charge e.g. quoting wrong section — Mistake cannot vitiate trial — Industrial Employment (Standing Orders) Act (1946), Sch., Item 9.

In criminal trials to which the warrant case procedure is applicable under the Code of Criminal Procedure, a slight mistake or defect in a charge could not possibly vitiate the trial. The principle contained in Section 537 of Criminal P. C. would cure such a defect even in the proceedings of a regular criminal Court. In the trial of summons cases by Magistrates all that is required is that facts which constitute an offence should be put to the accused and either admitted or proved. Even if the allegation put to an accused at a summons case trial is that the facts put to the accused constitute an offence under a section which does not apply, the offender can still be punished under the provision properly applicable on facts proved as provided by Section 246.

If the particular facts alleged against an employee constituted misconduct, the mere insertion of a wrong provision while stating the provision of the Standing Order applicable could not possibly vitiate the charge or the trial itself: (1960) 2 Lab LJ 56 (SC) Ref.

Where a wrong provision was introduced by merely inserting an additional letter indicating the particular head of the Standing Order sought to be applied, the error could not be said to be basic.

(Paras 6, 8, 9)

(B) Industrial Employment (Standing Orders) Act (1946), Sch., Item 9 — Misconduct — Meaning of — It is enough if

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alleged misconduct affects competence of employee for particular kind of work given to him — Misconduct by theft of property — Mere absence of evidence as to ownership of property could not make decision of domestic tribunal perverse.

The offence of theft, wherever theft is committed by an employee, shows that the employee is dishonest and his reliability as a worker may be affected for that reason. Such a defect in a sweeper who necessarily has access to residential premises of the employer and opportunities of committing theft is particularly dangerous. Therefore, a workman employed as a sweeper who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may very well be guilty of such misconduct as to merit dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does. The misconduct for which an employee can be dismissed need not necessarily have been committed in the course of his employment. It is enough if it is of such a nature as to affect his suitability for a particular employment. It is then reasonably connected with the question whether the workman can be retained in that employment. AIR 1965 SC 155 & AIR 1960 SC 806, Rel. on.

Held, that the absence of any evidence about the ownership of the property alleged to have been stolen could not make the decision of the domestic tribunal perverse. (Paras 11, 9)

(C) Constitution of India, Arts. 20 (2) and 310-311 — Double jeopardy — Scope of ‘Misconduct’ is wider than that of criminal offence e.g. theft — Mere fact that case was sent to criminal Court could not bar domestic enquiry.

The charge in disciplinary proceedings is not identical with that at the criminal trial. The scope of ‘misconduct’ is wider than that of a criminal offence such as theft. Disciplinary proceedings cannot be equated with a criminal trial. It is doubtful whether the principle of propriety viz., that the disciplinary authority should not enquire into a charge of which the employee is already acquitted by a criminal Court, laid down for disciplinary proceedings against civil servants, would be applicable with equal force to proceedings before a domestic tribunal by an employer against an employee. Where the dismissal on the charge of misconduct took place before the workmen were given the benefit of doubt and acquitted at the criminal trial under the Cri. P. C. the fact that the case was sent to a criminal Court could not bar a domestic inquiry: AIR 1962 Mys 84, Disting. (Para 12)

(D) Civil P. C. (1908), S. 11 — Object — Ground might and ought to have been taken, but not taken in Labour Court or

earlier in High Court — Held, on applying principles of constructive res judicata, that ground could not be taken in High Court.

The principles of res judicata are quite wide and general in application. They are designed to prevent unending litigation and piecemeal re-agitation of the same dispute on different grounds before different or same Courts. Where the ground in question was open to the opposite parties in the Labour Court and on the earlier occasion in the High Court but they did not take it:

Held, that the ground might and ought to have been taken earlier and on applying the principles of res judicata, the party was precluded from raising the ground at that stage. (Paras 12, 13)

(E) Industrial Disputes Act (1947), Section 15 — Powers of Labour Court — It is only when Labour Court comes to conclusion that fair enquiry was not held, that it can enter into merits of case: AIR 1965 SC 155, Rel. on. (Para 15)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 155 (V 52) =
(1964) 7 SCR 555, Tata Oil Mills
Co. Ltd. v. The Workmen 11, 15

(1962) AIR 1962 Mys 84 (V 49),
P. E. Ponnurangam v. Mysore
Govt. Road Transport 12

(1961) AIR 1961 SC 1189 (V 48) =
(1961) 1 Lab LJ 546, Central India
Coal Fields Ltd. v. R. B. Sobnath 3

(1960) AIR 1960 SC 806 (V 47) =
(1960) 3 SCR 227, Delhi Cloth
and General Mills Ltd. v. Kushal
Bhan 11

(1960) 1960-2 Lab LJ 56 = (1960-61)
18 FJR 138 (SC), Doom Dooma
Tea Co. Ltd. v. Assam Chah
Karamchari Sangha 7

T. N. Sapru, for Petitioner; J. N.
Tewari, for Opposite Parties.

ORDER:— The petitioner, the New Victoria Mills Ltd., Kanpur, prays for a writ of certiorari to quash the award of a labour Court dated 16-9-1966 (Annexure 27 to the writ petition) and consequential directions. The impugned award was given after this Court had caused, on 6-8-1963, in Civil Miscellaneous writ petition No. 2720 of 1959 connected with civil miscellaneous writ petition No. 2014/58, a previous award dated 26-6-1958 given by the same Labour Court adjudicating the same question between the same parties. Mr. Justice Dwivedi had ordered in that case:—

"I direct the Labour Court to re-hear the dispute and decide the question of fair hearing in the light of my judgment."

The question for adjudication before the Labour Court was framed as follows:—

"Whether the employers have wrongfully and/or unjustifiably dismissed Sri Jagannath, son of Sri Kunji, T. N. 9, and Sri Chhotey, son of Sri Chhedhi, T. N. 3,

sweepers, with effect from February 7, 1967, if so, to what relief are the workmen concerned entitled?"

The employers had tried and found Jagannath and Chhotey, opposite parties 2 and 3, guilty on a charge framed as follows:

"Aap 6-11-1954 ki rat me ek baje sagar peshi me cement ki bori chorate hue pakade gaye aur usi samay aap police me bhi dediyee gaye. Aap jawab deejiiye ke chori ki case men aap ke khilaf kiyon na karwai kiya jai and thereby committed an act of misconduct under Standing Order 23 (D) (Theft)."

This charge framed in language which was a mixture of Hindi and English, as indicated above, certainly put the matter with which the accused were charged fairly and squarely to them in language which was quite intelligible to them. The questions which were argued before this Court on the previous occasion were whether the charge had been properly framed and whether the accused had been given a fair hearing. Dwivedi, J., who quashed the previous award, had observed in the course of his judgment: "I have already stated that the award is founded on the only ground that the domestic enquiry did not give fair hearing to the employees." After coming to this conclusion, Dwivedi, J. held that the charge contained full details of the misconduct alleged against the workmen. It was also held there that the Labour Court had proceeded on a number of irrelevant considerations in coming to the conclusion that the accused had not got a fair hearing.

2. In the award now assailed by the petitioner, the Labour Court has observed that the case had been sent back by this Court in order to determine whether there was a fair hearing before the domestic tribunal. After making this observation, the Labour Court, for some reason, made no effort whatsoever to decide the question of fair hearing and seems to have forgotten all about it. Perhaps the Labour Court was of opinion that the direction to rehear the dispute meant that the whole case was re-opened and could be decided entirely afresh on whatever grounds the Labour Court thought fit to take. I may observe that even if the Labour Court's assumption that every question was open to it for adjudication afresh could be justified, it should have given a decision on the question this Court had expressly directed it to decide. The order of this Court, as I understand it, was that, although the dispute is to be reheard, a fresh decision must be given, in any case, on the only question which was apparently raised before the Labour Court and before this Court on the previous occasion, that is to say, the question whether a fair hearing was given to the workmen by the domestic tribunal. Unfortunately, the labour Court has not given any reason

for treating the whole case as open to it for re-adjudication without finding that the workmen did not get a fair hearing.

3. The labour Court held that a charge for misconduct brought by an employer against a workman need not be restricted to theft committed on the company's premises or during working hours of the operative. It relied on the decision of the Supreme Court in *Central India Coal Fields v. R. B. Sobnath*, AIR 1961 SC 1189 in order to decide issue No. 2 in favour of the employers. It was held in that case that improper conduct of an employee committed even outside the Company's premises and also outside the working hours could be misconduct under the standing orders. The Labour Court framed and decided an additional issue No. 2 against the workmen: Whether the Standing Orders of the concern were applicable to the workmen who are employed at the bungalows of the officers of the mills? Apparently, the workmen had raised the question whether a theft alleged to have been committed at the bungalows of the officers by employees could constitute misconduct within the meaning of that term as given in the Standing Orders. Although the Labour Court held that the Standing Orders would cover theft by a workman outside the Company's premises, it took the view that, there being no evidence that the cement stolen belonged to the Company, no charge for misconduct could be made out.

4. I have been taken through the written statements filed on behalf of the employers and the workmen before the Labour Court. The fresh question on which the Labour Court seems to have decided the whole case on this occasion, whether the cement alleged to have been stolen was the property of the Company or not, was not raised anywhere by the parties. The Labour Court, however, observed that the Managing Officer's bungalow on which the theft was committed was two and a half miles from the factory and did not belong to the factory. It practically negated the effect of its own finding that the Standing Orders applied to a case of theft outside the premises of the Company by introducing the condition that the theft had to be shown to be of the Company's property. It held that, as no evidence was produced at the domestic inquiry that the cement alleged to have been stolen was the property of the Company or that the theft was in connection with the Company's business, there was no evidence whatsoever to support the charge of misconduct. In other words, the Labour Court construed the charge as confined to theft of the property of the Company or one committed in connection with the Company's business and misconduct as confined to such theft. It held the finding of the domestic tribunal

to be "perverse" on the ground that there was no evidence at all about the ownership of the cement said to have been stolen.

5. It seems very doubtful whether the Labour Court could proceed at a tangent in this fashion at all at any stage to decide a question of fact which was not raised by the workmen either at their trial or before the Labour Court in their written statement. If the ownership of the property by the Company or its connection with the business of the Company was an essential ingredient of the charge of misconduct it might have been possible to say that the evidence in support of the charge could not constitute misconduct at all and that the finding of the domestic tribunal was perverse for that reason. In the case before me, the facts stated in the Hindi language and put to the employees could, if proved, constitute misconduct quite apart from the question whether the property stolen was that of the company or of an officer or director of the Company.

6. It is true that the charge mentions a provision of the Standing Order which only applied to a case of theft of the property of the Company or of property stolen in connection with the business of the Company. But, this provision was mentioned only in the part of the charge relating to the particular provision under which the alleged misconduct was supposed to be an offence. The factual ingredients of the charge of alleged misconduct were already put to the employees in Hindi. The only mistake in the charge was that the letter 'D' had been put within brackets after the words "Standing Order 23."

Even in criminal trials to which the warrant case procedure is applicable under the Code of Criminal Procedure, such a slight mistake or defect in a charge could not possibly vitiate the trial. In the trial of summons cases by Magistrates all that is required is that facts which constitute an offence should be put to the accused and either admitted or proved. Even if the allegation put to an accused at a summons case trial is that the facts put to the accused constitute an offence under a section which does not apply, the offender can still be punished under the provision properly applicable on facts proved as provided by S. 246 of the Code of Criminal Procedure.

7. The Labour Court appeared to have misdirected itself with regard to the meaning of the term "perverse" with reference to a decision. The Labour Court relied on *Doom Dooma Tea Co. Ltd. v. Assam Chah Karamchhari Sangha*, 1960-2 Lab LJ 56 (SC) where the following grounds upon which the result of a trial by a domestic Tribunal could be set aside were given: "(1) when

there has been want of good faith; (2) when there is victimisation or unfair labour practice; (3) when the management has been guilty of a basic error or violation of a principle of natural justice; and (4) when on the materials the finding is completely baseless or perverse." Mr. J. N. Tewari appearing on behalf of the opposite parties tried to justify the view taken by the Labour Court on the ground that the trial of the opposite parties by the domestic Tribunal was vitiated by a "basic error" and also on the ground that, on the materials on the record, the finding was completely baseless or perverse.

8. It has been conceded by Mr. Tewari that Standing Order 23 does not give a definition of misconduct at all but only gives instances of it. The Standing Order 23 begins as follows: "The following acts or omissions will be treated as misconduct." The Standing Order ends after mentioning various kinds of misconduct, with the words: "and any other misconduct." Thus, the language of the Standing Order itself shows that it does not define misconduct or illustrate it exhaustively. If the particular facts alleged, which were put to the employees in the Hindi language, constituted misconduct, the mere insertion of a wrong provision while stating the provision of the Standing Order applicable could not possibly vitiate the charge or the trial itself.

9. In this case, the wrong provision was introduced by merely inserting an additional letter indicating the particular head of the standing order sought to be applied. The principle contained in Section 537 of the Criminal P. C. would cure such a defect even in the proceedings of a regular criminal Court in a warrant case trial where charges have to be formally framed. The error could neither be basic nor could the absence of any evidence about the ownership of the property alleged to have been stolen make the decision of the domestic tribunal perverse. As already indicated, the view of the Labour Court is itself vitiated by basically and patently erroneous views about what constitutes a misconduct and the meaning of a "perverse" decision.

10. I may also mention that the award contains no discussion of any specific findings given by the domestic tribunal whose verdict was characterised as "perverse". On this occasion, the only ground upon which the award is really based is that the absence of evidence relating to the ownership of the cement alleged to have been stolen vitiated the whole trial and made a finding of guilt for the charge of misconduct perverse. This raises the question of the meaning of "misconduct."

11. In *Tata Oil Mills Co. Ltd. v. The Workmen*, AIR 1965 SC 155 it was held that although misconduct to be covered

by the particular Standing Order placed before their Lordships had to be shown to be rationally connected with the employment of the offender the mere fact that alleged disorderly behaviour took place at a distance from the factory where the employees worked could not take the disorderly behaviour outside the purview of misconduct. In *Delhi Cloth and General Mills Ltd. v. Kushal Bhan*, AIR 1960 SC 806, an employee of the Company manufacturing textiles was dismissed by his employers for misconduct on the ground that he had stolen the bicycle of a clerk of the Company. It could be urged there also that the offence was committed outside the course of employment of the Company. The dismissal for misconduct was, however, not considered improper by their Lordships of the Supreme Court. In that case, the dismissal had taken place pending a criminal trial for theft in which the employee was finally acquitted. It was held that the Labour Tribunal could not assail the proceedings on questions of fact even though it is better for an employer to await the decision of a criminal Court in a grave case so that the defence of the employee in the criminal trial may not be prejudiced. But, theft of another employees' property was held to constitute misconduct justifying the dismissal. Presumably the offence of theft, wherever theft is committed by an employee, shows that the employee is dishonest and his reliability as a worker may be affected for that reason. Such a defect in a sweeper, who necessarily has access to residential premises of the employer and opportunities of committing theft, is particularly dangerous. Therefore, a workman employed as a sweeper who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may very well be guilty of such misconduct as to merit dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does. The misconduct for which an employee can be dismissed need not necessarily have been committed in the course of his employment. It is enough if it is of such a nature as to affect his suitability for a particular employment. It is then reasonably connected with the question whether the workmen can be retained in that employment.

12. Another question raised by Mr. J. N. Tewari was that the workmen, opposite parties 2 and 3, having been acquitted by a criminal Court on the charge of theft of cement, could not be tried by the domestic tribunal and dismissed for the same offence. Learned counsel cited *P. E. Ponnurangam v. Mysore Government Road Transport*, AIR 1962 Mys 84 where it was held that, if an offence punishable by a criminal Court is alleged against a civil

servant and is actually sent to a criminal Court which acquits the civil servant, "it would be extremely improper for any disciplinary authority to inquire again into that charge and hold him guilty on the very evidence which was produced before the criminal Court and which it disbelieved." It was also held there: "To permit that would be to countenance an improper circumvention of the order of acquittal made by a competent criminal Court." This was a case of disciplinary proceeding against a civil servant. An inquiry into the same charge was held to be improper although it could not be held to be illegal for contravening the principle contained in Art. 20 of the Constitution. The charge in disciplinary proceedings is not identical with that at the criminal trial. The scope of "misconduct" is wider than that of a criminal offence such as theft. Disciplinary proceedings cannot be equated with a criminal trial. I also doubt whether this principle of propriety, laid down for disciplinary proceedings against civil servants, would be applicable with equal force to proceedings before a domestic tribunal by an employer against an employee. In the present case, the dismissal on the charge of misconduct took place before the workmen were given the benefit of doubt and acquitted at the criminal trial under the Criminal Procedure Code. The mere fact that the case was sent to a criminal Court could not bar a domestic inquiry. The Labour Court was only concerned with the correctness of the proceedings before the domestic tribunal. The main ground, however, on which I overruled this objection raised for the first time before me in this Court is that it was not raised at all either before the Labour Court or before this Court on the earlier occasion as it could have been done.

13. This brings me to the principle which should, in my opinion, be applied in such cases, quite apart from the opportunity which the opposite parties Jagannath and Chhotey had of raising such a plea before the Labour Court, this is the second occasion which the opposite parties have had of raising this question in this Court as an alleged bar to proceedings for dismissal by the employer. On the earlier occasion when this matter was considered by my learned brother Dwivedi, J. in this Court no such objection was taken at all. Even if it is an objection which was open at that stage, so that it might and ought to have been taken then, I would apply the principle of constructive res judicata and hold that the opposite parties cannot invoke this ground in this Court now. The principles of res judicata are quite wide and general in application. They are designed to prevent unending litigation and piecemeal re-agitation of the same dispute on different grounds before

different or same Courts. If the ground was open to the opposite parties on the earlier occasion in this Court and they did not take it, I think they are precluded now from raising it on this occasion before this Court.

14. As already observed, this Court had sent back the dispute for re-hearing and for decision of the question whether Jagannath and Chhotey, opposite parties 2 and 3, had a fair hearing before the domestic tribunal. That question ought to have been decided by the Labour Court in compliance with the orders of this Court, but it did not do so. Taking a charitable view of its error, it may be said that the Labour Court did not deliberately flout the orders of this Court but was under a misapprehension about the duty it was directed to perform.

15. It was only if the trial of Jagannath and Chhotey, opposite parties 2 and 3, was actually vitiated by a violation of principles of natural justice, so that it could be held that they did not get a fair hearing, that the Labour Court could enter into questions of fact itself and then decide them. As their Lordships of the Supreme Court have pointed out, in AIR 1965 SC 155 (Supra), the Industrial Tribunal can discard the findings of the domestic tribunal and give its own findings on questions of fact provided the proceedings before the domestic tribunal are vitiated by a basic error such as violation of principles of natural justice. In the present case, the only alleged basic error which was open for the Labour Court to adjudicate upon was whether the workmen had obtained a fair hearing before the domestic tribunal. It was only after it had arrived at the conclusion that they did not have a fair hearing that the Labour Court could have entered into merits of the case at all. The award of the Labour Court, however, contains no finding which could, so to say, open the door for entering upon a consideration of question of fact.

16. For the reasons given above, I quash the award of the Labour Court dated 16-9-1965 and issue fresh directions as follows: The Labour Court shall decide the specific question whether the opposite parties Jagannath and Chhotey had a fair hearing before the domestic tribunal. Only if it arrives at the conclusion that they did not have a fair hearing will it proceed to re-examine the facts relating to the alleged misconduct for itself. If it is able to and does re-examine the facts, it will bear in mind the meaning of "misconduct" as explained above. If the workmen had a fair hearing, it will not be open for it to consider any other question.

17. There should be no room now for the Labour Court to misapprehend the

orders of this Court. The parties will bear their own costs.

Petition allowed.

AIR 1970 ALLAHABAD 215 (V 57 C 33)

(LUCKNOW BENCH)

LAKSHMI PRASAD J.

B. D. Tandon, Petitioner v. State of U. P. and another, Respondents.

Writ Petn. No. 65 of 1968, D/-3-4-1969.

(A) Motor Vehicles Act (1939), Ss. 47 (3) and 64-A First Proviso — Re-determination of strength of permits — Notice to existing operators not necessary as no rights are affected — Nor does provision for limitation in First Proviso to S. 64-A confer on him right of hearing — (Constitution of India, Art. 226).

There is no provision in the Act requiring a notice to an existing operator at the stage of Section 47 (3). An existing operator, therefore, cannot claim notice or right of hearing at the said stage unless it be possible for him to establish that by a re-determination of strength under Section 47 (3) any of his rights is affected. A person may be aggrieved by an order even without his right being affected. If a permit is granted to a particular person to ply his vehicle on a particular route, it does not confer on him any right to exclude any person who is likewise granted a permit in accordance with the provisions of the Act, though he may feel aggrieved in so far as such other person is likely to divide the income derived so far by him alone. That way he may be said to be aggrieved. But it cannot by any means be said that by such introduction of another person any of his rights has been affected. It does not follow therefrom that any of his rights is affected by such an order so as to entitle him to claim a hearing from the authority concerned before it passes an order under Section 47(3) even if he may invoke revisional jurisdiction under Section 64-A on feeling aggrieved by a re-determination of strength under Section 47(3).

The provision for limitation in the first proviso to Section 64-A for an application in revision to be moved thereunder cannot be construed to confer a right of hearing before the Regional Transport Authority upon the person who may invoke revisional jurisdiction of the State Transport Authority under Section 64-A. AIR 1967 All 573 & AIR 1968 SC 410, Rel. on; AIR 1969 All 269 (FB), Expl.; AIR 1965 SC 458 & AIR 1961 SC 1500, Considered. (Paras 4, 5)

(B) Motor Vehicles Act (1939), Ss. 47 (3) and 43 (1) — Re-determination of strength of permits — Relevant considerations in-

dictated — Authority acting mechanically rather by applying its mind — Resolution held bad.

Considerations indicated in Cls. (a) to (d) to sub-section (1) of S. 43 are relevant for determination of strength on a particular route at a given time. Although these are not the only matters for consideration while determining strength under Section 47 (3), those are certainly some of the relevant considerations which should weigh with the authority while determining strength under Section 47 (3). Where none of these were taken into account while passing the resolution, and on the other hand matters, for the factual existence of which there was presumably no evidence whatsoever and which had hardly anything to do with the determination of strength on a route, were made a basis for the revocation of strength on all the routes in a particular region irrespective of varying factors obtaining on different routes:

Held, that the Regional Transport Authority acted in the matter mechanically rather by applying its mind to relevant factors. Such a resolution was bad in the eye of law and could not be permitted to stand. AIR 1963 All 383 and AIR 1969 SC 493, Rel. on. (Para 6)

(C) Civil P. C. (1908), Preamble — Interpretation of statutes — Mandatory or directory provisions — Use of expression "may" or "shall", not conclusive — Motor Vehicles Act (1939), S. 47 (3) is mandatory — Civ. Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All), Not foll.

In determining whether the provision is mandatory or directory the use of the expression "may" or "shall" is not conclusive. It depends on the intent of the Legislature and the same is to be gathered not only from the language of the particular provision but also from various other relevant factors.

Motor Vehicles Act is a regulatory Act, its main purpose being to regulate vehicular traffic with due regard to relevant factors such as among others those indicated in Section 43 of the Act. Section 47 (3) enjoins a duty on the authority to limit the number of stage carriages for which stage carriage permits may be granted. So long as that has not been done, there arises no occasion for the authority to dispose of applications pending before it for the grant of permits. It thus follows that the direction conferred on the authority under Section 47 (3) is in fact coupled with an obligation. That being so, the provision in Section 47 (3) cannot but be held to be mandatory. 1969 All LJ 453 & 1969-1 SCWR 569 & AIR 1963 SC 1618, Rel. on; Civ. Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All), Not followed. (Para 7)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 493 (V 56) = 1968 SC (Notes) Item 771 (p. 524), K. M. Vishwanatha Pillai v. K. M. Shanmugam Pillai 6
- (1969) Civil Appeal No. 1426 of 1968, D/-17-2-1969 = 1969-1 SCWR 569, Obliswami Naidu v. Additional State Transport Appellate Tribunal Madras 7
- (1969) AIR 1969 All 269 (V 56) = 1968 All LJ 279 (FB), Shiv Charan Dass Sharma v. Regional Transport Authority 4
- (1969) Spl. Appeal No. 1060 of 1967 and Civil Misc. Writ Nos. 3396 of 1967 and 4210, 4211 & 4212 of 1968, D/- 13-3-1969 = 1969 All LJ 453, Mahfooz Jan v. State Transport Tribunal, Lucknow 7
- (1968) AIR 1968 SC 410 (V 55) = (1968) 1 SCR 635, Lakshmi Narain Agarwal v. State Transport Authority, U. P. 4
- (1968) Civil Misc. Writ Nos. 4286 and 4320 of 1967, D/- 23-2-1968 (All), Balkrishna Khattri v. Regional Transport Authority, Lucknow 7
- (1967) AIR 1967 All 573 (V 54) = 1967 All LJ 657, Lakshmi Narain Agarwala v. State Transport Authority, U. P., Lucknow 4
- (1965) AIR 1965 SC 458 (V 52) = (1963) Supp 2 SCR 273, Municipal Board, Pushkar v. State Transport Authority, Rajasthan 5
- (1963) AIR 1963 SC 1618 (V 50) = (1964) 2 SCR 197, State of Uttar Pradesh v. Jogendra Singh 7
- (1963) AIR 1963 All 383 (V 50), Khalil-ul-Rahman Khan v. State Transport Appellate Tribunal 6
- (1961) AIR 1961 SC 1500 (V 48) = (1962) 1 SCR 676, Harish Chandra Raj Singh v. Deputy Land Acquisition Officer 5
- (1960) AIR 1960 Mys 141 (V 47), H. M. Shantanna v. State Transport Authority in Mysore 5

R. N. Trivedi, for Petitioner; Chief Standing Counsel, for Opposite Parties.

ORDER:— All these petitions under Art. 226 of the Constitution can conveniently be disposed of by a single judgment in so far as all of them are directed against the resolution dated 15th December, 1967 passed by the Regional Transport Authority, Lucknow Region, revoking strength on all the routes in Lucknow region with effect from the date of the resolution.

2. All the petitions except that of Writ Petition No. 314 of 1968 are operators on some or the other route in the Lucknow Region. The petitioner of Writ Petition No. 314 of 1968 is an association of operators providing motor passenger transport on the routes in this State. These

petitioners challenge the validity of the aforesaid resolution for a number of reasons to appear from discussion to follow hereafter. The main relief in each case is that the impugned resolution dated 15th December, 1967 passed by the Regional Transport Authority, Lucknow Region, Lucknow be quashed though in some petitions some other reliefs have also been claimed, such as in Petition No. 65 it is further prayed that the Regional Transport Authority impleaded as opposite party No. 2 in it be restrained from issuing permits more than one on Unnao Sandila route to which it relates since applications had been invited for the grant of only one permit on that route and further that the Regional Transport Authority be restrained from issuing any temporary permit on that route during the pendency of the applications for the grant of permanent permit.

3. Regional Transport Authority has contested each of these petitions. A counter affidavit has been filed in Writ Petition No. 195 of 1968 and another in Writ Petition No. 233 of 1968. No counter-affidavit appears to have been filed in any other petition.

4. I have heard learned counsel appearing for these petitioners and learned Standing Counsel appearing for the opposite party at some length. Three points have been urged in support of the petition. The first contention raised on behalf of the petitioners is that it is incumbent on the authority to give notice to the existing operators whenever it chooses to revise under Section 47 (3) of the Motor Vehicles Act strength on any route. A similar contention was raised before a Division Bench of this Court of which I happened to be a member in the case of Lakshmi Narain Agarwala v. State Transport Authority U. P. Lucknow, 1967 All LJ 657 = (AIR 1967 All 573). In that case the contention was rejected. Material observations which occur on page 660 (of All LJ) = (at p. 576 of AIR) may be reproduced below:—

".....We are unable to see as to how a person placed in the position of the petitioner can claim as a matter of right to be heard by a Regional Transport Authority whenever it decides to undertake redetermination of the strength on a route under sub-section (3). Obviously, if no such right has been conferred on him by the statute, he can have none unless it be possible to say that by such determination any of his rights is affected. It may be that if a larger number of operators is put on the route with the result that the profits so far earned by the existing operators become divisible among a larger number of persons and as such, an increase in the strength of the route may, in ultimate analysis, mean some diminution in the income of existing operators.

But that fact by itself does not furnish the existing operators with any cause of action in so far as by getting permits they get no monopoly and, as such, whatever be the ultimate effect of an increase in the strength on the route it does not entitle them to claim notice. It thus follows that neither there is any provision in the Act or in the rules requiring a notice being given to an existing operator in regard to a proposal to increase the number of operators on a route, nor the determination of such a matter affects prejudicially an existing operator so as to entitle him to be heard before the proposed action is taken. In that view of the matter we are unable to countenance the contention of the learned counsel that an existing operator must have his say in the matter of determination of the strength on a route under sub-section (3) of S. 47 before a final decision is taken thereunder."

Learned counsel urges that in view of the Full Bench decision of this Court in the case of Shiv Charan Dass Sharma v. Regional Transport Authority, 1968 All LJ 279 = (AIR 1969 All 269) (FB) and the decision of the Supreme Court in the appeal from the aforesaid case from which I have reproduced above certain material observations, AIR 1968 SC 410, Lakshmi Narain Agarwal v. State Transport Authority, U. P., the view expressed by the Division Bench must be taken to have been impliedly overruled. I am unable to agree with this contention. My attention has been drawn to the following observations in the Full Bench case occurring on page 286 (of All LJ) = (at p. 276 of AIR):

"Once a valid permit is granted to an operator he has a right to carry on his business of plying his vehicle on the route concerned and the right thus given to him is a proprietary right."

I fail to see as to how these observations affect the decision in Lakshmi Narain's case, 1967 All LJ 657 = (AIR 1967 All 573) (Supra). These observations at the most mean that a permit holder has a right to ply his vehicle thereunder in accordance with the terms thereof and has also a right to see that none is inducted on the particular route otherwise than in accordance with the provisions of the Motor Vehicles Act. These observations do not in my opinion go any further. They cannot be construed to confer any right on an existing operator to resist revision of strength by the authority concerned under Section 47 (3) of the Act. With regard to the contention that an existing operator has no right to prefer a revision under Section 64-A of the Motor Vehicles Act from an order revising strength on a route the Supreme Court in Lakshmi Narain's case, AIR 1968 SC 410 observes in paragraph 7 on page 413:—

"We are unable to say that no existing operator can be aggrieved by an order

made under Section 47 (3), increasing or decreasing the number of stage carriages; it would depend on the facts and circumstances of each case."

From these observations it is sought to argue that according to the decision of the Supreme Court an existing operator has a right of revision under Section 64-A from an order determining strength on a route and as such it must be inferred that he is entitled to have his say in the matter even before Regional Transport Authority while a strength on a route is being re-determined. I fail to see as to how that can be inferred from the abovesaid observations of the Supreme Court. In my view these observations are based on the language of Section 64-A pure and simple. In fact Section 64-A is not designed to confer any right on any one but only to define revisional powers of the State Transport Authority though no doubt in its first proviso it says that the State Transport Authority shall not entertain any application from a person aggrieved by an order of Regional Transport Authority unless the same is made within 30 days from the date of the order. It is because of this provision in the proviso that it is possible to infer that a person aggrieved by an order of a Regional Transport Authority can invoke the revisional jurisdiction of the State Transport Authority provided he conforms to the rule of limitation laid down therein. It cannot in my opinion be construed to confer a right of revision on a person who feels aggrieved by an order of a Regional Transport Authority. Moreover, having regard to the language of the first proviso to Section 64-A, at the most it can be said that a person aggrieved by an order of Regional Transport Authority can invoke revisional jurisdiction of the State Transport Authority. That would be so by virtue of a specific provision in the Act. That there is no specific provision requiring notice to an existing operator at the stage of Section 47 (3) is not in controversy. The argument that in view of what is provided in subsequent Cl. (f) to sub-s. (1) of S. 47 (it be taken that an existing operator has a right to make representations at the stage of Section 47 (3)) was repelled by a Division Bench of this Court in Lakshmi Narain's case, 1967 All LJ 657 = (AIR 1967 All 573) and that view has been upheld by the Supreme Court in AIR 1968 SC 410. Material observations occur in paragraph 5 on page 412. These are:—

"The learned counsel contends that the expression "matters mentioned in sub-section (1)" occurring in sub-section (3) refers back not only to matters mentioned in sub-clauses (a) to (f) to sub-section (1) in Section 47 but also the right of representation mentioned in sub-section (1).

We are unable to accept this line of reasoning as being sound."

So it is now settled that there is no provision in the Act requiring a notice to an existing operator at the stage of Section 47 (3). Such being the position, an existing operator cannot claim notice or right of hearing at the said stage unless it be possible for him to establish that by a re-determination of strength under Sec. 47 (3) any of his rights is affected. A person may be aggrieved by an order even without his right being affected. The Motor Vehicles Act is a regulatory Act. Its main purpose is to regulate vehicular traffic with a view to achieve maximum public convenience having due regard to relevant factors, such as the condition of road, demand of vehicular service in a particular region, number and nature of transport services available in a particular region and so on. Thus if a permit is granted under the provisions of the Act to a particular person to ply his vehicle on a particular route, it is obvious that it does not confer on him any right to exclude any person who is likewise granted a permit in accordance with the provisions of the Act. By introduction of another person on the route he may feel aggrieved in so far as such other person is likely to divide the income derived so far by him alone. That way he may be said to be aggrieved. But it cannot by any means be said that by such introduction of another person any of his rights has been affected. So even if an existing operator is a person who can invoke revisional jurisdiction of the State Transport Authority under Section 64-A on feeling aggrieved by an order of a Regional Transport Authority under Section 47 (3), it does not follow therefrom that any of his rights is affected by such an order so as to entitle him to claim a hearing from the authority concerned before it passes an order under Section 47 (3). Here, I may refer to the following observations of the Supreme Court in paragraph 7 of the report in AIR 1968 SC 410:

"The High Court, as stated above, was of the view that at the stage of Section 47 (3) existing operators would not be entitled to be heard by the Regional Transport Authority. But assuming that it is so, this does not affect the right of revision conferred by Section 64-A."

If right of revision under Section 64-A is not dependant on right of hearing by the Regional Transport Authority, I fail to see as to how the right of hearing at the stage of Section 47 (3) follows from the right of revision under S. 64-A.

5. Another argument raised in this connection is with reference to limitation provided in the first proviso to Sec. 64-A. It is said that unless it be conceded that an existing operator is entitled to notice at the stage of Section 47 (3), it would be well nigh impossible for him to conform

to the period of limitation provided in the first proviso to Section 64-A for invoking revisional jurisdiction of the State Transport Authority thereunder. In reply the learned Standing Counsel maintains that the expression "from the date of the order" occurring in the first proviso to Section 64-A is to be construed to mean "from the date of notice of the order." In support of his contention he places reliance on the case of H. M. Shantanna v. State Transport Authority in Mysore, AIR 1960 Mys 141. The headnote of the Mysore case says that under Section 64-A, Motor Vehicles Act limitation for revision against the order of the Regional Transport Authority to the State Transport Authority begins from the date the aggrieved party has notice of the order of the Regional Transport Authority and not from the date the order is made. As against that, the learned counsel for the petitioners places reliance on the following observations in paragraph 24 of the report in the case of Municipal Board, Pushkar v. State Transport Authority, Rajasthan, AIR 1965 SC 458:—

"There is considerable force therefore, in the argument that if the legislature had intended that an application for revision under Section 64-A may be made within 30 days from the date of intimation or knowledge of the order to the aggrieved person it would have said so; and in the absence of any such thing the Court is bound to hold that the application will be barred unless made within 30 days from the date of the order by which the person is aggrieved."

Learned Standing Counsel has then drawn my attention to the case of Harish Chandra Raj Singh v. Deputy Land Acquisition Officer, AIR 1961 SC 1500. In the last mentioned case after discussing some authorities it is observed in paragraph 11 on page 1505:—

"These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Therefore, we are satisfied that the High Court of Allahabad was in error in coming to the conclusion that the application made by the appellant in the present proceedings was barred under the proviso to S. 18 of the Act."

In my view it is unnecessary to come to a definite conclusion as to whether or not the words "from the date of the order" occurring in the first proviso to S. 64-A can be construed in the manner indicated in the Mysore case because in any view of the matter the provision for limitation in

the first proviso to Section 64-A for an application in revision to be moved thereunder cannot, in my opinion, be construed to confer a right of hearing before the Regional Transport Authority upon the person who may invoke revisional jurisdiction of the State Transport Authority under Section 64-A. If, as shown earlier, re-determination of strength under Section 47 (3) does not affect any right of an existing operator, he cannot claim a right of hearing before the Regional Transport Authority even if he may invoke revisional jurisdiction under Sec. 64-A on feeling aggrieved by a re-determination of strength under Section 47 (3). I would accordingly repeal the contention that an existing operator is entitled to notice at the stage of Section 47 (3).

6. The other contention urged on behalf of the petitioners is that a scrutiny of the impugned resolution would itself disclose that the decision incorporated therein proceeds on considerations not germane to determination of strength under Section 47 (3) and further that in fact the Regional Transport Authority did not at all apply its mind to any point material for such determination. This contention of the learned counsel does not appear to be without substance.

In its first sentence the resolution says that the authority had given serious consideration to the matter of grant of permits under the provisions of the Motor Vehicles Act. In the second sentence it says that because of fixation of strength on different routes some such evils have crept in that it is essential to introduce some drastic changes to remove those evils. In the third sentence it says that some persons who obtain permits misuse them. In its fourth sentence it says that we have therefore, come to this conclusion that if the limit of permits on routes is altogether done away with these evils would disappear.

Then comes the decision to the effect that limit of permits on all the routes in Lucknow region be revoked. In my view considerations stated in the resolution as the reason for revoking the limit on the routes in Lucknow region are obviously such as appear to have nothing to do with the matters which are to be taken into consideration for determining strength under Section 47 (3). There is nothing on record to show as to what material was before the Regional Transport Authority to entitle it to say that some of the permit-holders after obtaining permits misuse them. The resolution itself does not indicate as to in what manner the permits were misused. If the idea is that permit-holders or some of them allowed vehicles owned by others to be plied thereunder then obviously that would not be an abuse or misuse of the permit. It is ruled in the case of *Khalil-ul-Rahman Khan v. State*

Transport Appellate Tribunal, AIR 1963 All 383 that there is no provision in the Motor Vehicles Act which obliges a permit-holder to ply only that vehicle thereunder which he himself owns. As pointed out in the case it is open to a permit-holder to ply under his permit a vehicle owned by another and that would obviously be on such terms as may be agreed upon between the two. This decision of this Court is approved by the Supreme Court in the case of *K. M. Vishwanatha Pillai v. K. M. Shanmugam Pillai* decided on 25th November, 1968. Reference may be made to item No. 771 of 1968 SC (Notes), 524 = (AIR 1969 SC 493). Considerations indicated in Cls. (a) to (d) to sub-section (1) of S. 43 of the Act are obviously relevant for determination of strength on a particular route at a given time. Far from suggesting that these are the only matters which are to be taken into consideration while determining strength under Section 47 (3), I venture to say that those are certainly some of the relevant considerations which should weigh with the authority while determining strength under Sec. 47 (3). None of these appears to have been taken into account while passing the impugned resolution. On the other hand, as appears from an analysis of the resolution indicated above matters for the factual existence of which there was presumably no evidence whatsoever before the Regional Transport Authority and which appear to have hardly anything to do with the determination of strength on a route, have been made a basis for the revocation of strength on all the routes in a particular region irrespective of varying factors obtaining on different routes in relation to matters mentioned in Cls. (a) to (d) of sub-section (1) of S. 43. These facts do indicate that the Regional Transport Authority acted in the matter mechanically rather by applying its mind to relevant factors. I have already indicated above that the so-called abuse of permit is, having regard to the provisions of the Motor Vehicles Act, not at all an abuse. The fact, that there existed different strength on each different route in the Lucknow Region prior to the passing of the impugned resolution, is enough to show that varying conditions existed on different routes in the region so as to justify fixation of different strength on these routes. If in such circumstances a uniform decision has been taken to revoke limit on each route in the region and grant permits to all eligible applicants regardless of the number of applications pending in respect of any route, there is no escape from the conclusion that such a resolution is bad in the eye of law and cannot be permitted to stand. I accordingly conclude that the contention raised on behalf of the petitioners must prevail.

7. The last and the third contention raised on behalf of the petitioners is that notwithstanding the use of the word "may" in Section 47 (3), the provision contained therein is mandatory and not directory. It is well settled that the use of the expression "may" or "shall" is not conclusive of the matter. As to whether a particular provision is directory or mandatory notwithstanding the expression such as "may" or "shall" it uses depends on the intent of the Legislature and the same is to be gathered not only from the language of the particular provision but also from various other relevant factors. In this connection reference may be made to the following passage in Crawford on Statutory Construction on page 516:—

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other." That being so, while interpreting Sec. 47 (3), we have not to go only by its language but also by other factors such as indicated in the quotation cited above. There is no denying the fact that the Motor Vehicles Act is a regulatory Act—main purpose being to regulate vehicular traffic with due regard to relevant factors such as among others those indicated in Section 43 of the Act. If no limit were fixed on any route as envisaged by Section 47 (3), it would always be open to a person intending to ply a vehicle on any such route to make an application as envisaged by the earlier part of sub-section (1) of S. 57 and on such application a permit shall have to be issued after observing due formalities unless the Regional Transport Authority comes to a conclusion that the applicant is not a suitable person for the grant of a permit. In that event there would never arise an occasion for judging comparative merits of the various competing applicants for the grant of permits with the result that public interest may thereby suffer. Also in that event there would arise no occasion for the proviso to sub-section (3) of S. 57 coming into play. Failure to fix strength under Section 47 (3) may very well nullify the very purpose of the Act which is primarily to regulate vehicular traffic having regard to relevant considerations.

Considered in this background, the provision contained in Section 47 (3) cannot possibly be held to be directory. I may refer to the following observations made by a Division Bench of this Court in the case of Mahfooz Jan v. State Transport Tribunal, Lucknow, Special Appeal No.

1060 of 1967 connected with Civil Misc. Writs Nos. 3396 of 1967 and 4210, 4211 and 4212 of 1968 decided on 13th March, 1969 (All) a certified copy of which judgment has been placed before me:—

"From this observation it would be seen that the provisions of Section 47 (3) of the Act have been treated by their Lordships of the Supreme Court as the first duty of the Transport Authority in every case i.e. deciding the number of permits that have to be granted and then to take up the question of the fitness of individual applicants."

Reference may also be made to the following observations of the Supreme Court in R. Obliswami Naidu v. Additional State Transport Appellate Tribunal, Madras, Civil Appeal No. 1426 of 1968 decided on 17th February, 1969 (SC):—

"On an examination of the relevant provisions of the Act and the purpose behind Sections 47 and 57, we are convinced that before granting a stage carriage permit two independent steps have to be taken. Firstly, there should be a determination by the R. T. A. under Section 47 (3) of the number of stage carriages for which stage carriage permits may be granted in that route. Thereafter applications for stage carriage permits in the route should be entertained. The R. T. A. is not competent to grant stage carriage permits for more carriages than fixed under Section 47 (3)."

The above-cited observations made by a Division Bench of this Court and by their Lordships of the Supreme Court clearly indicate that Section 47 (3) enjoins a duty on the authority to limit the number of stage carriages for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region, and further that so long as that has not been done, there arises no occasion for the authority to dispose of applications pending before it for the grant of permits. It thus follows that the direction conferred on the authority under Section 47 (3) is in fact coupled with an obligation. That being so, the provision contained in Section 47 (3) cannot but be held to be mandatory. In this connection I may refer to the following observations of the Supreme Court in the case of State of Uttar Pradesh v. Jogendra Singh, AIR 1963 SC 1618 which occur in paragraph 8 of the report:—

"But it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command."

I have thus no hesitation in accepting the contention raised on behalf of the peti-

tioners that Section 47 (3) is mandatory and not directory. Learned Standing Counsel drew my attention to a single Judge decision of this Court in Balkrishna Khattri v. Regional Transport Authority, Lucknow, (Civil Misc. Writ No. 4286 of 1967 connected with Civil Misc. Writ No. 4320 of 1967 decided on 23rd February, 1968 (All)) wherein he has held that provision contained in Section 47 (3) is directory and contended that if I did not agree with the view expressed therein, it was necessary for me to refer the matter to a larger Bench. Normally no doubt I should have in the circumstances referred the matter to a larger Bench but there are two reasons why I do not propose to do so in the instant case. My first reason is that the decision of these writ petitions does not hinge on the controversy under consideration namely whether Section 47 (3) is directory or mandatory because even if it is held to be directory, the petitions would have to be allowed in view of my finding recorded above on the second point urged on behalf of the petitioners. My other reason is that the above-cited observations of a Division Bench of this Court and of the Supreme Court regarding the true import of Section 47 (3) go a long way to shake the authority of the single bench decision referred to by the learned Standing Counsel. For the reasons mentioned above, I am of opinion that the view expressed in the two writ petitions by a learned single Judge referred to by the learned Standing Counsel requires reconsideration but it is not necessary to refer that controversy to a larger Bench in the instant case because the decision of these petitions, in view of my finding on point No. 2, will in any event be in favour of the petitioners.

8. In the end, I allow these petitions and quash the impugned resolution revoking strength on all the routes in Lucknow Region. No other relief appears to be necessary in any of these writ petitions since once the resolution revoking strength on all routes in Lucknow region has been quashed, the Regional Transport Authority has in the matter of grant of permits to proceed on the basis of strength in existence unless the same has been revised according to law. I make no order as to costs.

Petitions allowed.

AIR 1970 ALLAHABAD 221 (V 57 C 34)
MAHESH CHANDRA, J.

Sri Ram Gopal and another, Appellants v. Surendra Kumar and others, Respondents.

Second Appeal No. 1402 of 1961, D/- 2-9-1968 against decree of Civil J., Farrukhabad, D/- 2-12-1960.

EM/GM/C276/69/SNV/D

(A) Registration Act (1908), Ss. 34, Proviso, 35 (3), 72 and 73 — Non-appearance of executant — When may amount to denial of execution. AIR 1918 Cal 225, Dissented from.

Non-appearance of the executant may amount to denial of execution within Section 72 if he wilfully refuses or neglects to appear and admit execution in obedience to a summons for that purpose. It is a question of fact to be determined whether the executant wilfully refused or neglected to appear and admit execution even though he had received summons. It does not follow from his mere non-appearance that he wilfully refuses or neglects to attend and admit execution. AIR 1918 Cal 225, Dissented from. (Case law discussed). (Para 6)

(B) Registration Act (1908), Ss. 72, 73 and 77 — Refusal by Sub-Registrar to register document — Refusal not on ground of denial of execution — Appeal under S. 72 — Maintainability — Order of District Registrar whether passed under S. 72 or S. 73 and amounting to refusal to order registration — Suit against, is maintainable under S. 77.

Where on failure of the executant to appear, the Sub-Registrar merely refuses registration and the refusal is not on the ground of denial of execution, the only course open to get the document registered is to file appeal to the District Registrar. In the absence of any evidence to the effect that the executant wilfully refused or neglected to appear and admit execution, the order of the Sub-Registrar cannot be taken as one of refusal on ground of denial of execution. The District Registrar cannot dismiss the appeal as not maintainable under Section 72 and on his refusal to order registration, suit under Section 77 is maintainable. (1912) 9 All LJ 756, Foll.

(Para 9)

Moreover, even assuming that proper course is to file application under Section 73, and the District Registrar refuses, whether rightly or wrongly, (for want of verification) to treat the appeal as an application, that order amounts to refusal to order registration. A suit under S. 77 is therefore, maintainable. AIR 1931 All 507 (FB) & AIR 1924 Lah 28, Rel. on.

(Para 10)

Cases referred:	Chronological	Paras
(1931) AIR 1931 All 507 (V 18) =		
ILR 54 All 57 (FB), Wali Moham-		
mad Khan v. Ishak Ali Khan		10
(1924) AIR 1924 Lah 28 (V 11) =		
5 Lah LJ 217, Uttam Singh v.		
Mt. Ratan Devi		7, 10
(1923) AIR 1923 Cal 35 (V 10) =		
ILR 50 Cal 180, Eziekel and Co.		
v. Annoda Charan Sen		5
(1918) AIR 1918 Cal 225 (V 5) =		
41 Ind Cas 57, Anila Debi v. Moni		
Mohan Mukherjee		5, 6

- (1912) 9 All LJ 756 = 16 Ind Cas
97, Hayat Ali v. Muhammad
Sadiq 8
(1887) ILR 11 Bom 691, In re, Shaik
Abdul Aziz 5
(1880) ILR 5 Cal 445, Radhakissen
Rowra Dakna v. Chooneeloll Dutt 5, 6

Baleshwari Prasad and R. C. Ghatak, for Appellant; K. C. Saksena, for Respondent.

JUDGMENT:— This second appeal arises out of a suit filed by Ram Gopal and Kishan Chand, appellants Nos. 1 and 2 against Jamuna Prasad, Chanda Devi, Ram Kali, Munni, Mithlesh Kumar, Surendra Kumar, Virendra Kumar and Ramendra Kumar respondents, who are the heirs of Jagannath Prasad. Jamuna Prasad is now dead and is represented by Smt. Bataso, Mahesh Chandra, Dinesh Chandra, Ramesh Chandra, Suresh Chandra, Kumari Asha Devi and Kumari Usha Devi respondents 2/2 to 2/7. Smt. Ram Kali is also now dead and her legal representatives are already on the record.

2. On 11-12-1957, an agreement was executed by the appellants on the one hand and Jamuna Prasad and Jagannath Prasad on the other in respect of a Sahan land in district Farrukhabad. It was presented for registration by Jamuna Prasad on 8-1-1958. Jamuna Prasad and Ram Gopal, appellant No. 1 admitted execution, but Jagannath Prasad did not appear before the Sub-Registrar. Registration was thereupon postponed. On 10-1-1958 registration was refused as to Jagannath Prasad executant by the Sub-Registrar. The appellants then presented an appeal to the District Registrar, but it was dismissed on 10-1-1959. On 9-2-1959, this suit was filed by the appellants for directing the respondents to get the document registered, and in case they failed to do so for directing the Sub-Registrar to register the document. Jagannath Prasad died before the institution of the suit and respondents 1 and 3 to 8 are his legal representatives.

3. In defence, execution of the document by Jagannath Prasad was denied. But it is no longer in dispute that the document was executed by Jagannath Prasad also. Nor is the question of the presentation of the document before the Sub-Registrar within time in dispute now. The only question in controversy now is whether the suit was or was not legally maintainable because an appeal was filed before the District Registrar and no application under Section 73 of the Registration Act was made before him within 30 days of the refusal of the Sub-Registrar. The learned Munsif decreed the suit. The first appellate Court allowed the appeal, reversed the decree of the learned Munsif and dismissed the suit, inasmuch as Jagannath Prasad did not appear before the Sub-

Registrar to admit execution of the document. His non-appearance was treated by the Sub-Registrar as a denial of the execution and the appellant should have consequently filed an application before the District Registrar under Sec. 73 and not an appeal under Section 72 of the Registration Act. Since no application was filed in accordance with the provisions of Section 73 the procedure provided by law was held not to have been complied with, and consequently no suit was held maintainable under Section 77 of the Registration Act.

4. The learned counsel for the appellants contends that in the first place mere non-appearance does not amount to a denial of execution, that the Sub-Registrar himself did not refuse to register on the ground of a denial of execution and that the District Registrar was in error in having treated the order of the Sub-Registrar as a refusal to register on such a ground and should not have dismissed the appeal. The learned counsel for the appellant also contends that even if the order of the sub-registrar be treated as being one on the basis of denial of execution and the appeal could not be treated as an application since it was not verified in accordance with Section 3 of the Registration Act, the order of the District Registrar amounted to a refusal to order registration of a document and that the suit was consequently maintainable under Section 77 of the Registration Act.

5. The document presented for registration was filed in the trial Court, but, after the decree of the trial Court the document was returned to the appellants for presentation to the Sub-Registrar for registration. We considered it necessary to have the document before us and we found that all that the Sub-Registrar said on 8-2-1958 was that the execution had been admitted by Jamuna Prasad and Sri Ram Gopal, who was acting also as the guardian of appellant No. 2. The order dated 8-2-1958 further said that the registration was postponed. This was evidently because Jagannath Prasad had not appeared to admit execution of the document. The order of the Sub-Registrar dated 10-4-1958 is "Registration refused as to Jagannath Prasad executant." It is thus evident that the Sub-Registrar's order does not say that the registration was refused because of the denial of the execution by Jagannath Prasad. The Court below has taken the view that non-appearance of Jagannath Prasad before the Sub-Registrar amounted in law to a denial of execution. For this the Court below has relied on Anila Debi v. Moni Mohan Mukerjee, AIR 1918 Cal 225. In that case it was held that no appeal lies to the Registrar against the refusal of a Sub-Registrar to register a document upon the wilful failure of the executant of the document

to appear before the Sub-Registrar, as such failure amounts to a denial of execution within the meaning of Section 72 of the Registration Act and that in such a case the only procedure open to the party presenting it was to apply to the Registrar under Section 73 to direct registration. In that case Fletcher, J. speaking for the Court observed:—

"The authorities in this Court establish clearly that a wilful failure to appear before a Sub-Registrar amounts to a denial of execution within the meaning of S. 72, Registration Act."

It appears that Calcutta and Bombay High Courts have repeatedly held that wilful refusal or neglect to attend and admit execution is equivalent to denial of execution within the meaning of the Registration Act. This was the view taken in Radhakissen Rowra Dakna v. Chooneelall Dutt, (1880) ILR 5 Cal 445 and in Eziekeil and Co. v. Annoda Charan Sen, ILR 50 Cal 180 = (AIR 1923 Cal 35). In the later case it was observed that the phrase 'denial of execution' is not defined but the neglect of the executant of a deed to appear in the registration office in obedience to a summons for enforcing his attendance, has been treated as equivalent to a denial of execution within the meaning of Section 35. Farran, J. in re Shaik Abdul Aziz, (1887) ILR 11 Bom 691 followed (1880) ILR 5 Cal 445 and held that the non-appearance of A in pursuance of summons was equivalent to a denial of execution within the meaning of Section 35 of the Registration Act, and that under the provisions of that section the Sub-Registrar was bound to 'refuse to register' the deed.

6. It will appear from the study of Ss. 34 and (sic 35) of the Registration Act that Section 34 provides that subject to the provisions contained in this part and in Sections 41, 43, 45, 69, 75, 77, 88 and 89 no document shall be registered under this act unless the persons executing such document, or their representatives, assigns or agents authorised as aforesaid appear before the registering officer within the time allowed for presentation under Sections 23, 24, 25 and 26 of the Act. The proviso will however, show that the section proceeds to take into account non-appearance because of an urgent necessity or unavoidable accident, and in cases where the delay does not exceed four months allows registration on payment of a fine not exceeding ten times of the proper registration fee in addition to the fee if any payable under Section 25. Sub-sections (1) and (3) of Section 35 provide for admission and denial of the documents respectively. Sub-section (1) provides for a case where execution is admitted. Sub-section (3) of Section 35 provides for those cases in which the execution is denied by the person by whom the document pur-

ports to be executed or if such a person appears to the registering officer to be a minor, an idiot, or a lunatic or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution. In such cases the registering officer shall refuse to register the document as to the person so denying, appearing or dead. Sections 72 and 73 do not mention the appearance of a person at all but refer to the denial of execution. The High Courts of Calcutta and Bombay have held that even a non-appearance of the executant may amount to denial of execution if he wilfully refuses or neglects to appear and admit execution in obedience to a summons for that purpose. They proceeded on the basis that it would defeat the object of the Act if it were held that a person executing a document requiring registration and successfully evading or deliberately disobeying the process of the Registration Office can prevent a document being registered at least for eight months. It is true, there may occur cases in which a person may be willing to appear and in fact proceed to the registration office to appear before the Registrar, to admit execution in obedience to summons but meets with an accident on the way and is consequently unable to appear before him. In such a case, it would not be logical to conclude a denial of execution from his mere non-appearance. That was perhaps the reason why in the leading case of (1880) ILR 5 Cal 445 the words wilful refusal or neglect to attend and admit execution (sic) because of an accident or illness cannot be said to have wilfully refused or neglected to attend and admit execution. It is only in the later decision of the Calcutta High Court in AIR 1918 Cal 225 that the High Court went further and held without saying so definitely that failure of a person to appear in spite of summons amounted to denial of execution. With due respect to their Lordship of the Calcutta High Court I, find myself unable to agree to such a proposition. It would be a question of fact to be determined whether the executant wilfully refused or neglected to appear and admit execution even though he had received summons. It does not follow from his mere non-appearance that he wilfully refuses or neglects to attend and admit execution.

7. In Uttam Singh v. Ratan Devi, AIR 1924 Lah 28 Moti Sagar, J. speaking for the Court observed:—

"We do not see any valid reason why a mere failure to appear, which may be due to an accident or to any other legitimate cause should be held to be wilful, and if the registration is refused, the refusal to register be held to be due to a denial of execution." The same reasoning will apply to the case of a neglect to attend and admit execution

by a person who is ill and thus physically incapable of attending the registration office or is prevented by accident from doing so. He cannot be said to have neglected to attend the registration office to admit execution. Learned counsel for the respondent pointed out the appellant's allegation in the plaint that in spite of notice Jagannath Prasad did not appear for the registration of the deed. But there is nothing in the plaint whatsoever to show that the appellants admitted that he wilfully refused or neglected to attend the registration office. Nor does the order of the Sub-Registrar show that there was any such wilful refusal or neglect or that he refused registration because of denial of registration either express or implied.

8. In *Hayat Ali v. Muhammad Sadiq*, (1912) 9 All LJ 756 Griffin, J., referred to the argument in which the learned counsel for the respondent supported the decision of the Court below on the admission that registration of the document was refused on the score of denial of execution. Griffin, J. referred to the order of the Sub-Registrar and observed that it is clear from the order of the Sub-Registrar that the registration was refused not on the ground of denial of registration and held that an appeal consequently lay to the District Registrar and he in his turn having refused to register the document, the plaintiff was under the provisions of Section 77 entitled to file a suit in the Civil Court for the declaration of his right to have the document registered.

9. On reading the order of the Sub-Registrar it is difficult to conceive of what the appellant could do other than what he actually did. The Sub-Registrar merely refused registration as to Jagannath having postponed it once. He did not say that registration was refused on the ground of denial of execution. The obvious course then for the appellant was to go in appeal to the District Registrar. There was no reason for him to infer that Registration had been refused on the ground of denial of execution when the order of the Sub-Registrar itself did not say so. The appeal to the District Registrar cannot be said to have been ill advised, and the District Registrar could not take the order of the Sub-Registrar as one of refusal on grounds of denial of execution when there was nothing on the record to show that there was such a denial or that there was any lawful refusal or neglect to appear and admit execution. No evidence was produced before the Courts below to the effect that there was such a wilful refusal or neglect to appear and admit execution. Nor is there any finding of either of the Courts below to that effect. The District Registrar should not therefore, have held that no appeal lay under Section 72 of the Registration

Act and should not have refused to order its registration.

10. The learned counsel for the appellants further contends that even if it be accepted that the appellant should have filed an application and that the appeal was not properly verified as an application and could not therefore, be treated as an application, even then the District Registrar's order is one refusing to order registration and that, consequently, the suit would lie under Section 77 of the Registration Act. In *Wali Mohammad Khan v. Ishak Ali Khan*, AIR 1931 All 507 (FB) it was held by a Full Bench of this Court that omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction, which can be cured if the plaintiff has acted in good faith. It was further held that the absence of signature or verification or for the matter of that presentation on the part of some of the plaintiffs did not affect jurisdiction of the Court. Obviously, even if the plaint or an application is not properly verified or presented the Court has the jurisdiction to exercise its discretion to allow or to refuse proper verification by the plaintiff or the applicant. If it allows proper verification, it cannot be said to have acted beyond its jurisdiction. It has power to exercise discretion rightly or wrongly in whatever manner. Whether the discretion to refuse to allow verification is exercised rightly or wrongly it is an order refusing to treat the appeal as an application and thus amounting to a refusal to order registration. A suit under Sec. 77 would, therefore, be maintainable. This was also the view taken in AIR 1924 Lah 28. As mentioned already, the execution of the document by the appellants and Jagannath Prasad and Jamuna Prasad is already admitted. The District Registrar was, therefore, in error in (sic. not) ordering the registration of the document.

11. The appeal is, therefore, allowed with costs throughout. The decree of the Court below is set aside and that of the trial Court is restored.

Appeal allowed.

AIR 1970 ALLAHABAD 224 (V 57 C 35)
FULL BENCH

K. B. ASTHANA, GYANENDRA
KUMAR & T. P. MUKERJI, JJ.

Mrs. G. Gordon, Objector, Appellant v.
Administrator General, U. P., Petitioner,
Respondent.

Spl. Appeal No. 413 of 1963, D/-9-4-1969
against judgment of W. Broome, J. in
Testamentary Case No. 21 of 1962, D/-
10-4-1963.

IM/JM/E230/69/YPE/P

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Principle of, is that all provisions must be harmoniously construed so as to achieve object for which law was enacted. (Para 7)

(B) Administrator General's Act (1913), Ss. 14, 2 (2) — Power of High Court to grant letters of administration — Estate of exempted person — Administrator General can be granted letters. AIR 1956 Hyd 149, Dissented from.

When Section 14 says that the Administrator General can apply for letters of administration in any case, whether the deceased was exempted or non-exempted person, even within the period of one month from the death of the deceased, it implies that he has the right to apply also beyond the period of one month from the date of death. In the absence of the next-of-kin, he would be entitled under Section 7 to the grant of letters of administration by the High Court. There is nothing in the phraseology of Section 14 which subjects it to the provisions of Sections 9, 10 or 11 or in any way limits the right of the Administrator General to apply for letters of administration. AIR 1956 Hyd 149, Dissented from; AIR 1943 All 356, Approved. (Paras 6, 7)

(C) Administrator General's Act (1913), Ss. 7, 8, 9, 10, 11 — Sections deal with different situations — There is no connection between Ss. 9, 10, 11 inter se and between these sections and Ss. 7 and 8.

It cannot be said that the provisions of Sections 7 and 8 cannot be read independently of the provisions of Sections 9, 10 and 11 of the Act. The provisions of Section 10 and 11 apply to the estate of an exempted as well as unexempted person. It is only Section 9 which is confined to the administration of the estate of an exempted person only. It is difficult to find any connection between these sections inter se and between these sections and Sections 7 and 8 of the Act. There is nothing in the scheme of all these sections indicating any inter-dependence. They deal with different situations. Under Section 9 a duty is cast upon the Administrator General to act and he must apply for letters of administration of the estate of any person other than an exempted person. He is under no such duty in respect of an estate of an exempted person. It will not mean that in case of the death of an exempted person the Administrator General has no right to administer his estate in case the deceased has not left any next-of-kin. He may apply or he may not apply. In case he applies to the High Court of his State in which the assets of an exempted person are found, the High Court has no option but to grant him letters of administration in preference to all others in the absence of next-of-kin of the deceased. Also if some one else applies

and there is no next-of-kin then the High Court will grant letters of administration to the Administrator General. The provisions of Section 7 and Section 9 of the Act thus are independent of each other and are not inter-linked. AIR 1955 Pat 56, Rel. on. (Paras 8, 9)

Cases Referred: Chronological Paras (1956) AIR 1956 Hyd 149 (V 43) =

ILR (1956) Hyd 184, Administrator General, Hyderabad v. T. Laxmamma 10

(1955) AIR 1955 Pat 56 (V 42) = ILR 33 Pat 974, Gobindlal Nakpho-pha v. Administrator General of Bihar 10

(1943) AIR 1943 All 356 (V 30) = ILR (1943) All 740, Mst. Ram Kali v. Administrator General U. P. 1, 7, 10
Ram Bahadur Verma for Appellant; J. K. Srivastava and Rajendra Bahadur, for Respondent.

ASTHANA, J.:— A Division Bench of the Court while hearing a Special Appeal from an order of a learned single Judge granting Letters of Administration to the Administrator General, in respect of the assets of one Alexander John, doubted the correctness of the decision in the case of Mt. Ram Kali v. Administrator General of U. P., AIR 1943 All 356 and referred the following question to a Full Bench.

"Whether the High Court can grant Letters of Administration to the Administrator General under the Administrator General's Act, 1913 where the deceased was an Indian Christian (and not an Anglo Indian)?"

2. The Administrator General's Act 1913 (Act No. 3 of 1913) (hereinafter called the Act) is a consolidating Act relating to the office and duties of the Administrator General. Sub-section (2) of Section 2 of the Act defines "exempted person" as an Indian Christian, a Hindu, Mohammedan, Parsi or Buddhist or a person exempted under Section 332 of the Indian Succession Act, 1865, from the operation of that Act. Thus clearly an Indian Christian was an exempted person within the meaning of the Act. The term Indian Christian was also defined by sub-section (4) of Section 2 of this Act as meaning a native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian Religion. It may be of some interest to note that the Administrator General's Act of 1913 has now been repealed and replaced by the Administrator General's Act, 1963 (Act No. 45 of 1963). In the new Act there is no provision for "exempted person." Thus the question which has been referred in a way is now of mere academic interest and may not arise in future. At one stage during the course of the argument before us it was suggested at the Bar that the deceased Alexander John, regarding whose estate Letters of Administration were

sought by the Administrator General, was an Angolo-Indian and not an Indian Christian. But that is a question which this Bench will not examine as the case before it is restricted to the question referred.

3. In the Act of 1913 in its Part III, rights, powers, duties and liabilities of the Administrator General are prescribed. Under Section 6 as regards the Administrator General of any State the High Court of that State would be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time-being in force, wheresoever the estate to be administered were situate within such State. It would thus be seen that it is the High Court of a State which was constituted as the forum from which the Administrator General could seek the grant of Letters of Administration under any law for the time being in force to administer an estate situate within the territorial jurisdiction of the said High Court. Section 7 of the Act which has an important bearing on the question referred to us, may now be reproduced. It runs as follows:—

"Any letters of administration, which are granted after the commencement of this Act by the High Court shall be granted to the Administrator General of the State unless they are granted to the next-of-kin of the deceased."

4. Then follows Section 8 which runs thus:—

"The Administrator General of the State shall be deemed by all the Courts in the State to have a right to letters of administration other than letters pendente lite in preference to that of—

- (a) a creditor; or
- (b) a legatee other than a universal legatee; or
- (c) a friend of the deceased."

The scheme is that when there is no next-of-kin of the deceased, the High Court is enjoined to grant letters of administration for the estate of the deceased to no other person except the Administrator General and Section 8 gives him preference over the class of persons mentioned therein.

5. The learned counsel for the objectors contended that though Section 7 limits the power of the High Courts to grant letters of administration only to the Administrator General, when the deceased has not left any next-of-kin, in preference to the class of persons mentioned in Section 8 yet nothing in those sections conferred a right on the Administrator General to apply for letters of administration, which right is secured to the Administrator General under the succeeding Sections 9, 10 and 11. It was submitted that since our Court has no ordinary original civil jurisdiction it is only Section 9 of the Act which will come into play and the provi-

sions of that section excluded out of its purview the administration of the estate of an 'exempted person.' Section 9 runs as follows:—

"If any person, not being an exempted person, has died leaving within any State assets exceeding the value of two thousand rupees,

and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such State for probate of his will, or for letters of administration of his estate,

the Administrator General of the State in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of such person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court, letters of administration of the estate of such person."

The submission was that while Sections 7 and 8 of the Act merely lay rules of preference in cases where the Administrator General had a right to apply for letters of administration but nothing therein confers upon the Administrator General the right to apply for letters of administration and it is only under Section 9 when any person other than an exempted person dies and the conditions therein are fulfilled that a right accrues to the Administrator General to apply to the High Court for letters of Administration. No doubt the argument raised above at first flush appears to have a logical plausibility but on a deeper consideration will be found to be untenable.

6. A perusal of Section 14 of the Act shows that nothing in the said Act shall be deemed to preclude the Administrator General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased. Section 14 in its terms applies to all cases whether the deceased were an exempted person or a non-exempted person. It confers upon the Administrator General a right to apply to the Court for letters of administration. There is nothing in the phraseology of S. 14 which subjects it to the provisions of Sections 9, 10 or 11 or in any way limits the right of the Administrator General to apply for letters of administration.

7. The marginal note appended to Section 7 reads: "Administrator General entitled to letters of administration unless granted to next-of-kin." When S. 14 says that the Administrator General can apply for letters of administration in any case, whether the deceased was exempted or non-exempted person, even within the period of one month from the death of the deceased, it implies that he has the right to apply also beyond the period of one month from the date of death. In the

absence of the next-of-kin, he would be entitled under Section 7 to the grant of letters of administration by the High Court. It is difficult then to agree with the contention that under the scheme of the Act, the Administrator General has no right to apply for the grant of letters of administration in case of the estate of an exempted person. The fundamental principle of interpretation of statutes is that all the provisions must be harmoniously construed so as to achieve the object for which the law was enacted. The main object behind the Administrator General's Act is to provide for a machinery for the proper administration of estates where there is no next-of-kin of any deceased, by a competent person on the directions of the High Court. It is the Administrator General who is constituted as the competent person under the Act. Inasmuch as after the commencement of the Act, while the High Court is enjoined not to grant letters of administration to any person save the Administrator General when there is no next-of-kin of the deceased, then to say that in regard to the estate of a deceased who falls within the category of an exempted person, as defined under the Act, the Administrator General cannot apply, will amount to denying the power to the High Court which is vested in it by law and to read the provisions of Section 7 of the Act as if there was engrafted therein an exception and no letters of Administration could be granted by the High Court to the Administrator General in respect of the estate of an exempted person.

The following observations of Allsop, J. in the case of AIR 1943 All 356 are apt:—

"If the provisions of Section 7 of the Act were not read to mean that letters of administration could be issued to the Administrator General of the Division even in respect of the estate of an exempted person, then for such an estate no letters of administration could be issued except to the next-of-kin and that would have been contrary to the provisions of Section 234 Succession Act. It is true that the provisions of the Succession Act cannot be read to affect the rights of an Administrator General, but I do not think that the Administrator General's Act without specifically saying so would have contemplated a repeal of the provisions of the Succession Act applied to the persons other than the Administrator General of a Division. I have come to the conclusion, therefore, that the Administrator General may apply for letters of administration in respect of any estate and that Section 8, Administrator General's Act must be read so as to mean that he will have a right in preference to creditors of legatees other than universal legatees or friends of the deceased in any Court other than a High Court. In a High Court, of

course, he has preference under Section 7 over everybody except the next-of-kin."

8. We think that the law has been correctly stated by Allsop, J. It is not possible to agree with the contention that the provisions of Sections 7 and 8 cannot be read independently of the provisions of Sections 9, 10 and 11 of the Act. The marginal note of Section 9 clearly indicates its purpose. It describes a situation when the Administrator General must apply to the High Court for administering the estates of persons other than exempted persons, while the purpose of Section 10 is to vest power in the High Court to direct the Administrator General to apply for administration of an estate and the purpose of Section 11 is to direct the Administrator General to collect and hold assets until the right of succession or administration is determined. The provisions of Sections 10 and 11 apply to the estate of an exempted as well as an unexempted person. It is only Section 9 which is confined to the administration of the estate of an exempted person only. It is difficult to find any connection between these sections inter se and between these sections and Sections 7 and 8 of the Act. There is nothing in the scheme of all these sections indicating any interdependence. They deal with different situations.

9. Section 9 deals with a special situation. When any person other than an exempted person dies leaving estate exceeding the value of two thousand rupees and no person to whom any Court would have jurisdiction to commit administration of such estate applies within one month of the death for grant of letters of administration of the estate, then it becomes incumbent on the Administrator General of the State in which such estate is situate to take proceeding to obtain letters of administration within a reasonable time after he had notice of the death of such person and of the deceased having left an estate exceeding the value of two thousand rupees. Thus under that section a duty is cast upon the Administrator General to act and he must apply for letters of administration of the estate of any person other than an exempted person. He is under no such duty in respect of an estate of an exempted person. That is to say, if a person other than an exempted person dies leaving an estate exceeding the value of two thousand rupees and the conditions mentioned in Section 9 exist, then the Administrator General would be failing in his duty and would be guilty of breach of his obligation if he does not take steps for the grant of letters of administration, while when an exempted person dies then in the same situation if the Administrator General does not take any steps, he would not be guilty.

of breach of his duty. The policy of the law seems to be that in case of the death of a person not being an exempted person his estate exceeding rupees two thousand in value must be administered by the Administrator General if no other person entitled to administer the estate applies within one month of the death.

The underlying object is to afford by law greater protection to the estate of a person other than an exempted person by placing upon the Administrator General a heavier and more onerous responsibility for seeking directions from the High Court, with the greatest possible expedition. This is also borne out by the provisions of Section 54 of the Act which requires the District Judge to take charge of property of a deceased person other than an exempted person leaving assets within the limits of his jurisdiction and then report the circumstances without delay to the Administrator General of the State. It will not mean that in case of the death of an exempted person the Administrator General has no right to administer his estate in case the deceased has not left any next-of-kin. He may apply or he may not apply. In case he applies to the High Court of his State in which the assets of an exempted person are found the High Court has no option but to grant him letters of administration in preference to all others in the absence of next-of-kin of the deceased. Also if some one else applies and there is no next-of-kin then the High Court will grant letters of administration to the Administrator General. The provisions of Section 7 and Section 9 of the Act thus are independent of each other and are not interlinked.

10. In the case of Gobindlal Nakphopha v. Administrator General of Bihar, AIR 1955 Pat 56 a Division Bench of the Patna High Court took the view that Sections 6, 7 and 8 cannot be so construed as to refer to unexempted persons and these sections were independent of Sections 9, 10 and 11 of the Act. It seems to have approved the decision of Allsop, J. in AIR 1943 All 356. A reference was made to the Division Bench decision of the Hyderabad High Court in the case of Administrator General, Hyderabad v. T. Laxmamma, AIR 1956 Hyd 149 in support of the proposition that the High Court was not competent to grant letters of administration on the application of Administrator General in the case of an exempted person. With great respect to the learned Judges of the Hyderabad High Court we cannot persuade ourselves to agree with their opinion. We think their reasoning that Section 9 of the Act prevents the Administrator General from applying for letters of administration or probate relating to the estate left by an exempted person is not supported by the phraseology of that section and as mentioned above we have res-

pectfully arrived at a contrary conclusion.

11. The question under reference may also be answered in the affirmative, having regard to the practice and precedent all along followed in this Court, permitting the grant of letters of administration to the Administrator General in respect of the assets or estate of an exempted person, in the absence of any next-of-kin of such a deceased. We have already noticed that under the scheme of the new Act there is no such distinction between the estates of exempted and non-exempted persons.

12. For the reasons given above, we answer the referred question in the affirmative.

13. Let the papers of the case now be placed before the Hon'ble the Chief Justice for sending the case back to the Division Bench for hearing and deciding the Special Appeal.

Reference answered in affirmative.

AIR 1970 ALLAHABAD 228 (V 57 C 36)

R. B. MISRA, J.

Union of India and another, Defendants, Appellants v. Hem Chandra and others Plaintiff, Respondents.

Second Appeal No. 1110 of 1962, D/-28-10-1968 against judgment and decree of Dist. J., Budaun, D/-7-12-1961.

(A) Administration of Evacuee Property Act (1950), Ss. 40, 46 (d) 17, 28 — Administration of Evacuee Property (Central) Rules (1950), R. 22 — Property purchased by P subsequently declared as evacuee property — Application by P under S. 40 for confirmation of sale dismissed — Subsequent application for registration of claim under Rule 22 also dismissed and P directed to go to Civil Court — Suit accordingly filed by P for refund of amount of sale consideration — Held, filing of such suit was clearly contemplated by R. 22 and S. 46 (d) could not stand as bar to the suit — Held, further, that Ss. 17 and 28 of the Act or S. 15 of Central Act 44 of 1954 had also no application to the facts of the case and jurisdiction of Civil Court to entertain suit was not barred in any manner: AIR 1968 SC 169 & AIR 1966 SC 245 & AIR 1965 All 70, Disting. (Paras 6, 8, 9, 10 & 15)

(B) Administration of Evacuee Property Act (1950), S. 4 — Scope — Section only contemplates that Act and rules framed thereunder override other laws. (Para 9)

(C) Limitation Act (1908), Preamble — Interpretation of Articles of Limitation Act — Principles.

BM/CM/A509/69/JHS/D

In interpreting the Articles of the Limitation Act certain well-established principles have to be borne in mind, e.g., (i) an interpretation which is penal should be avoided; (ii) if possible, the interpretation which does not bar the suit should be preferred to the one which bars the suit; (iii) if there is a specific Article applicable to the facts of the case, the residuary Article should not be applied; and (iv) all the columns of the Article should be construed. AIR 1953 Cal 50 & AIR 1957 Mad 431, Foll. (Para 18)

(D) Limitation Act (1908), S. 9 — Once period of limitation starts running, it cannot be arrested. (Para 21)

(E) Administration of Evacuee Property Act (1950), S. 40 — Administration of Evacuee Property (Central) Rules (1950), R. 22 — Limitation Act (1908), Arts. 97, 120 and 116 — Dismissal of application under S. 40 — Revision also dismissed — Subsequent application for registration of claim also dismissed — Applicant directed to go to civil Court — Limitation for suit.

Property purchased by P subsequently declared as evacuee property — Application by P under Section 40 for confirmation of sale dismissed and appeal and revision against order of dismissal also dismissed — Subsequent application under R. 22 for registration of claim also dismissed and P directed to go to Civil Court — Suit accordingly filed by P for refund of sale consideration: Held, if dismissal of application under Section 40 were to be taken as date of failure of consideration, P could not have filed suit soon after that date because of other obligatory intervening proceedings under the Act and Rules, which P did pursue and therefore, it could not be taken as starting point of limitation and Art. 97 did not apply: AIR 1955 Ori 57, Applied. Secondly sale deed being registered document Article most near and most specific could be Article 116 and not Art. 97. AIR 1946 All 159, Foll. Article 97 being thus not applicable one has to fall back upon Art. 116 or residuary Art. 120 and in either case period of limitation being six years, suit was in time: AIR 1922 All 475, Disting.; AIR 1965 Ker 154 & AIR 1967 Delhi 91, Rel. on. (Paras 21 and 22)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 169 (V 55) =
 (1967) 3 SCR 736, Custodian
 Evacuee Property Punjab v.
 Jafra Begam II
 (1967) AIR 1967 Delhi 91 (V 54),
 Ram Lal Pury v. Gokalnagar Sugar
 Mills Co. Ltd. 26
 (1966) AIR 1966 SC 245 (V 53) =
 (1966) 1 SCR 304, Raja Bhanu
 Pratap Singh v. Asstt. Custodian,
 E. P. Bahraich II, II4
 (1965) AIR 1965 All 70 (V 52) =
 1964 All LJ 132, Assistant Custodian

- dian Evacuee Property Meerut v.
 Virendra Kumar 13
 (1965) AIR 1965 Ker 154 (V 52) =
 1964 Ker LT 491, C. Ittycheria
 v. Varughese 25
 (1957) AIR 1957 Mad 431 (V 44) =
 ILR (1957) Mad 747, K. S. Rama
 Swami Ayyar v. S. V. Krishnaier 18, 19
 (1955) AIR 1955 Ori 57 (V 42) =
 ILR (1954) Cut 717, Panchanan
 Das v. Province of Orissa 21
 (1953) AIR 1953 Cal 50 (V 40) =
 56 Cal WN 770, Makhan Lal Rai
 Pramanik v. Pramatha Nath
 Basu 18, 19
 (1946) AIR 1946 All 159 (V 33) =
 ILR (1946) All 72, Babu Ram v.
 Amba Prasad 22
 (1922) AIR 1922 All 475 (V 9),
 Ram Bali Singh v. Shyam Sunder
 Misra 23

N. D. Pant, for Appellants; L. M. Pant,
 for Respondents.

JUDGMENT:— This is a defendant's appeal against the judgment and decree of the District Judge Budaun, dated 7th December, 1961. The facts in this case are not in dispute and, succinctly put, are as follows.

2. Smt. Umatul Khatun, wife of Moulvi Tawakkul Husain, was the owner in possession of house No. N-7/6, situate in Mohalla Sheikh Patti. She sold this house to Hem Chand respondent No. 1 (since dead and represented by his heirs) and Tribhuwan Nath respondent No. 2 for a sum of Rs. 1,500 under a registered sale deed dated 25th May, 1951. The two respondents paid the full price to the vendor. On 11th August, 1951 the Assistant Custodian, Evacuee Property, Budaun declared the house as evacuee property. The respondents, as required by the statute, applied for confirmation of the sale under Section 40 of the Administration of Evacuee Property Act (hereinafter referred to as the Act). Their application was, however, dismissed on 19th October, 1951. The appeal and thereafter revision preferred against the order of dismissal of the application under Section 40 also met the same fate. The respondents, therefore, applied under Rule 22 of the Administration of Evacuee Property (Central) Rules, 1950 (hereinafter referred to as the Rules). That application was also rejected, and the respondents were directed to go to the Civil Court. The respondents accordingly, after giving notice under Section 80, C. P. C., filed the suit giving rise to the present appeal for the recovery of Rs. 2075-42 together with interest and costs from the appellant.

2. The suit was contested by the appellant on the grounds that it was barred by time; that the jurisdiction of Civil Court was barred by Section 46 of Act

31 of 1950; and that the transaction was not a bona fide one.

3. The pleadings of the parties gave rise to a number of issues, the main being the issues of jurisdiction and of limitation. The trial Court came to the conclusion that the Civil Court had jurisdiction to try the suit, and that the suit was well within time. It also accepted the finding of the Custodian that there was no mala fides on the part of the respondents who paid the sale consideration under the bona fide belief that they would get possession of the house and they had no apprehension that such an old lady aged about 92 years would migrate to Pakistan so soon after the sale. The trial Court held that the conditions required under Rule 22 of the Administration of Evacuee Property Rules were fulfilled in the present case. On these findings the trial Court decreed the suit for Rupees 1,501-52 P.

4. The defendants went up in appeal, and the learned Judge confirmed the findings of the trial Court on the issues of jurisdiction and of limitation. The finding about the bona fide transaction on the part of the respondents does not appear to have been challenged before the lower appellate Court, and therefore, the finding of the trial Court on that issue would also be deemed to have been confirmed by the lower appellate Court. The defendants have now come to this Court in Second Appeal.

5. On the findings recorded by the trial Court, as confirmed by the lower appellate Court, only two points survive for decision in this appeal. The question of bona fides on the part of the respondents is now concluded as finding of fact.

6. Sri N. D. Pant, counsel for the appellants, first took up the issue of jurisdiction. He relied upon Section 46 (d) of the Act. Section 46 reads thus:—

"Save as otherwise expressly provided in this Act, no civil or revenue Court shall have jurisdiction:

- (a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or
- (b) (Omitted).
- (c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or
- (d) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

Sri Pant admits that it is only CL (d) of Section 46 which can apply to the facts of the present case. Clauses (a) and (c) have no application. In my opinion, Section 46 (d) of the Act does not stand as a bar to the civil suit. The respondents, as

indicated earlier, first applied for confirmation of the sale under Section 40 of the Act but that was rejected. Thereafter they applied under R. 22 of the Rules. Rule 22 so far as it is pertinent to our case reads—

"22(1). Any person claiming the right to receive any payment from any evacuee or from the property of such evacuee whether in re-payment of any loan advanced or otherwise, may present petition to the Custodian for registration of his claim. Such application shall be signed and verified by the claimant in the same manner as a plaint is required to be signed and verified under the Code of Civil Procedure, 1938.

Explanation:—An application under this sub-rule shall lie in respect of a claim for refund of money paid as consideration for the transfer by an evacuee of any property, where such transfer is not confirmed by the Custodian under Section 40 of the Act.

(2) (a) Where a claim made under sub-rule (1) is supported by—

- (i)
- (ii)
- (iii)
- (iv); or

(b) where such claim is of the nature referred to in the 'Explanation' to sub-rule (1) and the Custodian holds that the transfer of the property in respect of which the claim is made was a bona fide transaction, the Custodian may register the claim or such part thereof as has not been satisfied:

Provided that in the case of a claim of the nature referred to in the Explanation to sub-rule (1), the claim shall be registered only for that amount of money which is proved to have been paid as consideration for the transfer of the property.

(2-A) In any case which does not fall under sub-rule (2), the Custodian shall direct the claimant to establish his claim in a Civil Court.

- (3)
- (4)

Explanation—Nothing in this rule shall debar the Custodian from meeting the day to day expenses incurred in the management of evacuee property and such expenses may be paid without sanction. Sanction of the Central Government or the Custodian-General is also not required to the discharge by the Custodian of the legitimate obligations and liabilities incurred in the ordinary course of business of a trading concern carried on by the Custodian whether such liabilities and obligations are incurred before or after the vesting of the business in the Custodian."

7. The aforesaid rule makes it evident that it was open to the respondents to apply for registration of their claim, and

the respondents did so apply. The Custodian could register the claim on being satisfied with the conditions contemplated by R. 22 (2) (b), viz., that the transfer of the property in respect of which the claim was made was a bona fide transaction. Sub-rule (2-A) of R. 22 provides for a situation where the transaction was not found by the Custodian to be a bona fide one. In such a situation the Custodian 'shall' direct the claimant to establish his claim in a Civil Court, and actually the Custodian did direct the respondents in this case to get their claim established in a Civil Court. It was under these circumstances that the respondents had to file the suit giving rise to this appeal.

8. In view of Rule 22, Section 46 (d) cannot possibly stand as a bar to the suit. Section 46 has to be read along with R. 22. The Rule itself provides that in case a transaction of transfer was not found to be bona fide the Custodian "shall" direct the claimant to get his claim established in a Civil Court. The filing of such a suit for establishing the claim is clearly contemplated by the Rules framed under the Administration of Evacuee Property Act.

9. Sri Pant next referred to Sections 4 and 28 of the Act. Although from the lower Court's judgment it appears that these sections were never referred to before the Court below, I permitted Sri Pant to refer to them as on the admitted facts of the case it was a pure question of law. Section 4 provides:—

"The provisions of this Act and of the rules and order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law."

This section only contemplates that this Act and the rules framed thereunder override other laws. We have, therefore, to examine whether there is any rule or law in the Act or the Rules framed thereunder barring the jurisdiction of the Civil Court. If there is such a provision, the jurisdiction of the Civil Court would be barred; otherwise Civil Court will have jurisdiction. But it has already been noticed earlier that R. 22 instead of creating any bar provides for such a suit.

Section 28 of the Act reads:—

"Save as otherwise expressly provided in this Chapter, every order made by the Custodian-General, District Judge, Custodian, Additional Custodian, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian shall be final and shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceedings."

The suit giving rise to the present appeal has not been filed to challenge any order

of the Custodian: rather the suit has been filed in obedience to the order of the Custodian. Thus, Section 28 of the Act also has no application to the facts of the present case.

10. Next Sri Pant relied upon S. 17 of the Act. It reads thus:—

"17(1): Save as otherwise expressly provided in this Act, no evacuee property which has vested or is deemed to have vested in the Custodian under the provisions of this Act shall, so long as it remains so vested, be liable to be proceeded against in any manner whatsoever in execution of any decree or order of any Court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on such commencement and shall be deemed to be void.

(2) Where, after the 1st day of March, 1947, any evacuee property which has vested in the Custodian or is deemed to have vested in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any Court or other authority, the sale shall be set aside if an application in that behalf has been made by the Custodian to such Court or authority on or before the 17th day of October, 1950."

On the strength of this section, Sri Pant submitted that after the property had vested in the custodian no evacuee property would be liable to be proceeded against in any manner whatsoever. Sub-section (2) of S. 17 even provides for setting aside the sale of evacuee property in execution of such a decree on the application in that behalf being made by the Custodian. To my mind even this section has no application to the facts of the present case. The respondents have filed their suit for the refund of the sale consideration in respect of a bona fide transfer of property which was subsequently declared to be an evacuee property. The respondents are not proceeding against the evacuee property itself. The learned counsel also referred to a similar provision in Section 15 of Act 44 of 1954. But that section also will have no application for the same reasons as indicated above in respect of the application of Section 17 of the Act.

11. Sri Pant strongly relied upon The "Custodian Evacuee Property Punjab v. Jafran Begam", AIR 1968 SC 169. In that case it was held by their Lordships of the Supreme Court that the Act is a complete Code in itself in the matter of dealing with evacuee property. Section 7 of the Act gives the power to Custodian to determine what properties are evacuee properties. The jurisdiction of the Civil

Court or the Revenue Court is barred under Section 46, and no such Court can entertain any suit or adjudicate upon any question whether a particular property or right or interest therein is or is not evacuee property. Where the question whether certain properties are evacuee properties has been decided under Section 7 etc., whether that decision is based on issues of fact or issues of law, the jurisdiction in such a case was held to be clearly barred under Section 46. It would be noticed that the facts in the above case were entirely different from the facts of the present case. In the case in hand there is no question about adjudication of the property as being evacuee or otherwise. The above ruling is, therefore, clearly distinguishable.

12. Sri Pant next relied upon the Explanation added to sub-rule (4) (a) of R. 22 of the Rules and urged that the Custodian has been given the power under the said Rule to discharge the "legitimate obligations and liabilities", and on this basis he argued that the Civil Court had no jurisdiction and it is open to the respondents to approach the Custodian in the matter. In support of his argument he relied upon *Raja Bhanu Pratap Singh v. Assistant Custodian E. P. Bahraich*, AIR 1966 SC 245 at p. 440. It was held in this case that the Custodian can entertain the claim of the holder of a money decree against the evacuee for satisfaction of his dues out of the assets vested in the Custodian by Section 7 of the Act. It was further held that, in view of Section 17 (1) of the Act the evacuee property cannot be attached in execution of any decree or order of any Court or other authority whether the claim is against the evacuee or it is against the Custodian arising out of any act of administration done by him. The facts of this case are also distinguishable from the facts of the present case.

13. Next Sri Pant relied upon "*Assistant Custodian Evacuee Property, Meerut v. Virendra Kumar*", 1964 All LJ 132 = (AIR 1965 All 70). It was held in this case that, in view of the provisions of Section 17 (1) once the property vests in the Custodian it cannot be proceeded against in any manner unless expressly

provided in the Act itself. Section 16, totally bars the jurisdiction of the Civil Court in respect of certain matters set out therein. It was, however, held that the effect to be given to a notice under Section 50 is not to make the Custodian a legal representative of the evacuee in a suit filed against him but only to keep him in the picture. It was also held that the amendment of Section 10 (2) (m) of Act 91 of 1956 had completely taken away the right of the Custodian to make any payment to the decree-holder of an evacuee. The respondents in the present case are not proceeding against the evacuee property. They bona fide claim the refund of the amount paid by them as sale consideration in respect of transfer of property which was later declared to be evacuee property. Section 17, therefore, has no application to the facts of the present case.

14. Sri Pant also relied upon S. 10 (2) (a) of the Act, and relied upon the case of AIR 1966 SC 245 in support of his contention that the respondents should approach the Custodian and put up their claim before him. I am unable to accept this argument. So far as the aforesaid Supreme Court Case is concerned, the facts were entirely different and it has got no application to the facts of the present case. The respondents had already been to the Custodian and the Custodian had directed him to establish their claim in a competent Court of law. There is, therefore, no question of their approaching the Custodian now.

15. For the reasons given above I am of the view that the suit is maintainable in Civil Court and the jurisdiction of the Civil Court is not barred in any manner.

16. The next point involved in the case is the question of limitation. The question to be determined is whether Art. 97 or Art. 120 of the First Schedule of the Limitation Act is applicable to the present case.

17. In order to appreciate the point urged by the counsel for the appellant it would be necessary to read Arts. 97 and 120 of the First Schedule to the Limitation Act, quoted below:—

Description of suit	Period of limitation	Time from which period begins to run
97 : For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure
120 : Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

18. According to Sri Pant, Art. 97 would be applicable to the facts of the present case, while for the respondent it is urged that it is the residuary Art. 120 that would be applicable. In interpreting the Articles of the Limitation Act certain well-established principles have to be borne in mind, e.g., (i) an interpretation which is penal should be avoided; (ii) if possible, the interpretation which does not bar the suit should be preferred to the one which bars the suit; (iii) if there is a specific Article applicable to the facts of the case, the residuary Article should not be applied; and (iv) all the columns of the Article should be construed. That these principles are well established would be evident from the following cases:

(1) "Makhan Lal Rai Pramanik v. Pramath Nath Basu" (AIR 1953 Cal 50);

(2) "K. S. Rama Swami Ayyar v. S. V. Krishnier" AIR 1957 Mad 431.

19. We may examine these cases here. In AIR 1953 Cal 50 it was held that a Court ought not to put such an interpretation upon a statute of limitation by implication and inference as may have a penalizing effect unless the Court is forced to do so by the irresistible force of the language used. The Limitation Act being an Act which takes away or restricts the right to take legal proceedings must, where its language is ambiguous, be construed strictly. To the same effect is the case in AIR 1957 Mad 431.

20. Bearing the aforesaid principles in mind we have now to examine whether Art. 97 would be attracted in the present case.

21. Article 97 can have no application to the facts of the present case for various reasons. In the first place the period of three years is to be calculated from the date of the "failure of the consideration". Now, the question is what will be deemed to be the date of failure. Will it be the

date when the application for confirmation of the sale under Section 40 of the Act was dismissed on 19th October, 1951, or it will be the date when the appeal or revision arising out of that order was finally disposed of, or whether it will be the date when the application under R. 22 of the Rules was rejected on 7-6-1954. If we accept 19th October, 1951, and there is no reason why it should not be accepted, as the date of the failure of the consideration, the limitation would start from that date.

It is well established that once a period of limitation starts running, it cannot be arrested. The law of Administration of Evacuee Property Act—the self-contained Act—provides various remedies open to the purchaser under the Act. It also provides that the transferee has to proceed only in the manner provided by the Act. The respondent in this case did proceed in the manner provided by the Act and the Rules, and he filed the suit only when he had exhausted the remedies open to him under the Act. If the respondent could not file the suit just after the 19th of October, 1951, the date of the failure of the consideration, because of certain other obligatory intervening proceedings, that cannot be taken to be the starting point of limitation. In this, the respondent gets support from the case reported in "AIR 1955 Ori 57 at p. 60" Panchanan Das v. Province of Orissa wherein it was held that the plaintiff could not bring the suit on the date of cause of action as it was barred by the provisions of the Defence of India Rules. Thus, if the three columns of Art. 97 are construed, it is evident that this Article will have no application to the facts of the present case.

22. Another reason for holding that Art. 97 will have no application is that if there is a registered document, it is Article 116 which would be applicable and not Art. 97. Article 116 of the Limitation Act reads:—

Description of suit

Period of limitation

Time from which period begins to run.

116. For compensation for the breach of a contract in writing registered.

Six years

When the period of limitation would begin to run against a suit brought on a similar contract not registered.

Admittedly the sale deed in question was a registered document and, therefore, the Article most near and most specific to the facts of the present case could be Article 116, and not 97 (See "AIR 1946 All 159"). If Art. 97, which was sought to be applied by the counsel for the appellant as the relevant Article to the facts of the present case, has no application, we have

to fall back upon Art. 116 or the residuary Art. 120 of the Limitation Act. Which of the two Articles — Art. 116 or 120 — would apply, should not detain us, as in either case the period of limitation is six years, and if any of these Articles applied to the present suit, it would be well within time.

23. Sri Pant relied upon "Ram Bali

Singh v. Shyam Sunder Misra", AIR 1922 All 475. In this case a pre-emptor impleaded in the suit only one of the four brothers alienees of the property purchased, due to a mistake of fact. The suit was decreed, and the entire consideration was realized by the alienee who was impleaded and he was given formal possession. The pre-emptor's application for mutation was resisted by the three brothers of the alienee, who were not impleaded, and their objection was allowed except for 1/4th share of the alienee who had been impleaded. Thereafter the pre-emptor filed a suit for possession of the property released in favour of the three brothers or, in the alternative, for proportionate refund of the pre-emption money. It was held in these circumstances that the cause of action arose when the pre-emptor's claim for mutation was resisted, i.e., when the consideration failed or when the mistake of fact was discovered.

24. In the present case, however, the respondents were not in a position to bring the suit as there were certain intervening proceedings which they had to take before they could file a suit. The above ruling has, therefore, no application to the facts of the present case, Mr. Pant cited a few other cases also, but they are all clearly distinguishable.

25. Sri Agrawala, appearing for the respondents, relied upon "AIR 1965 Ker 154", C. Ittycheria v. O. Varughese. In this case a mortgagee brought a suit for realization of money advanced by him on a usufructuary mortgage to the mortgagor on the latter's failure to put the former in possession of the property. It was held that money was advanced not on the strength of a mere promise to execute a mortgage deed but as consideration for a mortgage with possession; payment of money could not be considered as "money paid upon an existing consideration" and the plea that the suit was barred by Art. 97 of the Limitation Act was unsustainable.

26. He also relied upon "AIR 1967 Delhi 91" Ram Lal Puri v. Gokalnagar Sugar Mills Co. Ltd. It was a suit for recovery of earnest money paid under a sale which did not materialize. It was held that the suit would be governed by Art. 120 of the Limitation Act and not by Arts. 62, 97 or 115. In my opinion the cases cited by Mr. Agarwala are more near the case than the cases relied upon by Sri Pant.

27. For the reasons given above I am unable to hold that the view taken by the Courts below was erroneous in any manner on both the points, and so the appeal must be dismissed.

28. The appeal is accordingly dismissed with costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 234 (V 57 C 37)

JAGDISH SAHAI AND
GANGESHWAR PRASAD, JJ.

Mela Ram, Appellant v. Senior Superintendent of Post Offices Agra Division and another, Respondents.

Special Appeal No. 510 of 1966, D/-13-8-1968, against order of R. S. Pathak, J., in C. M. W. P. No. 2641 of 1960, D/- 29-4-1966.

(A) Pensions Act (1871), S. 4 — Suit relating to amount of gratuity — Held, gratuity must be taken to be commuted pension and as such capital sum — Suit in Civil Court maintainable.

A pension is a periodical payment. Once a part of it is converted into a capital sum it ceases to partake the nature of pension. (Para 9)

Held, that in view of the rules operating in the case a gratuity must be taken to be commuted pension, which is a capital sum and not an accumulated pension and therefore, the jurisdiction of a Civil Court to entertain a suit relating to the amount of gratuity was not barred by Section 4. (Paras 8 and 11)

(B) Pensions Act (1871), S. 4 — Expression 'grant of money' does not include gratuity or a capital sum converted out of a part of pension. (Para 10)

(C) Civil P. C. (1908), Section 9 — Ouster of jurisdiction of Civil Court cannot be assumed — Ouster must be result of express provision in legislative enactment or one of necessary implication therefrom. (Para 6)

Cases Referred: Chronological Paras (1935) AIR 1935 Mad 249 (V 22) =

ILR 58 Mad 469, Municipal Council, Salem v. Gururajah Rao 8
S. C. Khare, for Appellant; H. N. Seth, for Respondents.

JAGDISH SAHAI J.:— This special appeal by Sri Mela Ram is directed against the judgment of Hon. R. S. Pathak, J. dated 24-9-1966 dismissing writ petition No. 2641 of 1960 filed by the petitioner appellant. The petitioner was in service of Government of India in the Postal Department in the capacity of Supervisor.

2. He retired from service, After calculation it was proposed to give him a certain amount of money as gratuity in addition to his monthly pension.

3. But before the pension or gratuity was paid and a pension slip or gratuity slip issued to the petitioner a sum of Rs. 3,300 was sought to be deducted from the amount of gratuity proposed to be paid to him.

4. He filed writ petition No. 2641 of 1960 challenging the order of the Director, Postal Staff, Lucknow directing the deduction of Rs. 3,300 from his gratuity.

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5. The writ petition came up for final hearing before Hon. R. S. Pathak, J. who took the view that considering the nature of allegations made, he considered that the proper remedy of the petitioner was to file a regular suit in a competent Civil Court and that in the circumstances of the case the relief by means of a writ petition was not the proper remedy. Dissatisfied with the judgment of Hon. R. S. Pathak, J. dated 29-4-1966, the petitioner-appellant has filed the instant special appeal. It was strenuously contended by Mr. S. C. Khare, the learned counsel for the petitioner-appellant, that the learned single Judge failed to notice that under Section 4 of the Pensions Act the suit was barred. Section 4 of the Pensions Act reads:

"Except as hereinafter provided no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the Government or by any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted."

6. It is well settled that the ouster of the jurisdiction of a Civil Court cannot be assumed. The ouster must be the result of an express provision in a legislative enactment or one of necessary implication therefrom.

7. Clearly if the amount of gratuity can be treated to be pension it would be doubtful whether the Civil Court would have jurisdiction to try any suit relating to it.

8. If on the contrary a gratuity cannot be comprehended in the expression "pension" as occurring in Section 4 of the Pensions Act then that provision would be no bar to the maintainability of a suit in a Civil Court relating to any deduction made from the amount of gratuity. In view of the rules operating in the present case a gratuity must be taken to be commuted pension. It is well settled that commuted pension is a capital sum and not an accumulated pension. See Municipal Council Salem v. B. Gururajah Rao, AIR 1935 Mad 249.

9. A pension is a periodical payment. Once a part of it is converted into a capital sum it ceases to partake the nature of pension.

10. Mr. Khare contended that assuming that gratuity is not pension it is still a "grant of money" within the meaning of Section 4 of Pensions Act. In our opinion the expression "grant of money" does not include gratuity or a capital sum converted out of a part of pension.

11. We are, therefore, of the opinion that a Civil Court would be competent to go into this matter.

12. In the present case the deduction has been made from the gratuity calculated as payable to the petitioner appellant on the ground that he was guilty of negligence of duty. Whether or not he was so guilty is a question of fact which can only be decided on the basis of evidence and not in the summary proceeding of a writ petition. Consequently we agree with R. S. Pathak, J. that in the circumstances of the present case the proper remedy of the petitioner is to file a regular suit.

13. We express no opinion on the merits of the controversy between the parties. The appeal is dismissed. There is, however, no order as to costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 235 (V 57 C 38)

K. N. SRIVASTAVA, J.

State of U. P., Appellant v. Janni and Others, Respondents.

Govt. Appeal No. 1850 of 1965, D/-31-7-1968 against order of Magistrate 1st Class, Roorkee, D/-14-6-1965.

Criminal P. C. (1898), S. 345 — In compromise cases acquittal is recorded simply because parties come to terms — It does not mean that no offence was committed at all — Prosecution for offences under Ss. 323 and 147, Penal Code — Composition of offence under S. 323 — Held, offence under S. 147 is against public tranquillity and is of aggravated nature and hence it is taken out of orbit of Section 345, Criminal P. C. — The offences under Ss. 147 and 323 are different and composition of offence under S. 323 did not amount to acquittal of accused of offence under S. 147: 1964 (2) Cri LJ 111 (Pat), Dissent. Case law discussed.

(Paras 11, 12, 13 and 15)

Cases Referred: Chronological Paras
(1964) 1964-2 Cri LJ 111 (Pat),

Ramphal Gope v. State of Bihar 2, 4, 14

(1950) AIR 1950 Lah 121 (V 37) =
51 Cri LJ 1016, The Crown v.
Muhammad Hussain 5

(1948) AIR 1948 Pat 58 (V 35) =
48 Cri LJ 433, Gurunarayan Das
v. Emperor 8

(1941) AIR 1941 Sind 186 (V 28) =
43 Cri LJ 68, Agha Nazarali Sultan
Muhammad v. Emperor 9

(1925) AIR 1925 Lah 464 (V 12) =
26 Cri LJ 686, Emperor v.
Jarnali 7

(1923) AIR 1923 Mad 592 (V 10) =
ILR 46 Mad 257 = 24 Cri LJ
114, Venkanna v. Crown 6, 9

L. Chandra and Navin Chandra, for Appellant, G. A., for Respondents.

BM/DM/A636/69/JHS/D

JUDGMENT: This is an appeal against the judgment and order passed by Sri M. P. Gautam, Magistrate 1st Class, Roorkee, district Sahranpur, acquitting the respondents of an offence under Sec. 323, I. P. C., and Section 147, I. P. C.

2. The facts, giving rise to this appeal, are as follows. Faiyaz, who is a resident of Sikandarpur, thana Fatehpur, district Sahranpur, lodged a report on 30-1-1965 at thana Fatehpur. The allegations in the report were that a nephew of Faiyaz was taking his bullocks to the field for ploughing. The bullocks damaged the crop of Aziz. The nephew of Faiyaz immediately drove out the bullocks, but he was slapped by Aziz and Idris. Faiyaz asked them not to slap his nephew. Thereupon all the respondents assaulted him with lathis. Faiyaz received a number of injuries. His injuries were medically examined. The Police registered a case against the respondents under Section 147, I. P. C. and Section 323, I. P. C. After completing the investigation, the police challaned the respondents. The parties filed a compromise for compounding the offence under Section 323, I. P. C. This compromise was verified and the trial Court passed the following order:—

"The injured complainant Faiyaz has compounded the offence under Sec. 323, I. P. C. against the accused. The accused are thus acquitted under S. 323, I. P. C.

The charge-sheet under Section 147, I. P. C. has also been submitted. The learned counsel for the accused has relied upon the ruling cited in 1964-2 Cri LJ 111 (Pat). The charge under Sec. 147, I. P. C. also jolts when the offence has been compromised by the injured." Against this order, the State has come up in appeal to this Court.

3. It was argued by the learned Assistant Government Advocate that the offence under Section 147, I. P. C. was not compoundable and the trial Court was wrong in acquitting the respondents of the offence under Section 147, I. P. C.

4. In *Ramphal Gope v. State of Bihar*, 1964-2 Cri LJ 111 (Pat), cited by the trial Court, Syed Naqui Imam, J., has held as below:—

"Mr. Baidya Nath Prasad appearing for the petitioners has pointed out to me that before the trial Court there was a compromise petition filed, and the trial Court accepted the compromise so far as the offence under Section 323, Indian Penal Code was concerned. Now that the appellate Court has found these petitioners guilty under Sections 323 and 323/34, Indian Penal Code, in my opinion, the compromise petition can be put into effect even at this stage. There now remains the charge under Section 147, Indian Penal Code which is not compoundable. But it appears that the common object of the

unlawful assembly was to assault. If the charges under Sections 323 and 323/34, Indian Penal Code fail on account of the compromise, it is obvious that the charge under Section 147, Indian Penal Code must also fail because the common object was to assault."

This question was the subject matter of decision in a number of cases. It appears that all the case law on the question was not placed before the Court in *Ramphal Gope's case*, 1964-2 Cri LJ 111 (Pat).

5. In *The Crown v. Muhammad Hussain*, 51 Cri LJ 1016 = (AIR 1950 Lah 121) *Muhammad Jan and Kayani, JJ.* reviewed the entire law on the subject, and held that if the offence under Sec. 324, I. P. C. was compounded by the permission of the Court, then the charge under S. 148, I. P. C. should not fail on that account and should be tried.

6. The earliest case on this subject is *Venkanna v. Crown*, AIR 1923 Mad 592. In this case, the accused were convicted under Sections 143 and 447, I. P. C. The offence under Section 447, I. P. C. was compounded. It was argued that the common object of the accused was to commit an offence of trespass and, as the offence of trespass was compounded, therefore, the offence under Section 143, I. P. C., ipso facto, failed. This argument was not accepted; and Wallace, J. observed as below:—

"I am not prepared to support this contention. The essence of the offence under Section 143, Indian Penal Code, is the combination of several persons united in the purpose of committing a criminal offence and that purpose constitutes in itself an offence distinct from the Criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium is sufficient compensation for what he has suffered."

7. Another case is *Emperor v. Jarnali*, AIR 1925 Lah 464. In this case, the accused were charged under Section 325, I. P. C. and Section 147, I. P. C. The offence under Section 325, I. P. C. was compounded with the permission of the Court. It was argued that after the acquittal of the accused of the offence under Sec. 325, I. P. C., the offence under Section 147, I. P. C. ipso facto, fell down. Campbell, J. observed as below:—

"If he had referred to Section 403 (2), Criminal P. C. and had read with it Section 235 (1) and illustration (g) to that sub-section he would have perceived that an acquittal under Section 345, Criminal P. C., of an offence under Section 325, Indian Penal Code, constitutes no bar to the subsequent trial of the accused on a charge under S. 147, Indian Penal Code."

8. In *Gurunarayan Das v. Emperor*, AIR 1948 Pat 58 the accused were charged under Sections 325, 147 and 148, I. P. C. This was a Division Bench case. Meredith, J. observed as below:—

"The convictions are not only for grievous hurt and hurt, but also under the rioting Sections 147 & 148. The offences under these Sections are not compoundable at all, and, therefore, no acquittal could be allowed by reason of the compromise in regard to the convictions under these sections."

Bennett, J. agreed with the judgment of Meredith J.

9. In *Agha Nazarali Sultan Muhammad v. Emperor*, AIR 1941 Sind 186 which is a Division Bench case, the aforesaid Madras case was followed, and it was held that if the other offence was compounded it did not mean that the offence under Section 143, I. P. C. also fell down. In this connection, the following observations can be read with advantage:—

"On the point that an offence under Section 143, Penal Code, is a distinct and separate offence in itself distinct and separate from an offence which it is the common object of the unlawful assembly to commit, and that although this latter offence may by itself be compounded, the offence under Section 143, Penal Code, is not compoundable as a matter of public Policy, being an offence in the fullest sense of the term against the public peace, there is the authority of the Madras High Court, ILR 46 Mad 257 = (AIR 1923 Mad 592)."

10. Unlawful assembly has been defined in Section 141, I. P. C. The first, second, fourth and fifth Clauses of this section would not apply to the facts of the present case. The third Clause, which would be applicable, reads as below:—

"To commit any mischief of criminal trespass or other offences; or"

It was argued that if an unlawful assembly was formed with an object to commit a crime and if it was found that the accused were not guilty of any offence, then the accused should not be held to have formed the unlawful assembly.

11. Section 146, I. P. C. defines rioting and Section 147, I. P. C., lays down the punishment for rioting by an unlawful assembly. The respondents formed an unlawful assembly and, in prosecution of the common object of the assembly, they committed violence and assaulted the complainant. The offence under Section 147, I. P. C. is certainly separate from the offence under S. 323, I. P. C.

12. The compromise would result in the acquittal of the respondents of the offence under Section 323, I. P. C. This would not go to show that they did not

commit any violence as members of the unlawful assembly. In compromise case, the acquittal is recorded simply because the parties come to terms. It does not mean that no offence was committed at all. On the other hand, admitting that the offence had been committed, the parties patch up their differences and enter into compromise, so that they may live peacefully in future. It is for this end that composition of certain kind of offence is permitted.

13. It should be noticed here that certain offences, which are of aggravated nature, are excluded from the operation of Section 345, Criminal P. C., under which the offences are compounded. The offence under Section 147, I. P. C., is against the public tranquillity and is of an aggravated nature. It has, therefore, been taken out from the orbit of S. 345, Cr. P. C.

14. In my opinion, the acquittal of the respondents of the offence under Section 323, I. P. C., on the basis of the compromise would not go to show that the offence under Section 323, I. P. C., was not at all committed. It will, therefore, be not correct to say that the respondents did not commit violence in prosecution of the common object of the unlawful assembly. I have already observed in the earlier part of this judgment that in *Ramphal Gope's case*, 1964-2 Cri LJ 111 (Pat) the earlier decisions were not taken into consideration, and the judgment in that case was based on the finding that if the charges under Sections 323 and 323/34, Indian Penal Code, failed on account of the compromise, the charge under Section 147, Indian Penal Code, also failed because the common object was to assault. With due deference, I do not subscribe to this view.

15. After taking into consideration the rulings of different High Courts on this question, I am of the opinion that the composition of the offence under Section 323, I. P. C., did not amount to acquittal of the respondents of the offence under Section 147, I. P. C. The learned trial Court has, therefore, wrongly acquitted the respondents of the offence under Section 147, I. P. C.

ORDER

The appeal is allowed. The order of the trial Court acquitting the respondents of the charge under Section 147, I. P. C., is set aside. Let the record of the case be sent down to the trial Court for trying the respondents for the offence under Section 147, I. P. C. in accordance with law.

Appeal allowed.

AIR 1970 ALLAHABAD 238 (V 57 C 39)

B. DAYAL AND B. N. LOKUR, JJ.

Smt. Prema Devi, Petitioner v. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp and others, Opposite Parties.

Civil Misc. Writ Nos. 1319 and 1235 of 1963, D/- 13-12-1968.

Hindu Succession Act (1956), Ss. 14 (1) and (2), and 4 (2) — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act — Hindu widow in possession of land in lieu of maintenance — Acquisition of Asami right under S. 11 of the U. P. Act — Asami right, held, did not become bhumidari right by reason of Section 14 of the Hindu Succession Act. AIR 1964 All 165 & AIR 1968 All 419, Overruled—(Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), Ss. 10 and 11) — (Constitution of India, Sch. 7, List III, Entries 5, 6 and 7; List II, Entry 18).

The provisions of Hindu Succession Act cannot be made applicable to agricultural plots governed by the U. P. Zamindari Abolition and Land Reforms Act.

(Paras 5 and 6)

Entry No. 5 in the third List of the Seventh Schedule to the Constitution which is the only entry under which the Central Legislature has the jurisdiction to pass the Hindu Succession Act relates only to personal law. Laws passed under this entry do not apply to any particular property. They merely determine the personal law. Entry 18 in List II in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State legislation. It is noteworthy that in List 3 wherever the entry relates to rights in land; agricultural land has expressly been excluded. While legislating in respect of such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. (Para 5)

Under the U. P. Zamindari Abolition and Land Reforms Act which regulated the tenancy rights, there is no provision applying personal law to any of the tenures created under that Act and thus the provisions of the Hindu Succession Act are wholly inapplicable to the land tenures under the U. P. Zamindari Abolition and Land Reforms Act. (Para 6)

A compromise decree allowed a Hindu widow to remain in possession of certain agricultural plots which were khudkasht

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and sir lands of the erstwhile holder. By reason of the provision under Section 11 of the U. P. Zamindari Abolition and Land Reforms Act, she became an Asami in respect of such lands. Subsequently when the Hindu Succession Act came into force, she claimed to have become a bhumidar of the land in view of Section 14 of the Hindu Succession Act:

Held, that she did not become a bhumidar, that is, a tenure holder of another class. Tenancy rights were created by the U. P. Zamindari Abolition and Land Reforms Act and Bhumidhari rights could only be acquired under the provisions thereof. The nature of her tenure would not change on the passing of the Hindu Succession Act. (Para 7)

Even if Section 14 of the Hindu Succession Act were to be held applicable, since she held the land in lieu of maintenance under the compromise decree, her limited rights could not be held affected. The case attracted sub-section (2) of S. 14 of the Hindu Succession Act. The scheme of Section 14 apparently is to give full proprietary rights to Hindu woman where she got only limited rights by virtue of ancient Hindu Law but not to affect those which were received under an instrument by deliberate human volition. AIR 1941 FC 72 & AIR 1960 Punj 666 (FB), Rel. on; AIR 1964 All 165 & AIR 1968 All 419, Overruled. (Para 8)

Cases Referred: Chronological Paras
(1968) AIR 1968 All 419 (V 55),

Ram Jag Mistri v. Dy. Director of Consolidation II, 9

(1964) AIR 1964 All 165 (V 51),

Shakuntala Devi v. Beni Madhav 9

(1960) AIR 1960 Punj 666 (V 47) =

ILR (1960) 2 Punj 665 (FB), Amar Singh v. Baldeo Singh 9

(1941) AIR 1941 FC 72 (V 28) =

ILR (1941) Kar FC 148, Hindu Women's Rights to Property Act, 1937, In the matter of 5

Sant Prakash, for Petitioner; Lalji Sahai Srivastava and Bharati Ji Agarwal, for Opposite Parties.

B. DAYAL J.:— These two connected writ petitions filed by Smt. Prema Devi, widow of Asharfilal and Satnarainlal and other have been referred to a Division Bench by a learned single judge of this Court as he found it difficult to agree with a single judge decision of this Court Ram Jag Mistri v. Deputy Director of Consolidation, AIR 1968 All 419. The facts of the case are now no more in dispute and have been decided finally by the Joint Director of Consolidation who, in turn, accepted the findings of fact arrived at in Second Appeal by the Deputy Director of Consolidation. The relevant facts may now be stated in short.

One Udaibhan Lal had four sons, namely, Bhagwati Pd., Satya Narain Lal, Daya Shankar Lal and Asharfi Lal. Smt. Prema

Devi is the widow of Asharfi Lal, who died in the lifetime of his father Udaibhan Lal. When Udaibhan Lal died in 1936, he left zamindari as also sir and khudkasht plots. On the death of Udaibhan Lal, the names of his three surviving sons, namely, Bhagwati Pd., Satya Narain Lal and Daya Shankar Lal, along with Smt. Premā Devi, widow of Asharfi Lal, were mutated in all the three villages, Dasuati, Sonahti and Pathkauli in the district of Basti where the properties of Udaibhan Lal were situated. In 1947, two of the brothers, Satya Narain Lal and Bhagwati Pd., filed suit No. 460 of 1947 in the Court of the Munsif, Basti, for a declaration that Smt. Premā Devi had no share in the property and to this suit Smt. Premā Devi was made a defendant. The third brother Daya Shankar Lal was also joined as a pro forma defendant. This suit was ultimately compromised in 1949 and a compromise decree was passed. Under the compromise decree, Smt. Premā Devi was given certain plots for her maintenance in two villages, Dasuati and Pathkauli. It is now a finding of fact that after the compromise in 1949 Smt. Premā Devi is in possession of those plots. She is not in possession of any other property of the family. In this compromise it was expressly provided that she would be entitled to maintain herself out of the income of those plots but she would have no right to alienate the same. It was further provided in the compromise that on her death, the property would revert back to the collaterals of her husband.

But it appears that even after the compromise the revenue records were not corrected and her name continued as a co-proprietor in all the three villages. On the coming into force of the U. P. Zamindari Abolition and Land Reforms Act, her name was recorded as co-bhumidhar of all the khudkasht and sir plots in all the three villages. In 1960, consolidation proceedings started and objections were filed by Satya Narain Lal and others that the name of Smt. Premā Devi was wrongly entered in the revenue records which should be expunged and that she was only entitled to be entered as an Asami over the plots given to her in the compromise in the two villages. Since the property lay in three villages and related to three different khatas, three separate objections were filed. The Consolidation Officer allowed all the three objections and expunged the name of Smt. Premā Devi as co-bhumidhar from all the three khatas. He directed her name to be recorded as an Asami over the plots given to her under the compromise.

On appeal, the decision was reversed and her name was maintained as co-bhumidhar in all the khatas. On second appeal, the Deputy Director of Consolidation restored the order of the Consolidation Officer and

allowed the appeal. On revision by Smt. Premā Devi, the learned Joint Director of Consolidation maintained the order expunging her name as co-bhumidhar in the two villages in which she had been given plots under the compromise and retaining her name as a Asami over the plots given to her. But he allowed the revision regarding village Sonahti where she had not been given any plot. The Joint Director of Consolidation thought that her rights in that village were not governed by the compromise. He directed that her name as co-bhumidhar would continue on the plots relating to that village Sonahti.

Against this decision of the Joint Director of Consolidation, one writ petition has been filed by Smt. Premā Devi challenging the correctness of the order in two revisions which were dismissed by the Joint Director of Consolidation and the other cross-writ petition has been filed by Satya Narain Lal and others challenging the correctness of the decision relating to village Sonahti. Both the writ petitions depending on common facts and law have been heard together and are being disposed of by this common judgment.

2. To deal first with writ petition 1235 of 1963 filed by Satya Narain Lal and others, it is sufficient to say that the learned Joint Director of Consolidation completely misdirected himself. The compromise in the civil suit related to all the three villages and in lieu of her right of maintenance, Smt. Premā Devi was allowed only the plots in two villages. It was not necessary to allow plots in all the three villages to satisfy her need of maintenance. The position on the date of the suit was that Smt. Premā Devi's husband having died in the lifetime of his father who also died in 1936 Smt. Premā Devi got no interest in the joint family property. She was merely entitled to maintenance. Under this compromise she got certain plots of land in her possession for her maintenance. After the compromise she was merely in possession of those plots and her rights were confined to those plots only. Even if her name continued, as joint owner by mistake, it could not give her any rights. The Deputy Director of Consolidation in Second Appeal was, therefore, right in expunging her name from all the three villages.

3. In the petition filed by Smt. Premā Devi, the contention of the learned counsel for the petitioner is that upon the passing of the Hindu Succession Act, 1956, Smt. Premā Devi acquired full Bhumidhari rights and in any case the compromise decree not having been enforced, had no effect upon her rights which she acquired by her name having been retained on the whole of the property as co-bhumidhar.

4. The second point is concluded by a finding of fact that she was never in pos-

session of the property other than the plots given to her by the compromise decree and the mere fact of her name remaining on the revenue records cannot be sufficient to invest her with any right. Under the Hindu Law, as it stood in 1936, she got no right in the joint family property and the only property which came into her possession by means of the compromise decree were the specific plots. Even under Section 14 (1) of the Hindu Succession Act, 1956, she could improve her position only in respect of property in her possession. So its effect has to be considered only regarding the specific plots given to her in lieu of maintenance.

5. In the first place, we are of the opinion that the Hindu Succession Act, 1956, cannot be made applicable to agricultural plots. This Act was passed by the Central Legislature in 1956 and the only entry under which the Central Legislature had the jurisdiction to pass the Act, was entry No. 5 in the third list of the Seventh Schedule of the Constitution. This entry is as follows:— "5-Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." This entry obviously relates only to personal law and laws passed under this entry do not apply to any particular property. They merely determine the personal law. In List 2, Entry No. 18 is as follows:— "Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." This entry which is in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State legislation.

It is noteworthy that in List 3 wherever the entry relates to rights in land 'agricultural land' has expressly been excluded. For instance, Entry No. 6 is as follows: "Transfer of property other than agricultural land....." Entry No. 7 is as follows:—

"Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." No such exception was expressly mentioned in Entry No. 5 because this entry related only to matters personal to individuals and did not relate directly to any property. While legislating in respect of

such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. Gwyer, C. J. while delivering the judgment of the Federal Court in a reference on the Hindu Women's Rights to Property Act, 1937, reported in AIR 1941 FC 72 observed as follows:—

"There is a general presumption that a Legislature does not intend to exceed its jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property", the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other....."

The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindus. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies. Sub-section (2) of S. 4 of the Act runs as follows:—

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

This sub-section indicates that it was only for the removal of doubts that this provision had been included. Even without this provision, the Act could not apply to agricultural holdings.

6. Under the U. P. Zamindari Abolition and Land Reforms Act which regulated the tenancy rights, there is no provision applying personal law to any of the tenures created under that Act and thus the provisions of the Hindu Succession Act are wholly inapplicable to the land tenures under the U. P. Zamindari Abolition and Land Reforms Act.

7. Even if it be assumed that this Act is applicable to agricultural land and land tenures, it is obvious that Section 14, which is the only provision possibly applicable to the facts of the case and which is relied upon by the learned counsel on behalf of Smt. Prema Devi, cannot give her any benefit. On the coming into force of the U. P. Zamindari Abolition and Land Reforms Act, in 1952 Smt. Prema Devi who was in possession of certain plots of land in lieu of her maintenance, became an Asami under Section 11 of that Act. Section 11 of the U. P. Zamindari Abolition and Land Reforms Act is as follows:

"Notwithstanding anything contained in Section 10 where sir or khudkasht has been allotted by the sir or khudkasht holder thereof to a person in lieu of maintenance allowance, such person shall

be deemed to be the asami thereof entitled to hold the land for so long as the right of maintenance allowance subsists."

Under this section Smt. Prema Devi became an Asami of the plots which had been given to her in lieu of maintenance. Subsequently, when the Hindu Succession Act, 1956, came into force, she could not become a bhumidhar, that is a tenureholder of another class. Tenancy rights were created by the U. P. Zamindari Abolition and Land Reforms Act and bhumidhari rights could only be acquired under the provisions thereof. It is not possible to hold that the nature of her tenure would change on the passing of the Hindu Succession Act.

Section 14, sub-section (1) of the Hindu Succession Act runs as follows:—

"Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

The property which Smt. Prema Devi held was Asami right in specific plots. She could not possibly become the full owner of those plots, for proprietary rights vest in the Government.

8. Apart from this, sub-section (2) of S. 14 of the said Act is as follows:—

"Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

In the present case, Smt. Prema Devi got these plots of land by means of a compromise decree. Before that decree, she had no right in the land. It was for the first time under the decree which was passed on a compromise that she got these plots of land. Even if it be assumed that this decree itself is a record of the compromise between the parties, then she got the property under the compromise which was filed in Court in writing and on the basis of which the decree was passed. This compromise is also covered by the words "other instrument" in sub-section (2) of S. 14 and, therefore, the rights given to Smt. Prema Devi under the compromise decree cannot be enlarged under sub-section (1) of the section. The scheme of Section 14 apparently is to give full proprietary rights to Hindu women where she got only limited rights by virtue of ancient Hindu Law but not to affect those which were received under an instrument by deliberate human volition. In the present case, limited rights were acquired under a compromise decree and are thus not affected even if the provisions of Section 14 of the Hindu Succession Act are applicable to the case.

9. Learned counsel on behalf of Smt. Prema Devi drew our attention to the case of Shakuntala Devi v. Beni Madhav, AIR 1964 All 165 where a learned single Judge of this Court held that the provisions of the Hindu Succession Act are applicable to agricultural land also which decision has been followed by another single Judge of this Court in AIR 1968 All 419. We have carefully gone through these cases but, with respect, we are unable to agree with this conclusion. Learned counsel also relied upon the case of Amar Singh v. Baldeo Singh, AIR 1960 Punj 666 (FB). In that case personal law was applicable to the land in dispute and the matter for consideration was, whether Section 14 of the Hindu Succession Act was valid. It was held valid as it related to a matter of personal law. We respectfully agree with the conclusion.

10. The result therefore, is that Civil Misc. Writ No. 1319 of 1963 filed by Smt. Prema Devi is dismissed while Civil Misc. Writ No. 1235 of 1963 filed by Satya Narain Lal and others is allowed. The order passed by the Joint Director of Consolidation is quashed and that of the Deputy Director of Consolidation in Second Appeal is restored. Parties will bear their own costs in this Court.

Orders accordingly.

AIR 1970 ALLAHABAD 241 (V 57 C 40) FULL BENCH

B. D. GUPTA, T. P. MUKERJEE
AND B. B. MISRA, JJ.

Bijai Narain Singh and others, Petitioners v. State of Uttar Pradesh, Opposite Party.

Civil Misc. Writ Petn. No. 2940 of 1968, D/-19-3-1969.

(A) Civil P. C. (1908), O. 19, Rr. 1 and 2 and Ss. 139, 141 and 5 (2) — Oath Commissioners appointed by District Judges to verify affidavits — They are competent only where affidavits are to be filed before Courts of Civil Jurisdiction governed by Civil P. C. — Oath Commissioners cannot verify affidavits to be filed before various authorities constituted under U. P. Act 5 of 1954, authorities being neither Courts of Civil jurisdiction nor governed by Civil P. C. in the matter of procedure — Authorities are not also revenue Courts — (Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), Ss. 8, 8-A, 9-A, 9-B, 19-A, 21, 38 and 41 and R. 26 of the Rules).

Order 19, Rr. 1 and 2 and Ss. 139 and 141 of Civil P. C. which are the relevant provisions under which Oath Commissioners are appointed and affidavits filed before them are verified, show that two

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conditions must be fulfilled in order that such appointees by the District Judges may be competent to verify the affidavits coming to them. One is that they are to be filed before the Courts whose procedure is governed by Civil P. C. And, the other is that those Courts must be Courts of Civil Jurisdiction. (Paras 9 & 42)

Thus viewed, the affidavits to be filed before the Consolidation Officers constituted under the U. P. Consolidation of Holdings Act or even officers higher to them cannot be verified by the Oath Commissioners appointed by the District Judges in that the authorities are neither Courts of Civil Jurisdiction nor governed by Civil P. C. in the matter of procedure. (Paras 35, 42 & 44)

(B) Civil P. C. (1908), Section 9 — Tribunals and Courts — Distinction pointed out.

Tribunals with many a trapping of a Court, nevertheless, are not Courts in the strict sense of exercising judicial power. Some such features are giving of a final decision, competence to hear contentious matters, power to render decisions affecting the rights of subjects, existence of a provision for appeal against its decision and it being a body to which a matter can be referred by another body. The presence of the above features does not necessarily make a quasi-judicial body a Court. Broadly speaking, what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide in a judicial manner the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. Viewed in the light of the above, the authorities constituted under the above U. P. Act either as it stood originally or as amended in 1963 cannot be called Courts. (Paras 13, 15, 28 & 29)

The Consolidation Officer exercises his judicial powers when he acts under Sections 9-A and 9-B of the Act after the village records have been revised and the valuations and shares in holdings have been determined under Section 8 and the Statement of Principles has been prepared under Section 8-A, again, when he acts under Section 21 after the provisional Consolidation scheme has been drawn up under Section 19-A. The matters which come up before the Consolidation Officer under Sections 9-A and 9-B are those dealt with under Sections 8 and 8-A, and those which come up under Section 21 are those dealt with under Section 19-A. Initially the matters under Sections 8, 8-A and 19-A are dealt with by the Assistant Consolidation Officer who disposes of non-contentious ones or those in which he can bring about conciliation, and forwards the disputed ones to the Consolidation Officers

for his decision under Sections 9-A, 9-B or 21, as the case may be. What is noticeable is that it is mandatory for the Assistant Consolidation Officer to consult the Consolidation Committee while acting under Sections 8, 8-A and 19-A. It is not correct to say that after the amendments in 1963 it is no longer necessary to take the views of the Consolidation Committee which was essential under the original provisions viz., Section 12 (2) and R. 34. Though, now, there is no mention of the Committee's views being considered or reported to the Consolidation Officer, yet, in the report under Section 9-A which replaced old Section 12 and the present R. 25-A, the Committee's view would also find place. Sections 8 and 8-A which compel the Assistant Consolidation Officer to consult the Committee implies that in his said report its views would also be stated. Section 9-B which makes mention of the Consolidation Committee in the section itself and further requires giving of notice also to the Consolidation Committee cannot be considered a mere empty formality. The purpose can be nothing else than to have its views also. Similar provisions are to be found in Section 21. Consequently, it cannot be said that the Consolidation Committee has no say in the matter now. R. 26 which had replaced old R. 34 cannot also go to sustain the plea that the authorities are Courts in that the influence of the Consolidation Committee stands in the way.

(Paras 26, 28, 29 & 31)

Even in the matter of procedure, all the provisions of Civil P. C. do not apply to the proceedings under the U. P. Act. S. 38 of the U. P. Act and R. 26 of the Rules made thereunder read with Chs. IX and X of the U. P. Land Revenue Act which attract the provisions of Civil P. C. to proceedings under the U. P. Consolidation of Holdings Act show that all the provisions of Civil P. C. are not applicable.

(Paras 32 and 42)

Consolidation authorities cannot also be held to be revenue courts within the meaning of Section 5(2) of Civil P. C., because the said authorities do not deal with suits or other proceedings relating to rent, revenue or profits of land used for agricultural purposes. The U. P. Act, on the other hand, provides for the consolidation of agricultural holdings for the development of agriculture. (Para 34)

(C) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 9-A — Consolidation authorities — Status of — Per Misra J.: Authorities not Civil Courts even for the limited purpose of S. 9-A—Per Mukerjee, J.: The authorities have full status of Civil Courts at least for the limited purpose — Deeming provision in a statute must be given full effect to — (Civil P. C. (1908), Preamble — In-

terpretation of Statutes — Deeming clauses) — (Civil P. C. (1908), S. 9 — Civil Court).

Per Misra, J.:— The words "shall be deemed to be a Court of competent jurisdiction" occurring in sub-section (3) of S. 9-A of the U. P. Consolidation of Holdings Act do not confer the full status of Courts on the Consolidation Officers mentioned in that section even for the limited purpose of that provision. The very use of the words 'deemed to be' goes to show that the legislature did not intend to give full status of Courts to the authorities constituted under the Act. AIR 1930 PC 54 & AIR 1965 SC 33 at p. 39, Foll.

(Para 30)

Per Mukerjee, J.:— The words "deemed to be" in sub-section (3) imply that although the consolidation authorities referred to in Section 9-A are not in reality Courts, the legislature intended that they shall be deemed to be Courts when they act within the limited ambit of that section. The duty of a Court in interpreting a statute is to give effect to the intention of the Legislature as expressed by the language thereof. A legal fiction created by a statute has to be given its full effect without allowing the mind "to boggle" and it must be held that the Assistant Consolidation Officer and the Consolidation Officer, when they dispose of matters mentioned in sub-sections (1) and (2) of Section 9-A have the "full status of Courts", anything to the contrary contained in any other law for the time being in force notwithstanding. AIR 1969 All 342 (FB), Dist.; 1952 AC 109, Foll.

(Paras 38, 40 & 41)

(D) Constitution of India, Art. 226 — Futile writ — Writs which cannot be given effect to not granted — Affidavits to be filed before authorities constituted under U. P. Act 5 of 1954 — Oath Commissioners appointed under Civil P. C. cannot be compelled to verify — (Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 42) — (Civil P. C. (1908), O. 19, Rr. 1, 2, Ss. 139 and 141).

The Consolidation Officers constituted under the U. P. Consolidation of Holdings Act perform duties both judicial and executive. The Oath Commissioners appointed under the provisions of Civil P. C. are competent to verify only affidavits as are required to be filed before Courts of civil jurisdiction to which the procedure contained in Civil P. C. is applicable. Hence, in the absence of any agency to decide as to which matters were judicial, it was neither feasible nor practicable to permit the Oath Commissioners appointed by the District Judges to verify the affidavits required to be filed before the Consolidation Officers. No writ can, therefore, issue because even if it was to be granted it could not be given effect to. (Para 21)

- Cases Referred: Chronological Paras
- (1969) AIR 1969 All 342 (V 56) = 1968 All LJ 144 (FB), Sita v. State of U. P. 11, 30, 39
- (1967) AIR 1967 SC 1494 (V 54) = 1967 Cri LJ 1380, Jugal Kishore Sinha v. Sitamarhi Central Co-op. Bank Ltd. 17, 18
- (1965) AIR 1965 SC 33 (V 52) = 1964-8 SCR 188, Commr. of I. T., Madras v. Express Newspapers Ltd. Madras 30
- (1964) 1964 RD 411 = 1964 All WR (HC) 424, Ram Bharosey Lal v. Dy. Director of Consolidation, U. P. 11, 15, 17, 18, 19
- (1963) AIR 1963 SC 416 (V 50) = 1963 (1) Cri LJ 330, Jagannath Prasad v. State of U. P. 14
- (1963) AIR 1963 SC 677 (V 50) = (1963) Supp 1 SCR 242, Jaswant Sugar Mills v. Laxmichand 14
- (1963) AIR 1963 SC 874 (V 50) = (1963) Supp 1 SCR 625, Engineering Mazdoor Sabha v. Hind Cycles Ltd. 14
- (1961) AIR 1961 SC 1669 (V 48) = 1962-2 SCR 339, Harinagar Sugar Mills v. Shyam Sunder 14
- (1956) AIR 1956 SC 66 (V 43) = 1956 Cri LJ 156, Braj Nandan Sinha v. Jyoti Narain 14
- (1956) AIR 1956 SC 153 (V 43) = 1956 Cri LJ 326, Virindar Kumar Satyawadi v. State of Punjab 14
- (1952) 1952 AC 109 = 1951-2 All ER 587, East End Dwellings Co. v. Finsbury Borough Council 40
- (1950) AIR 1950 SC 188 (V 37) = 1950 SCR 459, Bharat Bank v. Employees of Bharat Bank 14
- (1942) AIR 1942 Pat 1 (V 29) = ILR 21 Pat 1 (FB), Arjun Rautura v. Krishna Chandra Gajpati Narayan Deo 33
- (1935) AIR 1935 Nag 125 (1) (V 22) = 36 Cri LJ 765, Bade v. Emperor 33
- (1931) 1931 AC 275 = 144 LT 421, Shell Co. of Australia v. Federal Commr. of Taxation 12
- (1930) AIR 1930 PC 54 (V 17) = 1930 All LJ 73, Commr. of I.-T., Bombay v. Bombay Trust Corpn. Ltd. 30
- (1883) ILR 5 All 406 = 1883 All WN 92 (FB), Madho Prakash Singh v. Murli Manohar 33

Sripat Narain Singh, for Petitioners; Standing Counsel, for Opposite Party.

B. B. MISRA, J.:— This reference to a Full Bench arises out of a petition under Art. 226 of the Constitution seeking a writ of Mandamus commanding the U. P. Government to withdraw its Notification dated June 29, 1968, directing that Oath Commissioners appointed by District Judge under Section 139 of the Code of Civil Procedure were not authorised to verify affidavits relating to the proceedings

before the various authorities constituted under the U. P. Consolidation of Holdings Act 5 of 1954, (hereinafter referred to as the Act).

2. The six petitioners, who are lawyers of Azamgarh, were appointed Oath Commissioners by the District Judge of that place by his order dated 19-7-1966 passed under the provisions of S. 139 of the Code of Civil Procedure. Originally, affidavits to be filed, *inter alia*, before the various authorities constituted under the Act, used to be verified by the petitioners, the propriety of which was also recognised by the U. P. Government under its G. O. No. 3147/VII-AI-45/65 dated March 11, 1968. Subsequently, by G. O. No. 1855/VII-AI-44/65 dated June 29, 1968, the U. P. Government partially modified the aforesaid G. O. dated March 11, 1968, and withdrew its recognition in respect of affidavits to be filed before the Consolidation Authorities saying that, in view of judicial pronouncement, they were not Courts of Civil Judicature, and, as such, Oath Commissioners were not authorised to verify affidavits relating to proceedings before them. The petitioners challenge the legality of that order of the Government on the ground that the various authorities constituted under the Act are Courts of Civil Jurisdiction.

3. Thus the point for determination is as to whether Oath Commissioners appointed by District Judges are competent to verify the affidavits to be filed before the authorities constituted under the Act.

4. The relevant provisions of the Code of Civil Procedure under which Oath Commissioners are appointed and verify affidavits are to be found in Sections 139 and 141, and Order 19.

5. Affidavits are tendered under O. 19, Rr. 1 and 2 of the Code of Civil Procedure which are to the following effect:—

"1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs."

6. Section 139 of the Code of Civil Procedure reads thus:—

"In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
 - (b) any officer or other person whom a High Court may appoint in this behalf, or
 - (c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf,
- may administer the oath to the deponent."

7. It is not disputed that under subsection (c) of the above section, the U. P. Government has empowered District Judges to appoint Oath Commissioners.

8. Section 141 of the Code of Civil Procedure runs as follows:—

"The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

9. On a perusal of the above provisions, it would appear that two conditions must be fulfilled in order that Oath Commissioners appointed by District Judges may be competent to verify the affidavits coming to them. One is that they are to be filed before the Courts whose procedure is governed by the Code of Civil Procedure. And, the other is that those Courts must be Courts of Civil Jurisdiction.

10. It has, therefore, to be examined if the various authorities constituted under the Act are governed by the Code of Civil Procedure in the matter of procedure, and whether they are Courts of Civil Jurisdiction.

11. These matters were gone into threadbare by a Division Bench of this Court in *Ram Bharosey Lal v. The Deputy Director of Consolidation*, U. P., 1964 RD 411 (All) to which one of us was a party. After reviewing the case law on the subject and also examining the various provisions of the Act it came to the conclusion that the various authorities constituted under it were not Courts. Subsequently, a Full Bench of this Court approved that decision in *Sita v. State of U. P.*, 1968 All LJ 144 = (AIR 1969 All 342) (FB).

12. On the legal aspect it relied on an English Case, *Shell Co. of Australia v. Federal Commissioner of Taxation*, 1931 AC 275 at pp. 296-297, wherein Lord Sankey, L. C., made the following observations:—

"The authorities are clear to show that there are tribunals, with many of the trappings of a Court, which, nevertheless, are not Courts in the strict sense of exercising judicial power.

In that connection it may be useful to enumerate some negative propositions on the subject: (1) A tribunal is not necessarily a Court in the strict sense because

it gives a final decision, (2) Nor because it hears witnesses on oath, (3) Nor because two or more contending parties appear before it between whom it has to decide, (4) Nor because it gives decisions which affect the rights of subjects, (5) Nor because there is an appeal to a Court, and (6) Nor because it is a body to which a matter is referred by another body."

13. The negative propositions set out above indicate that the features to which they refer may constitute the trappings of a Court. But the presence of the said trappings does not necessarily make a quasi-judicial body a Court.

14. The above principles were followed in several cases by the Supreme Court from time to time. Those cases are *Bharat Bank v. Employees of Bharat Bank*, AIR 1950 SC 188; *Braj Nandan Sinha v. Jyoti Narain*, AIR 1956 SC 66; *Virindar Kumar Satyawadi v. The State of Punjab*, AIR 1956 SC 153; *Harinagar Sugar Mills Ltd. v. Shyam Sunder*, AIR 1961 SC 1669; *Jagannath Prasad v. State of Uttar Pradesh*, AIR 1963 SC 416; *Jaswant Sugar Mills Ltd. Meerut v. Lakshmi Chand*, AIR 1963 SC 677 and *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*, AIR 1963 SC 874.

15. The Division Bench of this Court in *Ram Bharosey Lal's case*, 1964 RD 411 (All) has given extracts from each of them. It is not necessary to traverse the whole ground again. Suffice it to say that broadly speaking what the above cases have laid down is that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide in a judicial manner the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

16. The Division Bench of this Court then examined the various provisions of the Act in the light of the law laid down in the aforesaid cases and came to the conclusion that the authorities constituted under that Act could not be called Courts.

17. The learned counsel for the petitioners contended that the law laid down in *Ram Bharosey Lal's case*, 1964 RD 411 (All) is no longer good law in view of a subsequent decision of the Supreme Court in *Jugal Kishore Sinha v. Sitamarchi Central Co-operative Bank Ltd.*, AIR 1967 SC 1494, and also because of the fact that the various provisions in the original Act on the basis of which that decision was given, have undergone a material change by subsequent amendments. It was urged that the points which led to the earlier decision were no longer there with the result that under the existing provisions, the Consolidation Authorities would answer the tests laid down in the cases mentioned

above and would come in the category of Courts.

18. The first point, therefore, to be seen is as to how far the Supreme Court in *Thakur Jugal Kishore Sinha's case*, AIR 1967 SC 1494 has touched the points decided by the Division Bench of this Court in *Ram Bharosey Lal's case*, 1964 RD 411 (All). As said above, the decision in *Ram Bharosey Lal's case*, 1964 RD 411 (All) is divisible into two parts, the first dealing with the legal question as to what category of tribunals fall within the category of 'Courts', and the second examining the various provisions of the Act in order to determine if they possessed all the attributes of Courts as laid down by the Supreme Court from time to time. In *Jugal Kishore Sinha's case*, AIR 1967 SC 1494 the Supreme Court has not said anything contrary to its earlier decisions laying down the criteria for deciding as to whether a tribunal is a Court or not. In fact, passages have been quoted from the two cases decided in 1956 elaborating the principle enunciated by Lord Sankey and setting forth the ratio decidendi in distinguishing Courts from quasi-judicial bodies. It would thus appear that there is nothing in *Jugal Kishore Sinha's case*, AIR 1967 SC 1494 touching the legal stand taken by the Division Bench of this Court.

Coming now to the other point decided by the Division Bench, the decision of the Supreme Court in *Jugal Kishore Sinha's case*, AIR 1967 SC 1494 can have no application. In the first place, the case before the Supreme Court was one under the Contempt of Courts Act and it had to see if the Assistant Registrar discharging the functions of the Registrar under Section 48 read with S. 6 (2) of Bihar and Orissa Co-operative Societies Act (6 of 1935) was a Court subordinate to the High Court. In the present case it has to be seen if the various Consolidation Authorities under the Act are Courts of Civil jurisdiction. Different considerations prevail in determining as to whether a Court is subordinate to the High Court or it is a Court of civil jurisdiction. In order to see if a particular tribunal comes under the Contempt of Courts Act, the primary consideration to see is if it is subordinate to the High Court whereas in a case like the one in hand, the point to be determined is as to whether it is a Court of civil jurisdiction. Secondly, the provisions of the Bihar and Orissa Co-operative Societies Act are different from the provisions of the Act. On an examination of the provisions of that Act, the Supreme Court found that the Registrar had not merely the trappings of a Court but in many respects had been given the same powers as were exercised by ordinary Civil Courts of the land by the Code of Civil Procedure. It has to be remembered that in that case the

Supreme Court came to that conclusion because of the particular provisions of the Bihar and Orissa Co-operative Societies Act. Consequently, it cannot be held that the decision of this Court in Ram Bharosey Lal's case, 1964 RD 411 (All) has been affected in any manner by the decision of the Supreme Court in Jugal Kishore Sinha's case, AIR 1967 SC 1494.

19. It has next to be seen if the Act has undergone any material change by subsequent amendment so as to call for a departure from the rule laid down in Ram Bharosey Lal's case, 1964 RD 411 (All). The original Act was passed in 1953 and came to be placed on the Statute Book as U. P. Act No. 5 of 1954. It was amended from time to time, the last amendment having been made by U. P. Act 8 of 1963. Rules under Section 54 (3) of the Act were first published in 1954 after the coming into force of the original Act. They were also amended from time to time after the various amendments of the Act, the last amendment in them having been made in 1963.

20. It is not necessary to go into all the amendments in the Act and the Rules which have been made from time to time. Only those amendments have to be looked into which are in respect of the powers exercisable by the Consolidation Authorities in discharging their judicial functions. For that purpose, only the amendments which were made by the Amendment Act 38 of 1958 and those made subsequently by Act 8 of 1963 along with the corresponding Rules made thereunder will have to be looked into.

21. The first thing would be to see as to what authorities have been constituted under the Act. The hierarchy of the various authorities constituted under that Act beginning from the lowest, as given in Section 42, are in the following order: Assistant Consolidation Officer; Consolidation Officer; Settlement Officer (Consolidation); Deputy Director (Consolidation); and Director of Consolidation. The Assistant Consolidation Officer and Consolidation Officer do the spade work and are the authorities of first instance before whom objections and disputes come up for decision. The powers of Assistant Consolidation Officer are restricted to non-contentious matters, and also where he can bring about conciliation between the parties. So far as disputed matters are concerned, he has to refer them to the Consolidation Officer for decision. Appeals against the orders of the Consolidation Officer are to be heard by the Settlement Officer (Consolidation). Revisions against the orders of the Settlement Officer (Consolidation) are to be disposed of by the Director of Consolidation, in which category the Assistant Director, the Deputy Director, and the Joint Director are also

included. As the Assistant Consolidation Officer and the Consolidation Officer are the initial authorities before whom objections and disputes come up, affidavits are to be filed mostly before them. It is only very sparingly that the necessity of filing affidavits before the authorities higher than them arises. Therefore, what has to be seen primarily is as to whether the Assistant Consolidation Officer and the Consolidation Officer can be held to be 'Courts'. It is not disputed that under the Scheme of the Act both these authorities have to perform both judicial and executive functions. In discharging their functions they have to be guided by the policy underlying the Act which is to be found in its Preamble, which says that it had been enacted to provide for the consolidation of agricultural holdings for the development of agriculture. It is thus noticeable that the Consolidation Authorities have to take into consideration the policy of the legislature also.

At the time of arguments it was conceded by the learned counsel for the petitioners that the Assistant Consolidation Officer was not a 'Court'. It was further conceded that the Consolidation Officer acts in dual capacities, that is to say, he exercises both judicial and executive powers. Obviously, therefore, when he is discharging his executive functions he cannot be called a 'Court'. Therefore, the only point to be determined is as to whether he can be held to be a 'Court' when discharging his judicial functions. Before embarking on the determination of that question, it may be pointed out that it would neither be feasible nor practicable to permit the Oath Commissioners appointed by District Judges to verify the affidavits to be filed before the Consolidation Officer because there was no one to decide as to whether the affidavit was required to be filed before the Consolidation Officer when he was acting in his judicial capacity or as an Executive Officer, and it would not be proper to leave the decision of that matter to the Oath Commissioner himself. The writ petition is, therefore, liable to be dismissed on this ground alone because even if it were granted the order cannot be given effect to as the Consolidation Officer exercised both executive and judicial functions and there was no agency to decide as to which matters were judicial, with the result that it could not be said as to what affidavits could be verified by the petitioners.

22. But, as the question about the various authorities constituted under the Act being Courts was argued at some length, it would be well to go into it.

23. As said above, the Consolidation Officer exercised some judicial functions also. So, it will have to be examined if he had all the attributes of a Court in

that limited sphere so as to hold him a 'Court'.

24. On an examination of the Act and the Rules after amendment in 1963 and their comparison with the earlier provisions it would appear that mostly there has been re-shuffling, breaking up, and re-numbering of the previous provisions, with the result that some old provisions have come to be deleted and a few provisions have been newly brought in. As we are mainly concerned with the judicial powers of the Consolidation Officer, we will have to confine the discussions with that end in view.

25. The first appearance of the Consolidation Officer for the exercise of his judicial powers comes when he acts under Sections 9-A and 9-B of the Act after the village records have been revised and the valuation and shares in holdings have been determined under Section 8, and the Statement of Principles has been prepared under Section 8-A. Then, he again comes into the picture when he acts under Section 21 of the Act after the provisional Consolidation Scheme has been drawn up under Section 19-A.

26. The matters which come up before the Consolidation Officer under Secs. 9-A and 9-B are those dealt with under Sections 8 and 8-A, and those which come up under Section 21 are those dealt with under Section 19-A. Initially the matters under Sections 8, 8-A and 19-A are dealt with by the Assistant Consolidation Officer who disposes of non-contentious ones or those in which he can bring about conciliation, and forwards the disputed ones to the Consolidation Officer for his decision under Section 9-A, 9-B or 21, as the case may be. What is noticeable is that it is mandatory for the Assistant Consolidation Officer to consult the Consolidation Committee while acting under Sections 8, 8-A and 19-A.

27. Now, with that background it may be seen as to what comes up before the Consolidation Officer for disposal and how he is to deal with it under Sections 9-A, 9-B and 21. It would be well to quote those provisions in extenso for a proper appreciation of the points raised at the Bar.

"9-A. Disposal of cases relating to claims to land and partition of joint holdings—

(1) The Assistant Consolidation Officer shall—

(i) where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned; and

(ii) where no objections are filed, after making such enquiry as he may deem necessary.

Settle the disputes, correct the mistakes and effect partition as far as may be by conciliation between the parties appearing

before him and pass orders on the basis of such conciliation.

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of trees, wells or other improvements for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding.

9-B. Disposal of objections on the Statement of principles—

(1) Where objections have been filed against the statement of Principles under Section 9, the Assistant Consolidation Officer shall, after affording opportunity of being heard to the parties concerned after taking into consideration the views of the Consolidation Committee, submit his report to the Consolidation Officer, who shall dispose of the objections in the manner prescribed.

(2) Where no objections have been filed against the Statement of Principles within the time provided therefor under Sec. 9, the Consolidation Officer shall with a view to examining its correctness, make local inspection of the unit, after giving due notice to the Consolidation Committee, and may thereafter make such modifications or alterations in the Statement of Principles as he may consider necessary.

(3) Any person aggrieved by an order of the Consolidation Officer under sub-section (1), or sub-section (2), may within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, whose decision, except as otherwise provided by or under this Act, shall be final.

(4) The Consolidation Officer and the Settlement Officer, Consolidation, shall, before deciding an objection or an appeal, make local inspection of the unit after giving due notice to the parties concerned and the Consolidation Committee.

21. Disposal of objection to the Provisional Consolidation Scheme—

(1) All objections received by the Assistant Consolidation Officer, shall, as soon as may be after the expiry of the period of limitation prescribed therefor, be submitted by him to the Consolidation Officer, who shall dispose of the same as also the objections received by him, in the manner hereinafter provided, after notice

to the parties concerned and the Consolidation Committee.

(2) Any person aggrieved by the order of the Consolidation Officer under sub-section (1) may, within 15 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, whose decision shall, except as otherwise provided by or under this Act, be final.

(3) The Consolidation Officer shall, before deciding the objections and the Settlement Officer, Consolidation, may, before deciding an appeal, make local inspection of the plots in dispute after notice to the parties concerned and the Consolidation Committee.

(4) If, during the course of the disposal of an objection or the hearing of an appeal, the Consolidation Officer or the Settlement Officer, Consolidation, as the case may be, is of the opinion that material injustice is likely to be caused to a number of tenure-holders in giving effect to the provisional Consolidation Scheme, as prepared by the Assistant Consolidation Officer, or as subsequently modified by the Consolidation Officer, as the case may be, and that fair and proper allotment of land to the tenure-holders of the units is not possible without revising the provisional Consolidation Scheme, or getting a fresh one prepared, it shall be lawful, for reasons to be recorded in writing, for —

(i) the Consolidation Officer to revise the provisional Consolidation Scheme, after giving opportunity of being heard to the tenure-holders concerned, or to remand the same to the Assistant Consolidation Officer, with such directions as the Consolidation Officer may consider necessary; and

(ii) the Settlement Officer, Consolidation, to revise the provisional Consolidation Scheme, after giving opportunity of being heard to the tenure-holders concerned or to remand the same to the Assistant Consolidation Officer, or the Consolidation Officer, as the Settlement Officer, Consolidation, may think fit with such directions as he may consider necessary."

28. The first point urged was that it was no longer necessary to take into consideration the views of the Consolidation Committee which was essential under the original provisions. In my opinion, that is not so. It is true that under the original Section 12 (2) and Rule 34 (both having been changed now) it was incumbent on the Assistant Consolidation Officer to incorporate the views of the Consolidation Committee in his report to the Consolidation Officer, but now no mention is made of any such report being made by the Assistant Consolidation Officer to the Consolidation Officer under Section 9-A, which has replaced old Section 12. Now, R. 25-A clearly says that the Assistant Consolidation Officer will send a report.

No doubt, specific mention has not been made about incorporating the views of the Consolidation Committee but when the Assistant Consolidation Officer had to consult that Committee under Sections 8 and 8-A, it implies that he would give its views also in his report.

The same is not true of Section 9-B, which does make a mention of the Consolidation Committee in the section itself. Not only that, Section 9-B enjoins not only upon the Consolidation Officer but also on the Settlement Officer (Consolidation) hearing an appeal to give notice not only to the parties concerned but also to the Consolidation Committee at the time of making local inspection. That is not a mere empty formality. To put it bluntly, the Consolidation Committee is not to be there simply to show the faces of its members. The purpose could be nothing else but to have its views also. Similar provisions are to be found in Section 21. Consequently, it cannot be held that the Consolidation Committee has no say in the matter even now.

29. The next contention was that old Rule 34 which set out 'the manner prescribed' under which the discretion to take evidence rested with the Consolidation Officer has been deleted and now a new Rule 26 has been incorporated, under paragraph 2 of which it has been made obligatory on the Consolidation Officer to hear the parties, frame issues on the points in dispute, take evidence, both oral and documentary, and decide the objections. On the basis of the above provision it was very vehemently stressed that the requisites laid down by the Supreme Court in the cases mentioned in the earlier part of this judgment had been fulfilled and that, therefore, Consolidation Officer should be held to be a 'Court'. Here again, the Consolidation Committee will stand in the way. The influence of a third party, however, remote, should not have any part to play in formulating the decision.

30. Thirdly, stand was taken on the words 'shall be deemed to be a Court of competent jurisdiction' in Section 9-A on whose basis it was said that the Consolidation Officer was a Court. There was no necessity of using any epithet or introducing this legal fiction if they were full-fledged Courts and the legislature intended to give them that status. The Privy Council has held that when a person is 'deemed to be something', the only meaning possible is that whereas he is not in reality that something, the legislature requires him to be treated as if he were. (See the Commissioner of Income Tax, Bombay v. the Bombay Trust Corporation Ltd., 1930 All LJ 73 = (AIR 1930 PC 54)). The same view has been held by the Supreme Court in the Commissioner of

Income-tax, Madras v. Express Newspapers Ltd., Madras, AIR 1965 SC 33 at p. 39. Thus the very use of the words 'deemed to be' goes to show that the legislature did not intend to give full status of Courts to the authorities constituted under the Act. It may, however, be urged that the legal fiction should at least be given effect to for the purpose for which it is created and so the Consolidation Authorities can be held to be Courts for the limited purposes in the provisions where the deeming clause has been used. In the present case it appears that the legislature did not intend to give the authorities the full status of Courts even in that limited sphere. This is indicated by the fact that the word 'Court' which was used independently and without any epithets in original Section 22 of the Act, which came to be interpreted by a Full Bench of this Court in Sita Ram's case, 1968 All LJ 144 = (AIR 1969 All 342) (FB) (Supra) as not including the Consolidation Officer, the Settlement Officer (Consolidation), and the Deputy Director of Consolidation was deleted in its entirety by the Amending Act of 1963.

31. From the above, it would appear that the Consolidation Officer under the Act or even Officers higher to him cannot be held to be Courts mainly because the views of the Consolidation Committee are always before them and they can be influenced by those views in their decisions.

32. It may now be seen as to whether the various authorities constituted under the Act are governed by the Code of Civil Procedure in the matter of procedure. On an examination of the various provisions of the Act it would appear that all the provisions of the Code of Civil Procedure have not been made applicable to the proceedings under the Act. Some limited powers have been specifically given under Section 38 and enlarged by Rule 26, which have been again supplemented by S. 41, which says that the provisions of Chapters IX and X of the U. P. Land Revenue Act, 1901, shall apply to all proceedings under the Act. On a perusal of the provisions of Section 38 and Rule 26 it would appear that they make a mention of the application of only some provisions of the Code of Civil Procedure. In the same way the provisions in Chapters IX and X of the Land Revenue Act show that all the provisions of the Code of Civil Procedure have not been made applicable to the proceedings under that Act also. As such, it could not be held that all the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Act. Had the intention of the legislature been to make all the provisions of the Code of Civil Procedure applicable to the proceedings under the Act, it could have said so just in one sentence.

33. Still, it was averred that though all the provisions of the Code of Civil Procedure had not been made applicable to revenue Courts, they were still held to be Courts. On that analogy it was contended that the various authorities constituted under the Act were at least revenue Courts and, as such, Courts of Civil Jurisdiction, and that, therefore, Oath Commissioners appointed by District Judges could verify the affidavits to be filed before them. For that contention, reliance was placed on a decision of the Judicial Commissioner's Court at Nagpur in *Bade v. Emperor*, AIR 1935 Nag 125 (1) which had relied on an earlier Full Bench decision of this Court in *Madho Prakash Singh v. Murli Manohar*, (1883) ILR 5 All 406.

As against those cases, the Standing Counsel Mr. M. N. Shukla cited a Full Bench decision of the Patna High Court in *Arjun Rautura v. Krishna Chandra Gajpati Narayan Deo*, AIR 1942 Pat 1 (FB). The rulings relied upon by the learned counsel for the petitioners can have no application to the present case because the Full Bench decision in (1883) ILR 5 All 406 (FB) was given under the old Code of Civil Procedure in which revenue Courts were not separately defined. Now, a revenue Court has been described specifically in Section 5 (2) of the present Code as follows:—

"Revenue Court in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature."

34. From the above description of revenue Courts it would appear that it deals with suits or other proceedings relating to rent, revenue or profits of land used for agricultural purposes. Under the Act, the proceedings do not relate either to rent, revenue or profits of land used for agricultural purposes. On the other hand, the Act provides for the consolidation of agricultural holdings for the development of agriculture. Obviously, therefore, consolidation Courts cannot come in the category of revenue Courts, as defined by Section 5 (2) of the Code of Civil Procedure.

35. It would thus appear that the various authorities constituted under the Act can neither be held to be Courts of civil jurisdiction nor governed by the Code of Civil Procedure in the matter of procedure. It follows, therefore, that the petitioners cannot verify the affidavits to be filed before the various authorities constituted under the U. P. Consolidation of Holdings Act.

36. Consequently, this writ petition must be dismissed.

37. T. P. MUKERJEE J.:— I agree with the conclusions arrived at by my learned brother Misra, J.

38. I regret, however, I am unable to agree with him in the view that the consolidation authorities, mentioned in Section 9-A of the Act, do not have "the full status of Courts" even for the limited purpose of that section. Section 9-A of the Act deals with "Disposal of cases relating to claims to land and partition of joint holdings" and it provides:—

"9-A (1) The Assistant Consolidation Officer shall—

(i) where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned, and

(ii) where no objections are filed, after making such enquiry as he may deem necessary, settle the dispute, correct the mistakes and effect partition as far as may be by conciliation between the parties appearing before him and pass orders on the basis of such conciliation.

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of tress, wells or other improvements, for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding."

Sub-section (3) of Section 9-A quoted above, states categorically that the Assistant Consolidation Officer and the Consolidation Officer, while acting, respectively under sub-sections (1) and (2), shall be deemed to be a Court of competent jurisdiction. The words "deemed to be" in sub-section (3) imply that although the consolidation authorities referred to in Section 9-A are not in reality Courts, the Legislature intended that they shall be deemed to be Courts when they act within the limited ambit of that section.

39. The fact that in the case of 1968 All LJ 144 = (AIR 1969 All 342) (FB) a Full Bench of this Court held that the word "Court" occurring in Section 22 (2) of the Act, as it was originally worded, did not refer to consolidation authorities in my opinion, has no bearing on the construction of Section 9-A of the Act, Sec-

tion 22 (2) of the Act, as it stood before, ran as follows:—

"Upon the publication of the Statement of Proposals under sub-section (1) of the Section 20 all suits or proceedings in the Court of first instance, appeal, reference or revision, in which the question of title or a question whether any person is a Sirdar, Adhivasi or asami in relation to the same land has been raised, shall be stayed."

40. Commenting on this sub-section, Beg, J., who spoke for the Full Bench, observed that the word "Court" used therein did not mean consolidation authorities. The terms of Section 9-A of the Act (introduced by Act 8 of 1963) are not, however, in pari materia with S. 22 (2). By S. 9-A, the Legislature enjoins that the Assistant Consolidation Officer and the Consolidation Officer shall be deemed to be Courts when acting under sub-ss. (1) and (2) of that section. The terms of S. 9-A are clear and unequivocal. The duty of a Court in interpreting a statute is to give effect to the intention of the Legislature as expressed by the language thereof. In this connection it may be appropriate to reproduce the dictum laid down by Lord Asquith, in memorable words, in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, 1952 AC 109:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

41. Thus, according to Lord Asquith, a legal fiction created by a statute has to be given its full effect without allowing the mind "to boggle" and it must be held that the Assistant Consolidation Officer and the Consolidation Officer, when they dispose of matters mentioned in sub-sections (1) and (2) of S. 9-A have the "full status of Courts", anything to the contrary contained in any other law for the time being in force notwithstanding.

42. That does not, however, necessarily mean that the Oath Commissioners appointed by the District Judges would be competent to verify affidavits before the consolidation authorities when they discharge their functions under Section 9-A of the Act. Such Oath Commissioners are appointed under Cl. (c) of Section 139 of the Civil Procedure Code which lays down:—

"139. In the case of any affidavit under this Code,

(a) any Court or Magistrate, or

- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf,

may administer the oath to the deponent."

It is manifest from the language of this section that Oath Commissioners may administer oath to the deponent "in the case of any affidavit under this Code." Section 141 provides that procedure laid down in the Civil Procedure Code shall be followed in all proceedings "in any Court of Civil jurisdiction" and the Preamble to the Code shows that it was enacted to consolidate and amend the laws relating to "the procedure of the Courts of Civil Judicature." Rule 1 of Order 19 of the Code lays down, *inter alia*, that "any Court may, for sufficient reason, order that any particular fact or facts may be proved by affidavit....." It follows from these provisions that the authority to administer oath to a deponent is confined exclusively to a proceeding in a Court of Civil Judicature to which the provisions of the Civil Procedure Code apply. Section 9-A of the Act, as already noted, enacts that the Assistant Consolidation Officer and Consolidation Officer shall be deemed to be "a Court of competent jurisdiction" when they act under sub-sections (1) and (2) of that section. Section 2-A does not lay down that the consolidation authorities are to be regarded as "a Court of civil jurisdiction" and, as my learned brother Misra, J. has pointed out, all the provisions of the Civil P. C. are not applicable to proceedings before such authorities. He has also shown that in view of Section 5 (2) introduced in the Civil P. C. of 1908, Revenue Courts cannot be regarded as Civil Courts.

43. The result is, obviously, that the Oath Commissioners are not competent to verify affidavits even for the purposes of the proceedings under Section 9-A of the Act.

44. **B. D. GUPTA, J.:**— I have had the benefit of reading the judgment of brother Misra and am in agreement with the opinion recorded by him that the various authorities constituted under the U. P. Consolidation of Holdings Act can neither be held Courts of civil jurisdiction nor be governed by the Code of Civil Procedure and that, therefore, the petitioners cannot verify affidavits desired to be filed before the various authorities constituted under the said Act.

45. As regards the divergence of opinion between brother Misra and brother Mukerji on the question whether the consolidation authorities mentioned in Section 9-A of the Act have the full status of Courts for the limited purpose of that

Section, I express no opinion because the expression of any opinion in regard to the above question does not appear necessary for deciding the case before us and will be in the nature of obiter.

BY THE COURT

46. In view of our opinion that the petitioners cannot verify affidavits desired to be filed before the various authorities constituted under the U. P. Consolidation of Holdings Act, the petitioners are not entitled to any relief.

Accordingly this petition is dismissed with costs.

Petition dismissed.

AIR 1970 ALLAHABAD 251 (V 57 C 41) FULL BENCH

G. KUMAR, J. S. TRIVEDI AND
B. N. LOKUR, JJ.

Swami Prasad Pradhan, Petitioner v. Hargovind Sahai Mathur and others, Respondents.

Civil Misc. Writ No. 3661 of 1967, D/- 13-5-1969.

(A) Panchayats — U. P. Panchayat Raj Act (26 of 1947), Ss. 95 (1) (g), 96-A—Suspension of Pradhan of Gaon Sabha — Power is delegated to Sub-Divisional Officer only and not to Collector — Suspension order passed by Sub-Divisional Officer under the Collector's order — Suspension is invalid.

In pursuance of Section 96-A, the power under Section 95 (1) (g) has been delegated to the Sub-Divisional Officer, but not to the Collector. It follows that the Collector has no authority to exercise the power under Section 95 (1) (g). Where a plain reading of the order of suspension passed by the Sub-Divisional Officer shows that it was under the Collector's orders that the Pradhan of Gaon Sabha was placed under suspension and not as a result of the judgment of the Sub-Divisional Officer himself, the order is invalid. It may be that the Sub-Divisional Officer was convinced that the Pradhan of Gaon Sabha had committed irregularities but the decision to suspend him is of the Collector and not of the Sub-Divisional Officer and hence the order of suspension is invalid. (Paras 3 and 4)

(B) Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 95 (1) (g) — Power under to suspend Pradhan of Gaon Sabha — Cannot be exercised during pendency of enquiry — Status of Pradhan vis-a-vis State Government — Sub-clauses of Section 95 (1) (g) — Construction of — 1966 All LJ 740 and CMW No. 1140 of 1969, D/-23-4-1969 (All) and C. M. W. No. 2399 of 1968, D/- 25-4-1969 (All), Overruled.

Sec. 95 (1) (g) does not permit suspension pending enquiry in relation to any of

IM/AN/E308/69/DVT/M

the clauses thereof. The section deals with the power of suspension or removal simpliciter. There is little doubt that the power of removal can be exercised only after due enquiry; there can also be no doubt that the power of suspension cannot be exercised except after due enquiry in cases falling under Cls. (i), (iii), (iv) and (v) or even in those falling under the first two parts of Cl. (ii), where the person concerned refused to act or becomes incapable of acting for any reason. The section cannot be construed as authorising suspension pending enquiry only in cases covered by the last part of Cl. (ii), viz. where he is accused or charged for an offence involving moral turpitude. The section has to be read as a whole and, when done so, there is no particular reason why suspension pending enquiry is prohibited in respect of all clauses and two parts of clause (ii) but permitted in respect of the last part of Cl. (ii). The setting of the section and its various clauses is such that the power relatable to the last portion of Cl. (ii) should not be inconsistent with or by way of exception to the power relatable to the other clauses and the first two parts of Cl. (ii). If a different treatment was intended in regard to the last part of Cl. (ii) the legislature would not have placed all the five clauses on the same footing. Therefore, the last part of Cl. (ii) cannot alone be singled out as authorising suspension pending enquiry. That being so, the power of suspension or removal conferred by Sec. 95 (1) (g) can be exercised only by way of punishment and not pending enquiry, whatever clause of the section including the last part of Cl. (ii) is attracted for action.

(Paras 16, 17)

The Pradhan holds an elected office and his rights and duties are regulated by the Act. Though a public servant within the meaning of Section 21 of the Penal Code by virtue of Section 28 of the Act, he is not a subordinate of the Sub-Divisional Officer or even of the State Government. The Act has conferred upon the State Government and its delegates, under Section 95, certain powers of control and supervision over the Gaon Sabha and its office bearers. The Pradhan is an elected representative and cannot be considered as a servant of the Government and also there is no contractual relationship between him and the Government much less the relationship of master and servant. The Gaon Sabha being the creature of statute, no question of inherent powers arises as the power and duties of Gaon Sabha as well as the powers and duties of its officers are all regulated by the Act.

(Para 13)

The power to place under suspension an officer of the Gaon Sabha is absolutely not essential for the proper exercise of the power conferred under Section 95 (1)

(g), and therefore, suspension during enquiry cannot be ordered on the ground of the well recognised canon of interpretation of statutes that while a statute confers a jurisdiction it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution. 1966 All LJ 740 & C. M. W. No. 1140 of 1969, D/-23-4-1969 (All) & C. M. W. No. 2399 of 1968; D/-25-4-1969 (All), Overruled; Spl. A. No. 109 of 1965, D/-7-4-1965 (All) & Spl. A. No. 93 of 1963, D/-9-12-1964 (All), Approved; AIR 1970 SC 140, Explained and Foll.

(Para 13)

(C) Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 95 (1) (g) (ii) and (iii) — Suspension of Pradhan — Validity of order — Determination of — Duty of Court — Pradhan charged for giving leases illegally to some persons — Charge referable to Cl. (iii) and not Cl. (ii) of Section 95 (1) (g).

In determining the validity or otherwise of the order of suspension, the Court has to look to the order of suspension itself and not to the accusations made in the charge-sheet prepared subsequently. Where the Pradhan of Gaon Sabha is suspended for giving leases illegally to some persons, the order of suspension is referable to Cl. (iii) and not to Cl. (ii) of S. 95 (1) (g).

(Para 11)

(D) Constitution of India, Art. 141 — Whether a statement of law made by Supreme Court following upon concessions made by counsel would be law declared by Supreme Court and binding on all Courts. (Quaere)

(Para 16)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 140 (V 57) =

Civil Appeal No. 721 of 1966, D/-31-3-1969, Sub-Divisional Officer, Sadar Faizabad v. Shambhu Narain Singh

12

(1969) Civil Misc. Writ No. 2399 of 1968, D/-25-4-1969 (All), Nathu v. Sub-Divisional Officer

15

(1969) Civil Misc. Writ No. 1140 of 1969, D/-23-4-1969 (All), Bhagwat Prasad v. Sub-Divisional Officer Baberu

14

(1967) AIR 1967 SC 997 (V 54) = 1967 Cri LJ 950, State of West Bengal v. Corporation of Calcutta

16

(1966) AIR 1966 All 158 (V 53) = 1965 All LJ 663, Babu Nandan Gir v. Sub-Divisional Officer, Salempur

6

(1966) 1966 All LJ 740 = ILR (1966) 2 All 675, Baburam Tripathi v. Sub-Divisional Officer

6, 7, 10, 11, 12, 14, 15

(1965) Spl. Appeal No. 109 of 1965, D/-7-4-1965 (All), Sub-Divisional Officer, Salempur v. Babu Nandan Gir

6, 10

(1964) Spl. Appeal No. 93 of 1963, D/-9-12-1964 (All), Shambhu

Narain Singh v. Sub-Divisional Officer, Sadar Faizabad 6, 8, 10, 12, 14

[1961] AIR 1961 SC 1245 (V 48) = 1962-1 SCR 151, Jagannath Prasad Sharma v. State of U. P. 16

N. K. Saxena, for Appellants; Standing Counsel, for Opposite Parties.

LOKUR, J.:— This petition under Article 226 of the Constitution is referred to a Full Bench at the instance of Kirty, J. on the ground that there is a conflict in decisions of Division Benches of this Court and the legal position is anomalous.

2. The petitioner Swami Prasad was elected Pradhan of the Bilrai Gaon Sabha in 1960 but was placed under suspension by an order of the Sub-Divisional Officer, Mahoba dated 17th October, 1967. The petitioner Swami Prasad has challenged the order of suspension as invalid on several grounds. The order of suspension reads as follows:

"Under Collector's order dated 29-9-67 Sri Swami Prasad, Pradhan Gaon Sabha Bilrai is placed under suspension with immediate effect. Tahsildar Mahoba will please get his charge transferred to Up-pradhan in consultation with B. D. O. Kabrai. He has been suspended for giving leases illegally to the persons. Charge-sheet will be followed later on."

There is no doubt that the petitioner Swami Prasad has been suspended pending a departmental enquiry on the ground that he had given leases illegally to some persons.

3. It was contended on behalf of the petitioner, in the first place, that the order has been made at the behest of the Collector and the Sub-Divisional Officer has not applied his mind to the facts of the case and hence the order is inoperative. In the counter-affidavit filed by the Sub-Divisional Officer, however, it has been brought out that the allegations made against the petitioner were initially enquired into by the Tahsildar and found to be correct, that the Sub-Divisional Officer looked into the report of the Tahsildar and, being satisfied that the petitioner had committed irregularities in granting leases to several persons, made a report to the Collector and thereupon the petitioner was suspended in public interest. A plain reading of the order of suspension passed by the Sub-Divisional Officer shows that it was under the Collector's orders that the petitioner was placed under suspension and not as a result of the judgment of the Sub-Divisional Officer himself. It may be that the Sub-Divisional Officer was convinced that the petitioner had committed irregularities in granting leases but the decision to suspend the petitioner was of the Collector and not of the Sub-Divisional Officer. This is clear from the order itself.

4. The order of suspension is attributed to the power conferred by Section 95 (1) (g) of the U. P. Panchayat Raj Act, 1947. It is the State Government which has the power under this section to suspend or remove, inter alia, an officer of a Gaon Sabha, but Section 96-A of the Act enables the State Government to delegate all or any of its powers under the Act to any subordinate officer or authority. In pursuance of this provision the power under Section 95 (1) (g) has been delegated to the Sub-Divisional Officer, but not to the Collector. It follows that the Collector has no authority to exercise the power under that section and any orders passed by him under that section are unauthorised. The order in question, though recorded by the Sub-Divisional Officer, is referable to the order of the Collector and the Sub-Divisional Officer has not himself taken the decision to suspend the petitioner. On this ground alone the order ought to be declared as invalid and the petition disposed of accordingly. However, this reference to the Full Bench has been made on a legal question which, in fairness, ought also to be considered and we proceed to do so.

5. The legal question raised before us is whether Section 95 (1) (g) permits the appropriate authority to place the Pradhan of a Gaon Sabha under suspension pending a departmental enquiry against him as has been done in the present case. Section 95 (1) (g) reads as follows:—

"95. Inspection— (1) The State Government may—

... ..
(g) suspend or remove a member of a Gaon Panchayat or joint committee or Bhumi Prabandak Samiti, an office-bearer of a Gaon Sabha or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat, if he—

(i) absents himself without sufficient cause from more than three consecutive meetings or sittings,

(ii) refuses to act or become incapable of acting for any reason whatsoever or if he is accused of or charged for an offence,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance as such is not desirable in public interest, or

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or,

(v) suffers from any of the disqualifications mentioned in Cls. (a) to (m) of Section 5-A;"

6. The order of reference has drawn attention to the decision of Pathak J. in Babu Nandan Gir v. Sub-Divisional Officer, Salempur, 1965 All LJ 663 = (AIR 1966 All 158) in which an order placing the pradhan under suspension pending en-

quity was held to be without legal authority. There was a Special Appeal against the judgment of the Single Judge and a Division Bench, relying upon an unreported decision of another Division Bench in *Shambhu Narain Singh v. Sub-Divisional Officer, Sadar Faizabad*, Spl. Appeal No. 93 of 1963, D/-9-12-1964 (All), confirmed the judgment, holding that the power to suspend the Pradhan conferred by Section 95 (1) (g) of the Act is to suspend by way of punishment after proper enquiry and not during the pendency, of the enquiry (*Sub-Divisional Officer, Salempur v. Babu Nandan Gir* Special Appeal No. 109 of 1965, D/-7-4-1965 (All) unreported).

However, in *Baburam Tripathi v. Sub-Divisional Officer*, 1966 All LJ 740, another Division Bench held that a perusal of Section 95 (1) (g) (ii) leaves no doubt that the order of suspension can be passed by the Sub-Divisional Officer as soon as he is prima facie satisfied that the office-bearer of a Gaon Sabha is accused of an offence involving moral turpitude. It is the difference of opinion between *Babu Ram Tripathi's case*, 1966 All LJ 740 and the *Sub-Divisional Officer, Salempur's case*, Spl. Appeal No. 109 of 1965, D/-7-4-1965 (All) (Supra) which has led to this reference to the Full Bench.

7. It may be mentioned at the outset that there does not appear to be any conflict of views between Pathak, J. in 1965 All LJ 663 = (AIR 1966 All 158) and the Division Bench which decided *Babu Ram Tripathi's case*, 1966 All LJ 740. In *Babu Ram Tripathi's case*, 1966 All LJ 740 the order of suspension was referable to Cl. (ii) of Section 95 (1) (g) and it was held that if the requirements of that clause are fulfilled, the power to suspend pending enquiry exists. Pathak, J. held that same opinion when he observed:—

"From an examination of the provisions of Cl. (g) it appears that the power to suspend or to remove was intended to be exercised by the State Government as a punitive measure only except for the specific case in sub-clause (ii) where a person was accused of or charged for an offence involving moral turpitude. In a case falling under the exception in which action is taken upon the mere accusation or charging of the person for an offence, the action could not obviously be of a punitive nature. There, it is possible to say that the power to suspend may be exercised pending enquiry into the accusation or the charge. For the remaining provision of Section 95 (1) (g) there is nothing to suggest that the power to suspend can be employed also pending enquiry."

8. In dismissing the appeal against the judgment of Pathak, J., however, the Division Bench made a general observation that the power under Section 95 (1) (g)

is to suspend by way of punishment after proper enquiry and not during the pendency of enquiry, thereby excluding the possibility of suspension pending enquiry even in cases answering to the requirements of Cl. (ii) of that section. This decision followed the view expressed by the Division Bench in Spl. App. No. 93 of 1963, D/- 9-12-1964 (All) (Supra) wherein it was held:—

"We have no doubt that the respondent had no power to suspend the appellant during the pendency of the enquiry into the charge against him. He could suspend him only by way of punishment as provided in S. 95 (1) (g). The Act contains no provision authorizing suspension pending enquiry into a charge."

9. The argument that the power to punish under Section 95 (1) (g) for a charge framed necessarily includes the power to suspend during the enquiry was negatived on the reasoning that it was not possible to say that suspension during the enquiry into a charge was intimately connected with the infliction of a punishment under Section 95 (1) (g), that the section would become meaningless or be rendered infructuous without such power and that in order to effectuate the punishment it must be preceded by suspension during the enquiry. It may incidentally be mentioned here that the order of suspension in that case did not specify the ground on which it was passed.

10. Thus, the conflict between *Babu Ram Tripathi's case*, 1966 All LJ 740 on one side and the cases of Spl. App. No. 93 of 1963, D/- 9-12-1964 (All) and Spl. App. No. 109 of 1965, D/- 7-4-1965 (All) on the other is merely regarding the availability of the power to suspend under circumstances falling within Section 95 (1) (g) (ii).

11. In the present case, it should be noted that the order of suspension was made on the ground that the petitioner granted leases illegally to some persons. This ground would not fall within the scope of Cl. (ii) of Section 95 (1) (g) and the decision in *Babu Ram Tripathi's case*, 1966 All LJ 740 would not, therefore, be applicable to the facts of this case. It is contended that the charge-sheet framed subsequently on the 21st November, 1967, did contain some accusation involving moral turpitude and, therefore, the case can be referred to Cl. (ii) of Section 95 (1) (g). In determining the validity or otherwise of the order of suspension, the Court has to look to the order of suspension itself and not to the accusations made in the charge-sheet prepared subsequently. On the face of the order of suspension, it is not referable to Cl. (ii) but to Cl. (iii) of Section 95 (1) (g) and it is not and cannot be contended that even in the case coming under Cl. (iii) a Pradhan can be suspended pending enquiry. On this

ground also the order of suspension deserves to be declared invalid.

12. However, to proceed further with the conflict of decisions of the two division Benches of this High Court, it has been brought to our notice that the decision of the Division Bench in Spl. App. No. 93 of 1963, D/- 9-12-1964 (All) was taken up in appeal to the Supreme Court in Civil Appeal No. 721 of 1966, Sub-Divisional Officer, Sadar Faizabad v. Shambhu Narain Singh, decided on 31st March, 1969—(AIR 1970 SC 140) and was upheld by the Supreme Court. It was argued that the Supreme Court having held that the power to suspend under Section 95 (1) (g) was a power to punish and that there was no specific power to suspend a Pradhan pending enquiry into charges, the law is well settled now and the decision of the Division Bench in Babu Ram Tripathi's case, 1966 All LJ 740 is no more good law.

13. The aforesaid judgment of the Supreme Court has been noticed subsequently in two cases in this High Court—one before a Division Bench and the other before a Single Judge. But before adverting to these two cases, it would be relevant to analyse the views of the Supreme Court. The Supreme Court has held that the Pradhan holds an elected office and his rights and duties are regulated by the Act. Though a public servant within the meaning of Section 21 of the Indian Penal Code by virtue of Section 28 of the Act, he is not a subordinate of the Sub-Divisional Officer or even of the State Government. The Act has conferred upon the State Government and its delegates, under Section 95, certain powers of control and supervision over the Gaon Sabha and its office bearers.

Referring to the power of suspension and removal envisaged by Section 95 (1) (g) the Supreme Court observed:—

"But that power is admittedly a power to punish. No specific power to suspend a Pradhan pending enquiry into the charges levelled against him has been conferred on the State Government. This much is conceded."

It was argued before the Supreme Court that the relationship between the State Government and the Pradhan was that of master and servant and the State Government was, therefore, competent to preclude the Pradhan from discharging functions under the Act during the pendency of the enquiry into the charges levelled against him, but the argument was repelled and it was held that the Pradhan was an elected representative and cannot be considered as a servant of the Government and also that there was no contractual rela-

tionship between him and the Government much less the relationship of master and servant. (This was the view of Pathak, J. also). It was also held that the Gaon Sabha being the creature of statute, no question of inherent powers arose as the powers and duties of Gaon Sabha as well as the powers and duties of its officers were all regulated by the Act. The further contention that the power to suspend by way of punishment must be construed as implying the power to suspend pending enquiry on the well recognised canon of interpretation of statutes that while a statute confers a jurisdiction it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution was not accepted on the ground that the power to place under suspension an officer of the Gaon Sabha is absolutely not essential for the proper exercise of the power conferred under Section 95 (1) (g).

14. The Supreme Court decision has been referred to in Civil Miscellaneous Writ No. 1140 of 1969, Bhagwat Prasad v. Sub-Divisional Officer Baberu decided on 23rd April, 1969 (All). In this case a Division Bench consisting of Broome and G. C. Mathur, JJ. following the decision in Babu Ram Tripathi's case, 1966 All LJ 740 held that suspension pending enquiry in cases falling under Cl. (ii) of Section 95 (1) (g) would be in order and distinguished the decision of the Supreme Court on the ground that the case before the Supreme Court appeared to relate to Cl. (i) of Section 95 (1) (g) and not to Cl. (ii). With respect, we are unable to agree with the distinction made. As observed above and as stated by the Division Bench in their judgment in Spl. Appeal No. 93 of 1963, D/-9-12-1964 (All) arising out of Shambu Narain Singh's case, it was not stated in the order of suspension on what ground the order was passed and hence it is not correct to hold that the Supreme Court which was dealing with Shambhu Narain Singh's case, Spl. Appeal No. 93 of 1963, D/- 9-12-1964 (All), was concerned with Cl. (i) of Section 95 (1) (g). The Supreme Court, in fact, has made no distinction between the various clauses of that section and their decision relates to Section 95 (1) (g) as a whole and not to any of its specific clauses.

15. The other case in which the Supreme Court decision is noticed is Nathu v. Sub-Divisional Officer, Civil Misc. Writ No. 2399 of 1968, D/- 25-4-1969 (All). In this case the order of suspension attracted the requirements of Cl. (ii) of S. 95 (1) (g) and was upheld on the strength of Babu Ram Tripathi's case, 1966 All LJ 740. Satish Chandra J., sitting singly, felt bound by the above decision of the Division Bench but he also observed that

the statements of the Supreme Court that the power to suspend conferred by Section 95 (1) (g) is admittedly a power to punish and no specific power to suspend a Pradhan pending enquiry into the charges levelled against him has been conferred on the State Government are based on admissions or concessions made by the counsel before the Supreme Court and not on a consideration or interpretation of the provisions of Section 95 (1) (g). He pointed out that the Supreme Court did not also address itself to the decision of the Division Bench in Babu Ram Tripathi's case, 1966 All LJ 740. His conclusion is:

"In the circumstances it is difficult to hold that this decision of the Supreme Court involves the declaration of law on the point whether there is power to suspend pending enquiry."

16. Satish Chandra, J. relied on a Supreme Court decision in Jagannath Prasad Sharma v. State of Uttar Pradesh, AIR 1961 SC 1245 for the proposition that a judgment of the Supreme Court which proceeds on concession of counsel cannot be deemed to be a declaration of law by the Supreme Court on the point conceded by the counsel and held that the Supreme Court decision under consideration cannot be treated as binding under Art. 141 of the Constitution as it was based on admissions and concessions made by the counsel. The following passage in the State of West Bengal v. Corporation of Calcutta, AIR 1967 SC 997 has also been referred to:—

"The decision made on a concession made by the parties even though the principle conceded was accepted by the Privy Council without discussion, cannot be given the same value as one given upon a careful consideration of the pros and cons of the question raised It is not possible to predicate what the Privy Council would have said if that distinction had been placed before it. Be that as it may this decision cannot be taken as finally deciding the question that is raised before us."

Satish Chandra, J. has posed a subtle question whether a statement of law made by the Supreme Court following upon concessions made by the counsel would be the law declared by the Supreme Court and binding on all Courts within the meaning of Art. 141 of the Constitution. We do not, however, propose to enter upon a discussion of this question, for, even if, on the reasoning of Satish Chandra, J. the Supreme Court judgment is not binding on us, in our view, section 95 (1) (g) does not permit suspension pending enquiry in relation to any of the clauses thereof. The section deals with the power of suspension or removal simpliciter. There is little doubt that the power of removal can be

exercised only after due enquiry; there can also be no doubt that the power of suspension cannot be exercised except after due enquiry in cases falling under Cls. (i), (ii), (iv) and (v) or even in those falling under the first two parts of Cl. (ii), where the person concerned refused to act or becomes incapable of acting for any reason. It is difficult to construe the section as authorising suspension pending enquiry only in cases covered by the last part of Cl. (ii), viz. where he is accused or charged for an offence involving moral turpitude. The section has to be read as a whole and, when done so, there is no particular reason why suspension pending enquiry is prohibited in respect of all clauses and two parts of Cl. (ii) but permitted in respect of the last part of Cl. (ii).

17. It is contended that the words "if he is accused of or charged for an offence involving moral turpitude" indicate that a mere accusation or a charge is sufficient to enable suspension pending enquiry. A literal construction of this part of Cl. (ii) may support this contention, but the setting of the section and its various clauses is such that the power relatable to the last portion of Cl. (ii) should not be inconsistent with or by way of exception to the power relatable to the other clauses and the first two parts of Cl. (ii). If a different treatment was intended in regard to the last part of Cl. (ii) the Legislature would not have placed all the five clauses on the same footing. We are, therefore, unable to single out the last part of Cl. (ii) alone as authorising suspension pending enquiry. That being so, we hold that the power of suspension or removal conferred by S. 95 (1) (g) can be exercised only by way of punishment and not pending enquiry, whatever clause of the section including the last part of Cl. (ii) is attracted for action.

18. The result is that the petition must succeed on the ground that the Sub-Divisional Officer has passed the order of suspension without exercising his own judgment and acting on the Collector's orders and also on the ground that the power of suspension pending enquiry is not contemplated by Section 95 (1) (g) of the Act. Accordingly, the order of suspension of the petitioner dated 17th October, 1967, is declared void and inoperative and is hereby quashed. We make no order as to costs.

Petition allowed.

bate must be taken of them only in so far as they relate to immoveable properties situated within Madras. Ex. A-6 was written at Guindy that is outside Madras, and, though part of it relates to immoveable property situated within Madras, so far as the legacy of Rs. 15,000 given to Aparanji Ammal is concerned, that disposition does not relate to immoveable property within Madras. To that extent Part 6, Succession Act, does not apply to the will and therefore no probate has to be taken". Dealing with the argument of the learned counsel for the respondent that probate must be taken for the whole of Ex. A-6, the learned Judge observed: "If this contention is correct, sub-clause (b) would have been worded 'to all wills and codicils made outside those territories containing any dispositions of immovable property situated within those limits'". Cornish J. in a separate judgment, after giving the history of the legislation agreed with Ramesam, J., that the plaintiff's claim to the pecuniary legacy under the codicil was maintainable without a probate.

In so far as the liability under the pronote is concerned, both the learned Judges held that the note was executed by the testator and his executor, the latter being under no obligation of any sort to Aparanji Ammal for the payment of the legacy, and the testator did not intend her to have both the legacy and the amount covered by the pronote. In this view, the Bench held that the legacy is recoverable without obtaining a probate. It may be noted that this decision was rendered in accordance with the law as it existed prior to the amendment of S. 57 by the addition of clause (c) in 1927 which applied the provisions of Schedule III to the wills of Hindus wherever executed. We may observe that probate is the only legal evidence of a will in any question respecting a right to property under the will and the classification of wills and codicils in Section 57 (1) clauses (a) and (b) before the amendment might have to be treated as separate instruments for the purpose of the application of Section 213(1) and the other relevant sections of the Indian Succession Act.

A will or codicil, as we have seen, comes within clause (a) and is governed by the applied sections of the Indian Succession Act but a will or a codicil made outside the prescribed limits comes within clause (b) and is governed by those sections. As Cornish, J. observed in AIR 1930 Mad 956 at p. 962: "The plain meaning of these words is that in respect of a will or of a codicil coming within clause (b) of Sec. 213 (1) applies only to the extent of the will or codicil disposing of immovable property within the prescribed limits, but does not otherwise apply to the instrument. There is nothing very strange in such an exception being made when it is remembered that in England formerly the Court of Probate had no jurisdiction to authenticate a will so far as it related to real estate and that the Probate

was no evidence at all of the validity or contents of a will as to such property". The question in that case was not whether the 1st defendant should apply for a probate of the entire property or for only a part of it. It was only whether the legatee could recover the amount without obtaining a probate. Ramesam, J., at page 959 said that he was clearly of opinion "in so far as the plaintiff has got to establish a right to the legacy of Rs. 15,000 no probate need be taken of Ex. A-6 whether we regard it as separate or independent will or whether it be regarded as a codicil supplementary to the will Ex. A-5. In either case, to the extent that the plaintiff's right to the legacy is sought to be established, no probate need be taken of it."

The learned Judge further observed: "It must be remembered that defendant 1 actually entered upon his duties as executor, applied for probate and got an order in his favour, but for some reasons did not actually take out a probate. He would now be estopped from saying that he is not under any obligation as executor; vide *Muniswami Chetti v. Maruthammal*, (1911) ILR 34 Mad 211 which applies the principle of *Srinivasa Moorthy v. Venkata Varada Aiyangar*, (1911) ILR 34 Mad 257."

4. This decision, in our view, does not throw any light, nor is it an authority for the proposition contended for by Sri Balaparameswari Rao that partial probate of a will can be obtained at the choice of the executor. As we said earlier, there is no section in the Succession Act dealing specifically with grants in respect of a portion of the estate of a particular item of property. Chapter II of Part IX dealing with limited grants for the use and benefit of others having right, and grants for the special purposes. The decisions which have been referred to in the office note cannot be distinguished, as attempted by Sri Balaparameswari Rao, on the ground that those cases relate to wills executed in Bengal or within the ordinary original jurisdiction of the High Courts of Bombay and Madras or in respect of immoveable properties situated within those territories. The principle laid down therein as a general rule that probate of a will should be applied for the whole of the estate, is not applicable to wills executed or properties situated outside those limits except in respect of immoveable properties situated within those limits.

There is no warrant for this contention. In the Goods of Grish Chunder Mittar, (1881) 6 Cal 483 = 7 Cal LR 593, *Mt. Girija Bala v. Manindra Lal*, AIR 1927 Cal 654 and In the Goods of Sewprasad Saraf, AIR 1954 Cal 444 are cases which are an authority for the proposition that, as a rule, in all cases the probate or the letters of administration must be taken for the entire estate, both of moveable as well as immoveable properties, and that the duty must be paid upon the value of the whole, except in cases where limited

ner by the observations that are complained of."

It is true that a person authorised to award a punishment can always entrust an enquiry to a person who is not so authorised *Pradyat Kumar Bose v. Hon'ble the Chief Justice of Calcutta High Court, 1955-2 SCR 1331 = (AIR 1956 SC 285)*. It is equally true that the entire proceedings beginning from the show cause notice, framing of the charges and the conduct of the enquiry and ending with the report and final show cause notice of punishment must conform to certain well-accepted principles of natural justice i.e., that the Enquiring Officer must be unbiased and should not prejudice the case, and that the enquiry also must be fair and impartial by giving full opportunity to the delinquent to plead and establish his defence. It appears that even where it is not alleged that the punishing authority is not biased or has not in any way violated the principles of natural justice or has not transgressed any of the accepted principles upon which fair and impartial enquiries have to be held, the fact that he acts upon a report of an enquiry conducted by an officer who is biased or has violated the principles of natural justice or has prejudged the case, would nonetheless vitiate the finding and punishment. In the language of Das C. J., in *State of U. P. v. Mohammad Nooth, AIR 1958 SC 86* at p. 91.

"If it shocks our notions of judicial propriety and fair play, as indeed it does, it was bound to make a deeper impression on the mind of the respondent as to the unreality and futility of the proceedings conducted in this fashion."

It will, in our view, not avail of an answer to allegations of bias that it was not alleged that the punishing officer was not biased even though the conduct of the Enquiring Officer had given rise to such bias. This principle of natural justice, we think is equally applicable to enquiries under Article 311 as they are to administrative tribunals and administrative enquiries. The principle of natural justice would include within it impartiality of hearing process and the conducting of proceedings in good faith.

4. In *Subba Rao v. State of Hyderabad, 1957 Andh LT 155 = (AIR 1957 Andh Pra 414)*, *Subba Rao C. J.* (as he then was) delivering the judgment of the Bench consisting of himself and Mohammed Ahmed Ansari, J. (as he then was), and agreeing with the summary of the case law on the subject given by Sinha, J., in *Choudhury v. Union of India, AIR 1956 Cal 862*, observed at p. 162:

"Doubtless, the Government i.e., the authority entitled to punish the petitioner in this case can ordinarily delegate the holding of an enquiry to its subordinate officers before taking final action against him. But it is a fundamental principle of natural justice that the officer selected to make an enquiry should be a person with an open mind and

not one who is either biased against the person against whom action is sought to be taken or one who has prejudged the issue." While it may not be permissible according to the observations made by the American Judges as cited by our learned brother — to probe into the mental process of the enquiring officer or the person charged with making an administrative decision but nonetheless where bias or prejudice is obvious even before the enquiry commenced so as to raise a strong feeling in the mind of the delinquent that he has no hope of a fair trial, then the principle that 'justice should not only be done but seen to be done' has its full impact upon the validity of the proceedings.

It is true that the process in administrative enquiries need not follow the ideals and patterns of regular courts of law. As observed by Mr. Justice P. B. Mukharji of the Calcutta High Court in an article "Administrative Law" (published in the *Journal of the Indian Law Institute, October 1958 Vol. I, Part No. 1*):

"The climate of the court, the climate of the orthodox jurisprudence, the pattern of the judicial procedure and the judicial environment, and the anatomy of the judicial process are all basically different from those of the administrative courts, the administrative agencies, the administrative process, and the administrative technique. To judicialise the administrative process is one way to defeat the new demand, and to fly against the very reason for the growth and development of the administrative law".

But nonetheless there can be no doubt that certain basic principles of natural justice apply equally to administrative enquiries as to judicial enquiries. A person who has conducted a preliminary enquiry and found a prima facie case for a regular enquiry, will not be permitted to conduct the regular enquiry because he has already in some way formed an opinion in the case, or where an administrative superior has expressed definite views on the conduct of a delinquent officer, he will not be permitted to hold an enquiry: See 1957 Andh LT 155 = (AIR 1957 Andh Pra 414). In *Suryanarayana v. State of Andhra Pradesh, (1967) 2 Andh WR 253* a Division Bench of this Court consisting of Chandrasekhara Sastry and Krishna Rao, JJ. had also taken a similar view. In that case, the charge against the petitioner was as follows:

"All the above goes to prove that Shri R. Suryanarayana Addl. Agricultural Demonstrator, Hiramandalam with an ulterior motive preplanned and committed the fraud by removing the paddy seed from the paddy seed bags procured by him.

He, being a responsible Government servant on the spot, instead of taking steps to see that his subordinate staff do not commit fraud, misappropriation or any other irregularity, has himself deliberately committed the fraud and thus failed to exercise

proper care to Government stocks quite contrary to rules in force."

The enquiry officer having thus clearly given a finding on the charges even before the enquiry started had also proceeded to indicate the punishment. The ratio of this decision was set out by Krishna Rao, J., at page 257:

"The above facts clearly indicate that the Enquiry Officer had already prejudged the issue and can never be expected to maintain an open mind during the course of the enquiry. In other words, the Enquiry Officer gave his judgment even before the trial, rendering the whole trial a mere farce. We are therefore justified in coming to the conclusion that the enquiry officer in the present case has not started his enquiry with an open mind but that he has prejudged the very issue before him."

The facts in each case therefore will have to be taken into consideration in determining whether there is a violation of the principles of natural justice and fair hearing. In the cases on hand, the Deputy Superintendent of Police had, in the charge-memos dated 17th June 1960, stated that the delinquents "had abused their position and brought discredit to the department". That was a categorical opinion and that in our view, indicates bias; or, at any rate, a fear or apprehension in the minds of the delinquents that they had no hope or chance of a fair trial; to say that the delinquents did not protest at that time is to ignore the fact that they, being in service in the lowest rung, may have entertained a fear of antagonising the superior. At any rate, that cannot be a matter which can be taken into consideration in determining whether the proceedings have been validly initiated. In our view, therefore, the expression of an opinion by the enquiry officer in the charge-memos that the delinquents had abused their position and brought discredit to the department would vitiate the proceedings.

5. On the second question whether the mentioning of the final punishment of dismissal in the charge memo constitutes a violation of Article 311 of the Constitution there is—as pointed out by Parthasarathi, J.—a divergence of view of Single Benches of this Court. Our learned brother Obul Reddy, J., in *Gunnama Naidu v. Sub-Collector Gudur*, W. P. No. 1566 of 1967 D/- 28-10-1968 (AP) thought that this would cause a reasonable apprehension in the mind of a delinquent Officer that the Enquiry Officer had made up his mind and that he will not have a fair-play if that Officer were to enquire against him. On the other hand, our learned brother Chinnappa Reddy, J., in *Venkanna v. State of Andhra Pradesh*, W. P. No. 2033 of 1966 on 1-3-1968 (AP) and *Sambaiah v. Government of Andhra Pradesh*, W. P. No. 1275 of 1966, D/-30-7-1968 (AP) was of the view that bias is not a legitimate inference that can be drawn invariably from the mere fact of the indication of punishment in the charge memo. As pointed out by Chinnappa

Reddy J. and as also noticed by us earlier the decision in 1967-2 Andh WR 253 was a case in which in the first show cause notice issued to the delinquent officer itself, the enquiry officer had given clear findings on all the charges and that was the ground on which the aforesaid Bench Decision, in our view and with respect, was rightly distinguished. The decision of our learned brother, Narasimham, J. in *Mohan Das v. Superintendent of Police, Khammameth*, (1967) 1 Andh WR 156 was also distinguished on the same grounds inasmuch as it was stated in the charge that the delinquent had grossly misbehaved in the affair.

It is no doubt true that our learned brother Krishna Rao, J. in *R. Suryanarayana's case*, 1967-2 Andh WR 253 (supra) did in the end mention that indicating the punishment in a charge-memo itself is not contemplated by Article 311 and is wholly inappropriate and that such an indication of penalty really offends Article 311 of the Constitution of India. In our view, that is not the ratio of that decision; and if that was the only ground, it would have to be seen whether in fact the indication of punishment prejudiced the defence of the delinquent if otherwise the enquiry was conducted in a fair and impartial manner and the provisions of Art. 311(2) were complied with.

6. In *Khem Chand v. Union of India*, AIR 1958 SC 300 their Lordships of the Supreme Court had considered a similar question. While referring to the observations of their Lordships of the Judicial Committee in *High Commissioner for India v. I. M. Lall*, AIR 1948 PC 121 in which the notice given to I. M. Lall did not specify dismissal as the only and particular punishment proposed to be imposed on him, but called upon him to show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority might think fit to enforce, S. R. Das, C. J., said that the observations of their Lordships of the Judicial Committee in I. M. Lall's case, AIR 1948 PC 121, *Supra*, while agreeing with the view taken by the majority of the Federal Court, quite clearly indicated that what they agreed with was that second opportunity was to be given to the Government servant concerned after the charges had been brought home to him as a result of the enquiry. "Their Lordships" the learned Chief Justice observed, "made it clear that no action could, in their view, be said to be proposed within the meaning of the section until a definite conclusion had been come to on the charges and the actual punishment to follow was provisionally determined on, for before that stage the charges remained unproved and the suggested punishments were merely hypothetical and that it was on that stage being reached that the statute gave the civil servant the opportunity for which sub-section (3) made provision."

A close perusal of the judgment of the Judicial Committee in I. M. Lall's case, AIR

1948 PC 121 (supra), will, however, show that the decision in that case did not proceed on the ground that an opportunity had not been given to I. M. Lall against the proposed punishment merely because in the notice several punishments were included, but the decision proceeded really on the ground that this opportunity should have been given after a stage had been reached where the charges had been established and the competent authority had applied its mind to the gravity or otherwise of the proved charge tentatively and proposed a particular punishment. Khem Chand's case, AIR 1958 SC 300 was one in which the charge-sheet had asked the delinquent to show cause why he should not be dismissed from service and though the report of the Enquiry Officer had found the delinquent guilty of practically all the charges for the first time the punishment of dismissal was suggested by him. But since he was not the punishing authority, he made a report to the Deputy Commissioner, but who accepted the report and confirmed the opinion that the punishment of dismissal should be inflicted on the appellant. The Deputy Commissioner did not appear to have given the delinquent a further opportunity to show cause why that particular punishment should not be inflicted on him. It is this omission to indicate the punishment in the second show cause notice as required under Clause (2) of Article 311 that had been held to have contravened the constitutional protection and his dismissal was therefore set aside. Though S. R. Das C. J., no doubt said as page 308:

"If the competent authority were to determine before the charges were proved, that a particular punishment would be meted out to the Government servant concerned, the latter may well feel that the competent authority had formed an opinion against him, generally on the subject matter of the charge or, at any rate, as regards the punishment itself",

nonetheless did not say, that by itself would amount to violation of the principles of natural justice. The question as we have posed earlier, would be as to whether the indication of punishment in the charge-memo by itself would amount to a violation of the principles of natural justice, or whether the constitutional protection guaranteed under clause (2) of Article 311 was also complied with. In many cases where punishment has been indicated, in the charge-memo it may be that it was meant to indicate that if the charges are proved, that punishment would be meted out but it is not to say without anything further that the charges had been proved against him and therefore the punishment would be meted out.

7. In the other unreported decision of this Court in K. Venkateswara Rao v. Inspector-General of Police, Andhra Pradesh W. P. No. 1164 of 1964 dated 20-9-1965 (AP) the Bench consisting of Manohar Pershad, J. (as he then was) and Kumarayya, J. had stated that the Deputy Inspector

General of Police had disagreed with the Enquiry Officer in respect of one charge which he found as proved while agreeing with the finding that the other charge was held to have not been proved observed that

"as the order of the Deputy Inspector-General of Police and the dissenting note do not show that that officer had come to an independent decision after perusing the record, such an order cannot be sustained, and has to be quashed. After this, it is unnecessary for us to go into the other contention of the learned counsel for the petitioner whether the evidence on record is legal evidence or not so as to sustain the order of dismissal."

After having so stated incidentally, the Bench also considered at the end the question whether the indication of punishment in the charge-memo would vitiate the enquiry. Reliance seems to have been placed by the Government Pleader for his contention that there is nothing wrong in indicating the punishment by a reference to the procedure contained in certain Police Standing Orders, but he could not produce them. On the other hand, the Government Order with which they were concerned had definitely stated that the accused officers should not be asked to show cause against a particular penalty in the first charge-memo itself before the competent authority arrives at a provisional conclusion after completion of the enquiry, thereby giving rise to an argument that the authority concerned had prejudged the issues involved. Further a penalty can be suggested only with reference to the charges proved.

This decision in our view, is not an authority for the proposition that the mere mention of punishment would by itself vitiate the enquiry because the Bench nonetheless held in that case that though there was a mention of penalty in the first show cause notice given to the petitioner therein, it does not appear that the Enquiry Officer had already made up his mind against the petitioner because if that was so, he would not have acquitted the petitioner of the charges. Manohar Pershad, J., had towards the end observed:

"In view of this there does not remain any force in the contention of the learned counsel for the petitioner that he was prejudged by this mention of punishment in the first notice."

8. An examination of the decided cases leads us to the conclusion that except in so far as the facts and circumstances of a particular case indicate a prejudged mind or amount to prejudging of the issue, the mere mention of punishment in the charge-memo by itself would not amount to bias or prejudice. If, as we said earlier, the provisions of clause (2) of Article 311 have to be complied with at the end of the enquiry; if so, a reasonable opportunity of being heard should be given by calling upon the delinquent to show cause as to

why he should not be meted out with the punishment indicated in the charge-memo in respect of the charges held to have been proved against him. While this is so, in order to obviate any allegation of bias or prejudgment, it is always best for the Enquiry Officers to avoid indicating punishment in the charge.

9. In the view taken by us on the first two questions, the last two questions specified in the order of Parthasarathi, J., need not be considered. The appeals are allowed with costs in this Court and in the Courts below, the judgment of the first appellate Court set aside and that of the trial Court restored.

Appeals allowed.

AIR 1970 ANDHRA PRADESH 119
(V 57 C 14)

KONDAIAH, J.

Nimmakayala Audi Narayanamma, Appellant v. State of Andhra Pradesh, Respondent.

Criminal Appeal No. 137 of 1968, D/-24-4-1969, against the complaint by the Asst. S. J., Cuddapah, D/-19-1-1968.

(A) Criminal P. C. (1898), Ss. 476, 537 — Scope and principles of Section 476 stated — It is incumbent on Court before making complaint to record finding that it is expedient in interests of justice to enquire into offence — Omission to record finding is not mere irregularity curable under Sec. 537 but goes to root of matter — Where no such finding is recorded, it is not permissible to draw presumption under Sec. 114, Evidence Act that Court had formed opinion regarding expediency to enquire into matter, even if Court making complaint may be Court before which offence was committed — Satisfaction is objective — Order must be a speaking order — Person sought, to be proceeded against must be heard before forming an opinion — AIR 1962 All 251, Dissent. (Evidence Act (1872), S. 114.)

On an analysis of Section 476 Criminal P. C. the following principles can be deduced:

(1) It is not every case of perjury irrespective of facts and circumstances that should form the subject of an enquiry but it is only in such cases where the Courts are of honest belief and opinion, on an objective consideration of the facts and circumstances that the interests of justice require the laying of a complaint.

(2) It is not mandatory but discretionary for the Court, depending upon the facts and circumstances of each case, either to conduct any preliminary enquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons that committed perjury.

(3) The proceeding under Section 476 appealable under Sec. 476-B is an indepen-

dent and altogether a different proceeding from that of the original Sessions case where the witnesses have committed the offence of perjury.

(4) The proceeding under Section 476 being penal in nature, it is not only desirable and reasonable, but just and proper and in accordance with the principles of natural justice to afford a reasonable opportunity by issuing a show cause notice to the accused party to establish by adducing evidence oral and documentary that it was not expedient in the interests of justice to prosecute him.

(5) On a plain reading of the provisions of Section 476, and in particular the words "such Court may... record a finding to that effect", there is no room for doubt that the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made, as a condition precedent for filing a complaint.

(6) The provision in Section 476 relating to the recording of a finding is not merely directory but is mandatory, for, an appeal lies against the order of the Court; and under Section 476-B, the appellate Court is competent either to withdraw the complaint already made or direct the complaint to be made, depending on the facts and circumstances of each case.

(7) The opinion or the satisfaction contemplated under Section 476 is an objective and not a subjective one and should be reflected in the finding recorded or the order passed by the Court and such an order must be a speaking one supported by valid and justifiable grounds to enable the appellate Court under Section 476-B to know the material on which the Court had come to such a conclusion or opinion that it was expedient in the interests of justice to launch a prosecution.

(8) Though the Court, while recording the finding contemplated under Section 476 need not strictly adhere to the very language, viz., "that it is expedient in the interests of justice that an enquiry should be made," used in the section, it must use such language that it leaves no doubt that it was a fit and proper case and it was in the interests of justice to launch a prosecution against the person or persons that committed perjury.

(9) Even where the Presiding Officer, before whom the offence under Section 195 (1) (b) or (c) has been committed, himself prefers the complaint and forwards the same to the Magistrate, no presumption under Section 114 of the Evidence Act to the effect that he had formed an honest opinion, even though no such finding has been recorded, that it is expedient in the interests of justice to enquire into the offence, can be made as, on a plain and grammatical reading of the language and scheme of Section 476, it is incumbent on the Court to give a specific finding before making a complaint. AIR 1962 All 251, Dissent.

(10) The omission or failure to record a finding to the effect that it is expedient in

the interest of justice to enquire into the offence, is not a mere irregularity curable under Section 537, Criminal P. C. and it goes to the root of the matter as the Court will have no jurisdiction to file a complaint without recording such a finding. AIR 1962 All 251, Dissent. (Para 16)

(B) Civil P. C. (1908), Preamble — Precedents — Decisions of Madras High Court prior to June 1954, are binding on Andhra Pradesh High Court. AIR 1955 Andhra 87, Foll. (Para 15)

Cases Referred: Chronological Paras

- (1968) AIR 1968 All 296 (V 55) = 1968 Cri LJ 1218 (FB), Chhajoo v. Radhay Shyam 9
 (1968) AIR 1968 Ori 144 (V 55) = 1968 Cri LJ 1092, Paramananda Mohapatra v. The State 12
 (1965) 1965 (2) Cri LJ 837 = 1965 BLJR 81, Rajeswar Singh v. Ram Bahadur Singh 14
 (1963) 1963-1 Cri LJ 713 = ILR (1962) 12 Raj 526, Brijmohanlal v. Sohanraj 12
 (1962) AIR 1962 All 251 (V 49) = 1962 (1) Cri LJ 555, Lal Behari v. The State 8, 15
 (1959) AIR 1959 Mys 117 (V 46) = 1959 Cri LJ 618, Narajappa v. Chik-karamiah 14
 (1958) 1958-2 Andh WR 480 = 1958 Andh LT 863, Sundararami Reddi v. Venkatasubba Naidu 13, 14
 (1955) AIR 1955 Andhra 87 (V 42) = ILR (1955) Andh 1 = 1955 Cri LJ 770, Subbarayudu v. State of Andhra 15
 (1952) AIR 1952 Pat 70 (V 39) = 1952 Cri LJ 285, Kailash Pati Mishra v. Nandlal Ahir 11
 (1948) AIR 1948 Mad 297 (V 35) = 49 Cri LJ 340, In re, Pakhiriswami Pillai 10, 15
 (1946) AIR 1946 All 156 (V 33) = 47 Cri LJ 545, Liaqat Husain v. Vinay Prakash 9
 (1933) AIR 1933 Mad 67 (1) (V 20) = 33 Cri LJ 960, Ramayya v. Emperor 10, 15
 (1928) AIR 1928 Mad 783 (V 15) = 29 Cri LJ 732, Chaduvula Munu-swami Naidu v. Emperor 10, 15
 C. Padmanabha Reddy, for Appellant; Public Prosecutor, for the State.

JUDGMENT: The complaint filed on February 2, 1965 by the appellant before the Police against Gotur Palreddi and eight others for the offences under Sections 457, 380, 395 and 395 read with 397 I. P. C. was referred as false. Thereupon, a private complaint preferred by her on 1-7-65 before the J.S.C.M., Cuddapah was, after committal tried by the Assistant Sessions Judge, Cud-dapah in S. C. 5/65 who, by his judgment dated October 28, 1967 acquitted the accused of all the charges levelled against them holding that there was neither truth nor substance in the complaint. On 19-1-1968, the

Assistant Sessions Judge filed a complaint before the Judicial First Class Magistrate, Cuddapah against the appellant alleging that she had maliciously instituted criminal proceedings against Gotur Palreddi and eight others on the false charge of commission of the offence of dacoity with intent to cause injury to them, knowing that there was no just or lawful ground for such charge or proceeding in his Court, and has thereby committed an offence punishable under the 2nd part of Section 211 I. P. C. Hence this appeal.

2. The failure on the part of the Assistant Sessions Judge, contended by Sri Padmanabha Reddy for the Appellant, to give a finding as contemplated by Section 476 Criminal P. C. about the expediency in the interests of justice to inquire into the offence under Section 211 I. P. C. alleged to have been committed by his client in the course of trial in S. C. No. 5 of 1965, warrants the quashing of the complaint.

3. The learned Public Prosecutor contended contra and urged that Section 476 Criminal P. C. does not contemplate the Court to give any such specific finding in every case.

4. The point that arises for determination is whether on the facts and in the circumstances, the Assistant Sessions Judge has or has not preferred the complaint according to law as contemplated by the provisions of Section 476 Criminal P. C.?

5. For a proper appreciation of the point at issue, it is profitable to consider Sec. 476 Criminal P. C. which reads thus:

"When any....Criminal Court is...of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in Section 195 sub-section (1), clause (a) or clause (b) which appears to have been committed in or relation to a proceeding in that Court, such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the First Class; having jurisdiction...."

Section 476 Criminal P. C. prescribes an exhaustive procedure relating to the preferring of complaints by Courts, civil, criminal or revenue, in respect of offences mentioned in clauses (b) and (c) of sub-sec. (1) to Section 195. This section enjoins the Court, before which the offence under Section 211, I. P. C. appears to have been committed in or in relation to any proceeding before it, to be satisfied objectively in each case that it was expedient in the interests of justice that an enquiry should be held into the offence. Thereafter the Court may have such preliminary enquiry as it thinks necessary and record a finding to the effect that it is expedient in the interests of justice or that it is a fit case to prosecute the person or persons who committed the offence and then make a complaint in writing and for-

ward the same to the First Class Magistrate for disposal according to law. The words "such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect" must necessarily be construed that it is incumbent on the Court to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence referred to in Section 195 (1) clause (b) or (c) although the preliminary enquiry may or may not be held in the discretion of the Court, depending upon the circumstances of each case. The action of the Court under Section 476 is appealable by the aggrieved party under Section 476-B Criminal P. C. to the Court having jurisdiction to receive appeals against the decisions of that Court.

In my considered opinion, the opinion contemplated under Section 476 to be formed by the Court before which the offence appears to have been committed, that it was expedient in the interests of justice to prosecute such person or persons, must be an objective but not a subjective one. The test that has to be laid must be that of a prudent reasonable person and it should be a speaking one supported by valid grounds. Otherwise it would be often very difficult and sometimes even impossible for the appellate Court under Section 476-B to arrive at a conclusion as to whether the Court has rightly applied its mind and passed the order under Section 476 Criminal P. C. or not. The opinion contemplated under Section 476 must be expressed in a speaking order. Whether it be either with or without such preliminary enquiry as the Court thinks it necessary it has to record a finding to the effect that on a consideration of the facts and circumstances, it was of an honest and bona fide opinion that it was a fit case for prosecution or that it was expedient in the interests of justice to enquire into the matter. Without such finding it would be very difficult to probe into the mind of the Court that passed the order under Section 476 Criminal P. C. or the complaint lodged by the Court before the First Class Magistrate as the appellate Court while considering under Sec. 476-B Criminal P. C. is entitled to agree or disagree with such an action of the trial Court and make the complaint in cases where the subordinate Court refused to make a complaint, under Section 476-B or direct the withdrawal of the complaint in appropriate cases if it finds that the same is not warranted in the interests of justice.

6. That apart, the provisions of Section 476 and Section 476-B Criminal P. C. contemplate a different proceeding from that of the original proceeding before the subordinate Court where the offence appears to have been committed by the party. After the closure of the enquiry relating to the main offence which was decided in the Sessions Case, the further proceeding contemplated under Section 476 Criminal P. C. to prosecute the person who had filed a false com-

plaint, which in the opinion of the Court it is expedient in the interests of justice to be enquired into is a different proceeding. No doubt it is true, as pointed out by the learned Public Prosecutor, in some cases it happens that the very same Magistrate or the Judge who tried the original case would have been the Presiding Officer who had to consider the applicability of the provisions of Section 476 Criminal P. C. and file a complaint in appropriate cases. Even then it is just and proper that that Court whether presided by the same presiding Officer or by a different Officer, should proceed according to the provisions of Section 476 and issue a show cause notice as to why the person sought to be prosecuted should not be prosecuted and after affording an opportunity, record a finding to the effect that it was expedient in the interests of justice to enquire into the offence committed by him and file a complaint before the First Class Magistrate.

The proceedings under Section 476 Criminal P. C. being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the Court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding. That apart, the appellate Court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits.

7. It appears there is no direct case of our High Court on this question. I shall presently consider the several decisions of various High Courts cited before me by both the counsel in support of their respective contentions.

8. The decision of the Allahabad High Court in Lal Behari v. State, AIR 1962 All 251, on which strong reliance has been placed by the learned Public Prosecutor, in a way supports his plea. The learned Public Prosecutor relies upon the following passage of Nigam J., who spoke for the Bench, at page 255:

...the jurisdiction of the Court to prefer a complaint does not in my opinion depend upon the recording of the opinion though it is consequent on the formation of such an opinion. In the circumstances, I am of the view that omission to record such an opinion is only an irregularity and does not affect the legality of the complaint...Nor-

mally the fact that a complaint is preferred is itself evidence of the fact that such an opinion had been formed and in proper cases a presumption may even be raised under Section 114 of the Indian Evidence Act."

No doubt, the aforesaid passage supports the contention of the learned Public Prosecutor. It is pertinent to notice two sentences prior to the aforesaid passage, which read thus:

"...I am of opinion that the formation of an opinion that the prosecution is expedient in the interests of justice is a condition precedent to the preference of the complaint. The law also requires that such a finding should be recorded...."

The aforesaid passage in paragraph 20 in the Judgment of Nigam J., at page 255, if read as a whole, would also support the plea of the appellant herein that a finding to the effect that the prosecution is expedient in the interests of justice should be recorded.

9. In *Liaqat Husain v. Vinay Prakash*, AIR 1946 All 156, a Division Bench of the same High Court has ruled that a finding by the Court that the prosecution is expedient in the interests of justice must be given before filing the complaint. In *Chhajoo v. Radhay Shyam*, AIR 1968 All 296 (FB), a Full Bench of the same High Court, while considering the scope and interpretation of Section 476 Criminal P. C., observed at page 302 thus:

"An analysis of Section 476 of the Code of Criminal Procedure, as already pointed out, would show that it contemplates three stages in the making of a complaint: The first stage is when a finding has to be given by the Court concerned to the effect that it is expedient in the interests of justice to file a complaint; the second is the making of the complaint in writing signed by the presiding officer or by the officer appointed by the High Court and the third stage is that of forwarding the same to a Magistrate of the First Class."

10. The Madras High Court is consistently of the view that the provision in Section 476 Criminal P. C. to record a finding that it is expedient in the interests of justice to enquire into the offence, is not merely directory but is mandatory and it is a condition precedent for preferring a complaint before the Magistrate in *Chaduvula Munuswami Naidu v. Emperor*, AIR 1928 Mad 783, *Devadoss, J.* ruled thus at page 783:

"Before a complaint under Section 476 is made, it is necessary that a Court which thinks that an offence mentioned in Sec. 195, sub-section (1), clause (b) or clause (c) has been committed should record a finding to that effect and after recording such finding may make a complaint....The provision is not merely directory, but it is mandatory, for an appeal lies against the order of the Court and under Section 476-B an appellate Court can either withdraw a complaint or direct a complaint to be made. That being so, it is necessary for the appellate Court to see what

reasons the lower Court had for deciding to make a complaint under Section 476. It is not every case of perjury that should form the subject of an inquiry; but it is only when the interests of justice do require that a complaint should be made then and then only a complaint should be made. Though the Courts should be anxious to put down perjury as much as possible, it is not in the interests of justice that every false statement made by a witness in Court or in an affidavit filed in Court should be subject of a charge for perjury."

In *Ramayya v. Emperor*, AIR 1933 Mad 67 (1), a Division Bench of the Madras High Court ruled thus:

"The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a record to that effect if that is their opinion because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they mean something which they have not written." In *re, Pakhiriswami Pillai*, AIR 1948 Mad 297, *Yahya Ali, J.*, ordered the withdrawal of the complaint as there was no finding by the Magistrate that the prosecution was expedient in the interests of justice as the same is an incurable defect.

11. In *Kailashpati Mishra v. Nand Lal Ahir*, AIR 1952 Pat 70, *Ahmed, J.*, while considering the scope of Section 476 Criminal P. C. at page 71, observed thus:

"The section, therefore, lays down two conditions for its operation. Firstly, a preliminary inquiry, if necessary, shall be held and secondly, that the Court shall record a finding to the effect stated in the section."

12. In *Paramananda Mohapatra v. The State*, AIR 1968 Orissa 144, the Orissa High Court has taken the same view. In *Brijmohanlal v. Sohanraj*, 1963 (1) CrL LJ 713 (Raj), the Rajasthan High Court held that the requirement of recording a finding that it is expedient in the interests of justice that a complaint be filed under Section 476, is mandatory and any failure to comply with that requirement deserves the order to be set aside.

13. The decision of *Jaganmohan Reddy, J.* (as he then was) in *Sundaram Reddy v. Venkatasubba Naidu*, 1958-2 Andh WR 480, does not render any assistance to the prosecution case in the present case. What the learned Judge had to consider in that case was whether or not preliminary enquiry was compulsory in each case. The learned Judge, at page 485, observed thus:

"What the Court has, therefore, to decide under this section is whether an offence of the kind contemplated under the section appears to have been committed and in the interests of justice it should further enquire into it. It is not always obligatory on the part of the Court to make a preliminary

enquiry; but that would depend upon the facts and circumstances of each case." Negating the contention of the counsel for the accused that the Sessions Judge failed to record his opinion that it was expedient in the interests of justice that an enquiry should be made, the learned Judge observed at page 484 thus:

"No doubt the Sessions Judge had not used the actual words of the section, namely that it is expedient in the interests of justice that an enquiry should be made, but in my view there is no charm in this incantation where the Judge has used language which leaves no doubt that the prosecution was in the interests of justice. It is not a question of a mere inference alone."

14. The decisions of the Mysore High Court in *Narajappa v. Chikkaramiah*, AIR 1959 Mys 117 and of the Patna High Court in *Rajeswar Singh v. Ram Bahadur Singh*, 1965 (2) CrL LJ 837 (Pat), relied upon by the learned Public Prosecutor, do not advance his plea, as those cases are the authorities for the view expressed by this Court in 1958-2 Andh WR 480, that the preliminary enquiry was not compulsory, but the Court, in its discretion, may dispense with the holding of an enquiry if it thinks that it was unnecessary on a consideration of the facts and circumstances of any given case.

15. The decisions of the Madras High Court in AIR 1928 Mad 783, AIR 1933 Mad 67 (1) and AIR 1948 Mad 297, being before June, 1954, are binding on me (see *Subbarayudu v. State of Andhra*, ILR 1955 Andhra 1 = (AIR 1955 Andhra 87)). That apart, the language of Section 476 Criminal P. C. fully supports the view of the Madras High Court that it is incumbent on the Court to form an opinion that it is expedient in the interests of justice to enquire into the offence and record a finding to that effect, and that the failure to conform with such a requirement warrants the quashing of the complaint as the defect is not a one which can be cured under Section 537 Criminal P. C. I am in entire agreement with the view expressed by the Madras High Court. I am unable to agree with the view expressed by Nigam, J., who spoke for a Division Bench of the Allahabad High Court in AIR 1962 All 251, that the jurisdiction of the Court to prefer a complaint does not depend upon the recording of the opinion and that the omission to record such an opinion is only an irregularity and does not affect the legality of the complaint.

16. From the aforesaid discussion, the following principles can safely be deduced:

(1) It is not every case of perjury irrespective of facts and circumstances that should form the subject of an enquiry but it is only in such cases where the Courts are of honest belief and opinion, on an objective consideration of the facts and circumstances that the interests of justice require the laying of a complaint.

(2) It is not mandatory but discretionary for the Court, depending upon the facts and

circumstances of each case, either to conduct any preliminary enquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons that committed perjury.

(3) The proceedings under Section 476 Criminal P. C. appealable under Sec. 476-B is an independent and altogether a different proceeding from that of the original Sessions case where the witnesses have committed the offence of perjury.

(4) The proceeding under Section 476 Criminal P. C. being penal in nature, it is not only desirable and reasonable, but just and proper and in accordance with the principles of natural justice to afford a reasonable opportunity by issuing a show cause notice to the accused party to establish by adducing evidence oral and documentary that it was not expedient in the interests of justice to prosecute him.

(5) On a plain reading of the provisions of Section 476, and in particular the words "such Court may...record a finding to that effect," there is no room for doubt that the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made, as a condition precedent for filing a complaint.

(6) The provision in Section 476 relating to the recording of a finding is not merely directory but is mandatory, for, an appeal lies against the order of the Court; and under Section 476-B, that the appellate Court is competent either to withdraw the complaint already made or direct the complaint to be made, depending on the facts and circumstances of each case.

(7) The opinion or the satisfaction contemplated under Section 476 is an objective and not a subjective one and should be reflected in the finding recorded or the order passed by the Court and such an order must be a speaking one supported by valid and justifiable grounds to enable the appellate Court under Section 476-B to know the material on which the Court had come to such a conclusion or opinion that it was expedient in the interests of justice to launch a prosecution.

(8) Though the Court, while recording the finding contemplated under Section 476 Criminal P. C., need not strictly adhere to the very language, viz., "that it is expedient in the interests of justice that an enquiry should be made," used in the section, it must use such language that it leaves no doubt that it was a fit and proper case and it was in the interests of justice to launch a prosecution against the person or persons that committed perjury.

(9) Even where the Presiding Officer, before whom the offence under Section 195 (1) (b) or (c) has been committed, himself prefers the complaint and forwards the same to the Magistrate, no presumption under Section 114 of the Evidence Act to the effect that he had formed an honest opinion, even though no such finding has been recorded, that it is expedient in the interests of justice

to enquire into the offence, can be made as, on a plain and grammatical reading of the language and scheme of Section 476, it is incumbent on the Court to give a specific finding before making a complaint.

(10) The omission or failure to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence, is not a mere irregularity curable under Section 537 Criminal P. C. and it goes to the root of the matter as the Court will have no jurisdiction to file a complaint without recording such a finding.

17. Let me now turn to the facts of the present case and under the merit of the respective contentions of the counsel, applying the principle referred to above. Admittedly, the Assistant Sessions Judge, who tried S. C. No. 5 of 1965, did not record a finding in the Sessions case that the appellant herein had committed perjury and it was in the interests of justice to prosecute her. Not only that there was no finding to that effect in the Sessions case which ended in acquittal, but even a show cause notice as to why the appellant who committed perjury should not be proceeded against, was not issued before preferring the complaint before the Magistrate. It is true, as contended by the learned Public Prosecutor, that it was the same person who tried the Sessions case that filed the complaint before the Magistrate, but on that account alone, it cannot be held that he had formed in his mind an honest and bona fide opinion that it was just and proper to prosecute the appellant. As already expressed earlier, I feel it not just and proper to draw any inference or presumption under Section 114 of the Evidence Act that the Assistant Sessions Judge who tried the case being the same person that filed the complaint before the Magistrate, must be presumed to have come to such an honest conclusion that it was in the interests of justice to conduct an enquiry into the offence of perjury committed by the appellant before him. When there is no finding either in the original judgment or subsequently, it is very difficult to sustain the argument of the learned Public Prosecutor that the complaint in the present case is in order. Therefore, for all the reasons stated above, the proceedings in P. R. C. 1/68 on the file of the Judicial First Class Magistrate, Cuddapah that have arisen out of the complaint filed in the present case, must be held to be not according to law and procedure contemplated under Section 476 Criminal P. C. and must be quashed. It is no doubt open to the Court to proceed afresh and make any complaint, if it so thinks, after following the procedure indicated above.

18. In the result, the appeal is allowed, quashing the complaint filed on 19-1-1968 by the Assistant Sessions Judge, Cuddapah before the Judicial First Class Magistrate, Cuddapah.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 124
(V 57 C 15)

KRISHNARAO, J.

Ogeti Pedda Ranganna, Petitioner v. Zaleka Bee and another, Respondents.

W. P. No. 2388 of 1967, D/-27-6-1969.

Motor Vehicles Act (1939), S. 110F — Jurisdiction of Tribunal under Workmen's Compensation Act, 1923, is not barred — What is barred is jurisdiction of Civil Court — Tribunals under two Acts have concurrent jurisdiction — Option lies with claimant to choose one or the other tribunal and he cannot be compelled to choose a forum which would be convenient to defendant — Once a particular forum is chosen, claimant cannot choose another forum — Though application for compensation is not filed under Motor Vehicles Act, employer's remedy against insurer under contract of insurance is always available under general law — (Workmen's Compensation Act (1923), S. 19). 1969 Lab IC 371 (Punj), Rel. on. AIR 1966 SC 135, Disting.

(Paras 2, 3)
Cases Referred: Chronological Paras
(1969) 1969 Lab IC 371 = 1968-1

Lab LJ 80 (Punj), Ram Sarup v.

Gurdev Singh

(1966) AIR 1966 SC 135 (V 53) =

(1965) 3 SCR 665, Damji v. Life

Insurance Corporation of India

A. Gangadhararao and P. Sitaramaraju, for Petitioner; T. Venkatappa and 2nd Govt. Pleader, for Respondents (Nos. 1 and 2 respectively).

JUDGMENT: This is an application under Article 226 of the Constitution of India for the issue of a Writ of Certiorari to quash the order of the second respondent, Commissioner for Workmen Compensation, Andhra Pradesh, Hyderabad in W. C. Case No. 283 of 1966 dated 2-8-1967 overruling an objection as to the maintainability of the claim for compensation before him. The first respondent herein filed the application before the Commissioner for Workmen Compensation, Andhra Pradesh, under the provisions of the Workmen's Compensation Act, being the legal representative of the deceased workman employed under the petitioner. The petitioner herein raised an objection before the Commissioner questioning his jurisdiction to entertain the claim in view of Section 110 of the Motor Vehicles Act under which a Claims Tribunal (District Judge) was specially constituted to adjudicate upon all claims for compensation arising out of accidents involving motor vehicles. This objection was overruled by the Tribunal under the Workmen's Compensation Act. Against the said order, the petitioner has come up to this Court stating that the tribunal has no jurisdiction to proceed with the enquiry.

2. The contention of the learned counsel is that the tribunal under the Motor Vehicles Act is constituted under a special enactment relating to accidents arising in connection

with the motor vehicles and that therefore the jurisdiction of the tribunal under the Workmen's Compensation Act, which should be regarded as a general Act, is excluded. Section 110-F of the Motor Vehicles Act in express terms excludes only the jurisdiction of a civil Court with respect to any action taken or to be taken before the Claims Tribunal under the Motor Vehicles Act. The legislature is certainly aware of the provisions of the Workmen's Compensation Act the tribunal constituted therein for adjudication of claims under the said Act. The provisions of Sec. 110-F, while expressly barring the jurisdiction of civil courts as such, do not contain any indication that the jurisdiction of any other tribunal is barred. Turning to the provisions of the Workmen's Compensation Act, the jurisdiction of a civil Court alone is barred with respect to adjudication of claims falling under the purview of the said Act. It is therefore a clear case where the provisions of each of the enactments operate independently of one another having concurrent jurisdiction to entertain claim or compensation. In such a case, the option lies with the workman to choose one or the other tribunal. It is of course undisputed that if the workman chooses a particular tribunal, it will not be open to him to choose the other tribunal under the Motor Vehicles Act. In the present case, the workman or the claimant having chosen the tribunal under the Workmen's Compensation Act, it is not open to the employer to ask him to choose a different tribunal, for, the choice lies with the claimant and not with the employer. The decision of the Punjab High Court in *Ram Sarup v. Gurdev Singh*, (1968) 1 Lab LJ 80 = (1969 Lab IC 371), directly supports the contention of the respondent that the provisions of the Motor Vehicles Act do not exclude the jurisdiction of the tribunal under the Workmen's Compensation Act. The learned counsel for the petitioner placed reliance on a ruling of the Supreme Court reported in *Damji v. Life Insurance Corporation of India*, AIR 1966 SC 135, wherein it was held that when the jurisdiction of the tribunal under Section 41 of the Life Insurance Corporation Act, which is a special enactment, was invoked, the provisions under the Companies Act containing general provisions regarding winding up of companies, appointment of liquidators and bar of suits or other legal proceedings except with the leave of the Court, etc., are not applicable. In the said case, reference was made to Section 41 of the Life Insurance Corporation Act which provides that no civil Court shall have jurisdiction to entertain or adjudicate upon any matter which a tribunal is empowered to decide or determine under Section 15 of that Act. In view of the clear provisions of Section 41 of the Life Insurance Corporation Act barring the jurisdiction of Civil Courts, it was held by the Supreme Court that the jurisdiction of the Company Court was expressly excluded. I do not see how the peti-

tioner can place any reliance upon this ruling. Though it was observed that the provisions of the Life Insurance Corporation Act were in the nature of a special enactment creating a special tribunal, reliance was placed on the provisions of Section 41 of the Life Insurance Corporation Act barring the jurisdiction of the Company Court to entertain identical matters. But in the instant case, Section 110-F of the Motor Vehicles Act, as already pointed out, does not bar the jurisdiction of any other tribunal to decide claims as to compensation.

3. It was next contended on behalf of the petitioner that if the claimant applies for compensation before the Tribunal under the Motor Vehicles Act, there is a provision for issuing notice to the insurer in which case, the employer can work out his rights against the insurer also in the same proceeding and that he would be deprived of such an opportunity if the claim for compensation is not made before the tribunal under the Motor Vehicles Act. In a case where there are two tribunals having concurrent jurisdiction, the claimant who is in the position of a plaintiff is the dominus litis and has the right to choose his own forum and he cannot be compelled to choose a forum which would be convenient to the defendant. Though the application for compensation is filed under the Motor Vehicles Act, the employer's remedy against the insurer under the contract of insurance is always available under the general law. I am not therefore inclined to accept this contention of the petitioner that the claimant should choose a particular forum which would be convenient to the opposite party.

4. For the above reasons, this writ petition fails and is dismissed with costs of the first respondent. Advocate's fee Rs. 100.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 125
(V 57 C 16)

KUMARAYYA AND KONDDIAH, JJ.

N. Raja Pullaiah and others, Petitioners v. Dy. Commercial Tax Officer, Kurnool and another, Respondents.

Writ Petns. Nos. 619, 637, 729 and 732 of 1964, D/-4-2-1969.

Constitution of India, Article 226 — Illegal assessment — Writ against — Best judgment assessment smacking of arbitrariness — Held liable to be set aside — (Income Tax Act (1961), S. 144) — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 9 (2) (b)).

Assessment of taxes to the best of judgment has to rest on some relevant dependable data and cannot be arbitrary. Where turnover of oil mill was assessed on basis of consumption of electricity and even that test was conducted not in that very mill but

EM/EM/C20/69/HGP/D

in other mills and the allowances for defects in mechanism, minor differences from rotary to rotary, quality of seeds and skill of the driver, were not made on actual proper checking or on reasonable calculative basis.

Held that the data relied upon by the assessing authorities smacked of arbitrariness and the best judgment assessment was liable to be set aside. (Para 4)

K. Venkataramaiah, for Petitioners (in all);
Prl. Govt. Pleader, for Respondents.

KUMARAYYA, J.: The common point for determination in all these writ petitions is whether the assessment made by the Deputy Commercial Tax Officer on the best judgment basis smacks of arbitrariness so that the assessment orders may be quashed.

2. It would appear that in all these cases provisional assessments were made for the year 1962-63 and the assessed amounts were also paid. At the time of final assessment, the Deputy Commercial Tax Officer, on a perusal of the account books submitted before him, came to the conclusion that they were not in order and could not be safely acted upon. He gave his reasons therefor which, according to the respondents, are cogent and valid. The account-books being thus rejected, the only course left open to the taxing authority was to make assessment to the best of his judgment. Even this had to rest on some relevant dependable data and could not in law be arbitrary. The Deputy Commercial Tax Officer assessed the turnover on the basis of consumption of electricity. No test was conducted in that very mill to find out the rate of consumption of electricity for a definite quantity of seeds to be converted into oil. He rested his conclusion on the result of tests conducted in other mills. He determined the turnover on that basis and levied the tax thereon, of course, making allowances for defects in mechanism, minor differences from rotary to rotary, quality of seeds and skill of the driver. These allowances were not made on actual proper checking or on reasonable calculative basis. As the resultant turnover had inflated the tax figure enormously, the petitioners went up in appeal. Under the provisions then in force the appeals could be heard and disposed of only on payment of the assessed tax. As the assessee were unable to pay the same, their appeals were dismissed for non-payment of taxes. Hence they came to this Court invoking writ jurisdiction.

3. The main complaint of the petitioners is that the method adopted by the taxing officer cannot afford a sure or reasonable basis for determination of the turnover. The consumption of electricity by itself cannot form a reliable test for determining the yield of oil. The yield depends upon various factors viz., the quality of the seed, the condition of the machine, the skill of the driver, the soundness of electric equipment, etc. There may be several other disturbing factors which affect the net yield of oil. The con-

sumption of electricity itself is affected by various factors. That apart, results of the tests carried on in other concerns or undertakings, which may not be similarly circumstanced for various reasons, cannot form a reasonable basis for determining the yield of the petitioners' concerns. It is on these grounds that the assessments have been brought into question.

4. To our mind there is force in the argument advanced by Mr. Venkataramayya, learned counsel for the petitioners. There is no strong or valid reason why the authority did not carry out the test in the rotaries of the petitioners themselves. The fact that the meter is inconveniently placed is no ground against carrying on the experiment. It is pointed out to us that in like cases the Tribunal itself had set aside the assessments in view of the wide disparity in electricity consumption from mill to mill for the required quantity of oil yield. Be that what it may, it is plain, knowing it for certain, that the turnover depends on various factors and circumstances peculiar to the rotaries concerned, the taxing authority rested their conclusions on the tests carried in other rotaries. The basis furnished by tests conducted in other undertakings cannot be of much relevance for the purpose of these mills about which it cannot be said that they are similarly circumstanced in all respects. As the data relied upon by the assessing authorities, which is made the basis of best judgment assessment, thus smacks of arbitrariness, the best judgment assessment is liable to be set aside.

5. The orders are therefore quashed. It is however, open to the authorities to proceed afresh in accordance with law.

6. In the result, these writ petitions are allowed. There will be no order as to costs.
Petitions allowed.

AIR 1970 ANDHRA PRADESH 126
(V 57 C 17)

SESHACHALAPATI AND SAMBASIVA
RAO, JJ.

G. V. Krishna Rao and others, Petitioners
v. The First Addl. Gift Tax Officer, Guntur,
Respondent.

Writ Petn. No. 26 of 1963, D/-26-2-1968

(A) Constitution of India, Art. 246 and
Sch. VII — Legislative entries should not be
interpreted in narrow, pedantic sense — En-
tries comprehend ancillary and subsidiary
matters.

Entries in legislative lists should not be
interpreted in a narrow and pedantic sense
and the language of the entries must be held
to comprehend ancillary and subsidiary
matters. The power to enact incidental or
ancillary legislation is included in the grant
of a substantive power and follows without
express provision therefor. (1894) AC 189 and
(1884) 10 AC 119 (129), Ref. (Para 6)

HM/JM/D263/68/BDB/D

(B) Constitution of India, Sch. VII, List I, Entry 97 and List II, Entry 49, Arts. 246, 248 — Tax on land — Gift of land — Gift of land is taxable under Gift Tax Act (1958), S. 15 (3) — Subject matter of gift tax falls under Entry 97, List I and not under Entry 49, List II. AIR 1962 Mys 269, Dissented from.

The object of Item 49, List II is the levy of a tax on the ownership of property as such, while gift tax is a tax on a particular use of the property or the exercise of a single power subsidiary to ownership. The owner of a property may put it to several uses. A gift inter vivos is one of the several rights a person may have in a property. This form of tax attaches itself to a transfer of property while the tax envisaged in Entry 49, is incidental to the ownership irrespective of any use to which it may be put. And the source of power to enact gift tax must be sought in Article 248 read with Item 97 of List I of the Constitution. Parliament has exclusive power to make laws with respect to any subject or matter which is not expressly within the scope of the heads of power enumerated in the lists. The gift tax does not entrench upon the exclusive legislative power of the State legislature as indicated in Item 49 of List II. The manifest object of the Gift Tax Act and its pith and substance is not to tax lands or buildings as such but to impose tax on gifts inter vivos. The scope of the gift tax, therefore is referable to Article 248 read with Item 97. AIR 1962 Mys 269, Dissented; AIR 1962 Ker 97 and AIR 1963 Mad 419 and AIR 1965 Punj 65 and AIR 1967 All 19, Rel. on.

(Paras 6, 7, 8)

(C) Hindu Law — Joint family — Father merging his self-acquired property into joint family property — Such conversion amounts to transfer and diminution of rights of father and enlargement of rights of coparceners — AIR 1962 Mad 26 and 1967-66 ITR 169 (Mad) and 1967-65 ITR 19 (Mys), Dissented — Case law discussed.

(Para 18)

(D) Gift Tax Act (1958), Ss. 2 (xxiv) (d), 4 (d) — Hindu father merging his self-acquired property into joint family property — His rights being diminished the transaction is gift.

By means of merging self-acquired property into joint family property a person is diminishing his rights to property and increasing the rights of others within the meaning of Section 2 (xxiv) (d) and therefore the shares obtained by others in merged property fall within the meaning of the gift as defined in Section 2 (xii) and Section 4 (d) of the Act.

(Para 22)

(E) Transfer of Property Act (1882), Section 123 — Registration Act (1908), S. 17 — Hindu father merging self-acquired property into joint family property — No formal registered instrument necessary — (Hindu Law — Self-acquired property — Merger of, into joint family property — No registered instrument necessary).

There is no provision under the Hindu Law that the conversion of separate property into joint family property required a formal registered instrument. All that is required is that there should be a clear intention on the part of the member of the joint family to waive his separate rights in the properties in question and to impress them with the character of joint family properties.

(Para 24)

(F) Gift Tax Act (1958), Ss. 2 (xxviii), 2 (xii), 2 (xxiv) and 4 (d) — "Person" — Definition is inclusive one — Coparceners taking share in self-acquired property of another coparcener which was merged in joint family property — Transfer in this case is to 'person' within definition of Gifts Tax Act.

(Para 25)

(G) Gift Tax Act (1958), S. 2 (xxiv) (d) — "Transaction" — Conversion of self-acquired property into joint family property — Conversion is "transaction".

The conversion of self-acquired property of the father into the joint family property means the abridgment of the father's absolute rights therein and the transference of right in the property. Such a process would fall within the normal meaning of the expression 'transaction'. (1949) 78 CLR 199 (Australia), Dist.; AIR 1968 Ker 190, Ref.

(Para 26)

(H) Gift Tax Act (1958), Ss. 29, 31 and 3 — Gift tax not recovered from donor — Recovery from donees — Notice of demand — Essentials.

Sec. 29 contemplates that normally the gift tax is payable by the donor. That is what the charging section — S. 3 — provides for. But where in the opinion of the Gift Tax Officer, the tax could not be recovered from the donor, who has died, it may be recovered from the donee. It also indicates that in such a situation if there are more donees than one, they are liable jointly and severally for the amount of the tax and further it is provided that the amount of tax due from donee shall not exceed the value of the gift made to him as on the date of the gift. The recourse to the donees can be had only when the Gift Tax Officer is of opinion that the tax cannot be recovered from the donor. In coming to that opinion the Gift Tax Officer must not act arbitrarily. He should apply his mind to all the relevant circumstances of the case to find out whether he can collect the money from the donor or not and only on coming to a conclusion that the money cannot be recovered from the donor, can he start the proceedings for recovery of the tax against the donees. (Held that the demand under Section 31 issued to donees was in conformity with S. 29).

(Para 29)

(I) Gift Tax Act (1958), S. 30 — Priority of Government in respect of arrears of tax — Government can proceed against immoveable properties gifted.

The Government has a priority in respect of arrears of tax. The English common law doctrine of the priority of Crown debts has been given judicial recognition in India prior

to 1950 and by virtue of Article 372 (1) of the Constitution, that doctrine continues to be in force. In seeking therefore, to realise the arrears of tax from the immoveable property comprised in the gift, the department is proceeding well within its rights. Gift tax is the first charge on the property gifted.

(Para 32)

(J) Gift Tax Act (1958), Section 2 (iii) — “Assessee” — Definition is wide enough to include every person who is deemed to be a donee.

(Para 35)

(K) Constitution of India, Article 19 (1) (f) — Gift Tax Act (1958), Ss. 22, 23, 24, 26, 29 — Notice to donees to pay gift tax — Remedies available to contest the notice — Appeal is a creature of statute — Absence of provision of appeal do not make proceedings invalid — Section 29 does not contravene Article 19 (1) (f). AIR 1963 Cal 127 Dissented from.

By reason of the notice of demand issued under Section 31 read with Section 29 of the Act, the assessors are entitled to take advantage of the remedies prescribed under the Act. Under Section 22 (b) of the Act any person objecting to the amount of gift tax determined as payable by him under the Act has a right of appeal to the Appellate Assistant Commissioner from the orders of the Gift Tax Officer. He has a further right of appeal to the appellate tribunal under Section 23. There is also the right of applying to the Commissioner under Section 24 for revising the orders of his subordinates. Eventually, there is also a right to ask for a reference to the High Court under Section 26 of the Act. Further, the absence of a provision for an appeal does not by itself constitute an infringement of property rights. An appeal does not rest upon an inherent right; but it is the creature of a statute. (1913) ILR 40 Cal 21 (PC) and AIR 1959 SC 213, Rel. on.

Therefore even on the assumption that there is no right of appeal expressly provided for donee called upon to pay the tax, that circumstance by itself will not invalidate Section 29. AIR 1963 Cal 127, Dissented from.

(Paras 35, 36)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Ker 190 (V 55) = 1968-67 ITR (SN) 36, P. K. Subrahmanya Iyer v. Commr. of Gift Tax, Kerala 26
- (1967) AIR 1967 All 19 (V 54) = 1967-66 ITR 74, Shamsunder Choudhari v. Gift Tax Officer, Allahabad 9
- (1967) 1967-66 ITR 169 = 1967-2 Mad LJ 352, Kandaswami Chettiar v. Commr. of Agricultural Income Tax 18A
- (1967) 1967-65 ITR 19 = 10 Law Rep 397 (Mys), Smt. Laxmibai Narayana Rao v. Commr. of Gift Tax 21
- (1965) AIR 1965 SC 866 (V 52) = 1965-55 ITR 637, Commr. of Income Tax Gujarat v. Keshavlal Lallubhai Patel 18A

- (1965) AIR 1965 SC 1061 (V 52) = 1965-56 ITR 91, Builders Supply Corporation v. Union of India 32
- (1965) AIR 1965 SC 1494 (V 52) = 1965-56 ITR 62, Commr. of Income Tax, Madras v. M. K. Stremann 18A
- (1965) AIR 1965 SC 1708 (V 52) = 1965-55 ITR 660, Commr. of Income Tax, Madras v. Bagyalakshmi and Co., Udamalpet 12
- (1965) AIR 1965 Andh Pra 95 (V 52) = 1965-1 Andh WR 69, Commr. of Gifts Tax Andhra Pradesh, Hyderabad v. Satyanarayana Murthy 19, 21
- (1965) AIR 1965 Punj 65 (V 52) = 1964-54 ITR 632, Mst. Gaindi v. Union of India 9
- (1963) AIR 1963 Cal 127 (V 50) = 1962-45 ITR 528, Rahaman Tea and Lands Co., (P.) Ltd. v. Gift Tax Officer 33
- (1963) AIR 1963 Mad 419 (V 50) = 1963-2 Mad LJ 192, Dandapani v. Additional Gift Tax Officer, Cuddalore 9
- (1962) AIR 1962 Guj 6 (V 49) = 1962-44 ITR 266, Keshavlal Lallubhai v. Commr. of Income Tax, Gujarat 18A
- (1962) AIR 1962 Ker 97 (V 49) = 1962-45 ITR 66, Joseph M. T. v. Gift Tax Officers 9
- (1962) AIR 1962 Mad 26 (V 49) = 1961-41 ITR 297, M. K. Stremann v. Commr. of Income Tax, Madras 14, 18A
- (1962) AIR 1962 Mys 269 (V 49) = 1962-45 ITR 194, D. H. Nazareth v. 2nd Gift Tax Officer 5
- (1960) AIR 1960 Andh Pra 115 (V 47) = 1960-1 Andh WR 153, Sesharatnam v. Gift Tax Officer 6
- (1959) AIR 1959 SC 213 (V 46) = 1959-35 ITR 388, Narayana Chetty v. Income Tax Officer, Nellore 35
- (1958) AIR 1958 SC 468 (V 45) = 1958 SCJ 459, Sundararamier and Co. v. State of Andhra Pradesh 7
- (1953) AIR 1953 SC 495 (V 40) = 1953 SCJ 707, Arunachala Mudaliar v. Muruganatha Mudaliar 18
- (1949) 78 CLR 199, Grimwade v. Federal Commr. of Taxation 26
- (1921) AIR 1921 Mad 168 (V 8) = ILR 44 Mad 499 (FB), Viravan Chettiar v. Srinivasachariar 17
- (1916) AIR 1916 PC 104 (V 3) = 43 Ind App 151, Mst. Girja Bai v. Sadashiv Dhundiraj 15
- (1913) ILR 40 Cal 21 = 39 Ind App 197 (PC), Rangoon Botatoung Co., Ltd. v. Collector of Rangoon 35
- (1909) ILR 32 Mad 377 = 2 Ind Cas 519, Mana Tawker v. Ramchandra Tawker 17
- (1902) 12 Mad LJ 299 = ILR 25 Mad 678 (PC), Raja Chelikani Venkataramanayamma v. R. C. Venkayamma Garu 17

- (1898) ILR 20 All 267 = 25 Ind App 54 (PC), Balwant Singh v. Rani Kishori 18
- (1894) 1894 AC 189 = 63 LJPC 59, Attorney General of Ontario v. Attorney General for Dominion of Canada 6
- (1888) ILR 10 All 272 = 15 Ind App 51 (PC), Sartaj. Kuari v. Deoraj Kuari 17
- (1884) 10 AC 119, Small v. Smith 6
- (1877) 3 QBD 1 = 47 LJ QB 10, Sandback Charity Trustees v. North Staffordshire Rly. Co. 35
- (1863) 6 Suth WR 71, Muddun Gopal v. Ram Buksh 18

Y. G. Krishna Murthy, for Petitioners; T. Anantababu, Standing Counsel for the Income Tax Department, for Respondent.

SESHACHALAPATI J.: This is a petition under Article 226 of the Constitution of India for the issue of a writ of certiorari or any other appropriate writ or order to quash the notice dated 30-11-1962 issued to the petitioners by the respondent, the Additional Gift Tax Officer, Guntur. The Petitioners 1, 2, 5 and 6 are the sons and Petitioners 3 and 4, the daughters of late G. V. Srinivasarao, who was a leading Advocate in Guntur. Sri Srinivasa Rao acquired considerable properties. On 4-3-1958 Sri Srinivasa Rao gifted certain properties to his daughters, Petitioners 3 and 4 of the value of Rs. 10,000. By an affidavit dated 26-3-1958, he declared his intention to treat his self-acquired properties referred to in the affidavit as properties belonging to the family consisting of himself and his four sons. On 27-3-1958, he effected a partition of the said properties between himself and his sons by a registered instrument.

2. On information received of certain dispositions by late Srinivasarao the gift tax officer having appropriate jurisdiction, issued a notice under Section 13 (2) of the Gift Tax Act to late Srinivasa Rao to furnish a return for the assessment year 1959-60. With respect to that notice late Srinivasa Rao filed a return declaring only the gifts made by him to his daughters on 4-3-1958 and cash gift to his purohit. The properties referred to in the affidavit dated 26-3-1958 of late Srinivasa Rao were claimed as joint family properties which were already partitioned and therefore not liable for the gift tax.

3. Sri Srinivasa Rao died on 9-1-1962. On 31-10-1962 the First Addl. Gift Tax Officer, Guntur passed an order under Section 15 (3) of the Act holding that the properties gifted by Srinivasa Rao to his daughters and Purohit on 4-3-1958 and the self-acquisitions converted into joint family properties on 26-3-1958 and partitioned on 27-3-1958 less the 1/5 the share of Srinivasa Rao were liable to the payments of Gift Tax. He determined that the total value of the gifts were in the order of Rs. 2,16,915 and directed the payment of Rs. 15,629.50 ps. as tax.

4. It would appear that the demand notice was served on the 2nd petitioner Sri Brahmanandaraao on 11-11-1962 who signed the acknowledgment for G. V. Srinivasa Rao. By a letter dated 19-11-1962, Mr. Brahmanandaraao informed the respondent that his father had died on 9-1-1962 and that he had made certain dispositions of properties that fell to his share in partition and therefore fresh demand may be made on the parties regarding the gift tax. The respondent thereupon raised a fresh demand on the donees on 30-11-1962. On 6-12-1962, the 1st petitioner Sri G. V. Krishnarao informed the respondent that an appeal was being preferred to the Appellate Assistant Commissioner under Section 22 of the Gift Tax Act and that therefore the collection of the tax may be kept in abeyance till the disposal of the appeal. Similar letters were filed by the Petitioners 2, 4 and 6. On 29-12-1962, Sri G. V. Chelapatirao, the 5th petitioner, wrote to the respondent to let him know how much portion of the gift tax he had to pay on his share and suggesting that the gift tax payable may be divided between all the parties concerned and demands made and that he would pay his portion of the tax before 15-2-1963. On 9-1-1963, the respondent issued notices to the petitioners and the Purohit after discussing the matter with their Chartered Accountant apportioning the tax payable between the parties and calling upon them to pay the proportionate tax on or before 10-2-1963. This writ petition was filed on 7-1-1963 and was admitted on 9-1-1963. In C. M. P. No. 235 of 1963 interim stay was directed against the operation of the notice dated 30-11-1962.

5. In the course of a full and able argument, Mr. Y. G. Krishnamurthy, the learned counsel for the petitioners has raised several contentions. The first contention is that the Gift Tax Act so far as it deals with taxes on lands and buildings falls within the scope of item 49 of State List (List II) to Schedule VII to the Constitution and that Parliament has no legislative competence to enact a law providing for the taxation of gifts on lands and buildings. In support of this contention, reliance was placed on the decision of the Mysore High Court, In D. H. Nazareth v. 2nd Gift Tax Officer, 1962-45 ITR 194=(AIR 1962 Mys 269). In that case the learned Judges held that the power conferred on the State Legislature by entry 49 of list II of the VIIth schedule to the Constitution to make laws with respect to taxes on lands and buildings includes the power to tax gifts of lands and buildings and therefore within the exclusive power of the State Legislature. The Gift Tax Act, 1958 in so far as it purports to provide for taxes on lands and buildings was held to be ultra vires the powers of Parliament. The learned Judges in the above case proceeded on the footing that an entry in the lists to the VIIth Schedule to the Constitution should be given its widest possible amplitude and that the aforesaid principle refers not only to

the general items but also to entries relating to taxation. It was observed that the residuary entry 97 in list I should not ordinarily be invoked and should be invoked only as a last resort and that the power to tax property necessarily includes the power to tax a right or incidence of ownership.

6. It is a well-settled principle that the entries in the legislative lists should not be interpreted in a narrow and pedantic sense and that the language of the entries must be held to comprehend ancillary and subsidiary matters. The power to enact incidental or ancillary legislation is included in the grant of a substantive power and follows without express provision therefor. (vide *Attorney General of Ontario v. Attorney General for Dominion of Canada*, 1894 AC 189 and *Small v. Smith*, (1884) 10 AC 119 at p. 129). Even construing the entries liberally it cannot be said that the tax on gifts is comprehended by entry 49 of the State list. In *Sesharatnam v. Gift Tax Officer*, 1960 (1) Andh WR 153=(AIR 1960 Andh Pra 115), a Bench of this Court consisting of Chandra Reddy, Chief Justice and Ansari, J., after a close and detailed examination of the relevant heads of enumerated powers in the lists in the context of decided cases observed thus:—

"We find it difficult to import transfer and alienation of agricultural land into 'lands' in entry 49. The latter item concerns itself with an altogether different head of litigation that is tax on the ownership of property. The object of this item is the levy of a tax on the ownership of property as such while gift tax is a tax on a particular use of the property or the exercise of a single power subsidiary to ownership. The owner of a property may put it to several uses. A gift inter vivos is one of the several rights a person may have in a property. This form of tax attaches itself to a transfer of property while the tax envisaged in entry 49 is incidental to the ownership irrespective of any use to which it may be put."

We are in respectful agreement with this view.

7. If, therefore, the Gift Tax is not comprehended within the scope and ambit of item 49 of List II of the VII Schedule to the Constitution, the source of power must be sought in Article 248 read with item 97 of List I of the Constitution. In this connection, it is necessary to bear in mind the following observations of Venkatarama Ayyar, J. speaking for the majority opinion of the Supreme Court in *Sundaramier and Co. v. State of Andhra Pradesh*, 1958 SCJ 459 at p. 488. = (AIR 1958 SC 468 at p. 494):

"The above analysis—and it is not exhaustive of the Entries in the lists — leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included but is treated as a distinct matter for purposes of legislative competence. And this distinction is also mani-

fest in the language of Article 248 Clauses (1) and (2) and of Entry 97 in List I of the Constitution.

Article 248 is in these terms:

"248 (1):— Parliament has exclusive power to make any law with respect to any matter not enumerated in the concurrent list or State list.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists."

Item 97 is in these terms:—

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

8. Having regard to the pattern of the Indian Constitution it requires, no demonstration that Parliament has exclusive power to make laws with respect to any subject or matter which is not expressly within the scope of the heads of power enumerated in the lists. We are of opinion that the gift tax does not entrench upon the exclusive legislative power of the State Legislature as indicated in item 49 of list II. The manifest object of the Gift Tax Act and its pith and substance is not to tax lands or buildings as such but to impose tax on gifts inter vivos. The scope of the gift tax, therefore is referable to Article 248 read with item 97.

9. In *M. T. Joseph v. Gift Tax Officer*, 1962-45 ITR 66=(AIR 1962 Ker 97) a Bench of the Kerala High Court has held that inasmuch as the levy of tax on gifts of agricultural lands is not expressly provided for either in the State List or in the Concurrent lists, the Act necessarily falls under and is referable to the residuary power vested in Parliament under clause (2) of Article 248 read with item 97 of the Union list. In *Dandapani v. Additional Gift Tax Officer, Cuddalore*, 1963-2 Mad LJ 192=(AIR 1963 Mad 419), the Madras High Court has taken a similar view that the Gift Tax Act falls within the legislative competence of Parliament under item 97 of List I read with Article 248(1) of the Constitution. To the same effect are the conclusions of the Punjab High Court in *Mst. Gaindi v. Union of India*, (1964) 54 ITR 632=(AIR 1965 Punj 65). In *Shamsunder Choudhari v. Gift Tax Officer Allahabad*, (1967) 66 ITR 74=(AIR 1967 All 19) a Bench of the Allahabad High Court has also taken the same view.

10. In the light of such preponderance of judicial authority we are unable with respect, to follow the decision of the Mysore High Court so strenuously pressed upon our attention by Mr. Krishna Murthy. We hold that the objection as to legislative competence of Parliament for enacting the Gift Tax Act is not correct and must be rejected.

11. The next contention strenuously pressed upon us by the petitioner's learned counsel is that the properties obtained by the petitioners 1, 2, 5 and 6 are not gifts within the meaning of Section 2 (xii) of the Gift Tax Act as there is no transfer of property within the meaning of Section 2 (xxiv). The word 'Gift' is defined as follows:—

"gift" means the transfer by one person to another of any existing moveable or immoveable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be gift under Section 4. The word 'transfer' of property is defined as follows —

"Transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing includes—

(a) the creation of a trust in property;
(b) the grant or creation of any lease, mortgage charge, easement, licence, power, partnership or interest in property;

(c) The exercise of a power of appointment of property vested in any person, not the owner of the property to determine its disposition in favour of any person other than the donee of the power;

(d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person;"

12. The learned counsel has contended that these provisions should be construed in the context of the relevant principles of Hindu Law and he has relied on a passage in the judgment of the Supreme Court in Commissioner of Income-tax, Madras v. Bagyalakshmi and Co., Udamalpet, 1965-55 ITR 660 = (AIR 1965 SC 1708) where Subba Rao J. (as he then was) observed:

"Except where there is a specific provision of the Income Tax Act which derogates from any other statutory law or personal law, the provision will have to be considered in the light of the relevant branches of law."

13. We are of opinion that the Gift Tax Act is a self-contained enactment and the definitions of gift and transfer of property are exhaustive in their scope and the two statutory definitions have to be construed strictly without importing any conceptions not strictly derivable from the expressions employed.

14. The learned counsel has however strongly pressed upon our attention a decision of the Madras High Court in M. K. Stremann v. Commissioner of Income Tax, Madras, (1961) 41 ITR 297 at page 310 = (AIR 1962 Mad 26 at p. 30). In that case a question arose as to whether, when a father merged the self-acquisitions with his ancestral property and effected a partition, there was a transfer of assets within the meaning of Section 16 (3) (a) (iv) of the Income Tax Act. The learned Judges held that neither in the merger of the self-acquired properties nor in the subsequent partition was there any transfer of assets direct or indirect within the meaning of Section 16 (3) (a) (iv). The following passage in the judgment of the learned Judges may be usefully extracted:—

"Severance in status with the resulting change in the nature of the ownership of the property is one of the incidents of a coparcenary. The property held by the coparcenary vests in the separated members as tenants-in-common after the severance in status. That result can be brought about by the unilateral exercise of the volition of the separating member or members of the family. At that point of time the property which had up to then been impressed with the character of joint family or coparcenary property, becomes impressed with the character of property held in severalty by the tenants-in-common. The change does not itself constitute a transfer. Nor even does it result from any transfer of assets.

Similarly when the separate property of a coparcener ceases to be his separate property and becomes impressed with the character of coparcenary property there is no transfer of that property from the coparcener to the coparcenary. It becomes joint family property because the coparcener, who owned it up to then as his separate property, has by the exercise of his volition impressed it with the character of joint family or coparcenary property, to be held by him thereafter along with the other members of the joint family. It is by his unilateral action that the property has become joint family property.

Coparcenary property ceasing to be joint family property of the coparceners on a division in status between them and becoming thereafter the property held in severalty by the divided members, and the property of a coparcener ceasing to be his and becoming the property of the coparcenary of which he continues to be a member, are both incidents of a coparcenary governed by the Mitakshara School. Either can be brought about by the Unilateral action of the coparcener concerned. Neither transaction amounts to a transfer of property from one juristic entity to another. A transfer is essentially a contract, a bilateral transaction. The transaction by which a property ceases to be the property of a coparcener and becomes impressed with the character of coparcenary property does not itself amount to a transfer. No transfer need precede the change. No transfer ensues either".

15. So far as the partition of the joint family property is concerned, it is clear that there is no transfer as such. In a Hindu family governed by the Mitakshara School so long as it remains joint and undivided, there is joint ownership and no particular member of the family can predicate that he has any definite or ascertained share. When there is a partition between members of such family, there is a severance in status accompanied by a definition and ascertainment of shares of the respective members. The word "Vibhaga" which is used in the Mitakshara and which is generally translated

as partition, is nothing more than the adjustment of diverse rights regarding the whole, by distributing them in particular portions of the aggregate. In *Mst. Girja Bai v. Sadasiv Dhundiraj*, 43 Ind App 151 at p. 159 = (AIR 1916 PC 104 at p. 107), the Privy Council cited with approval Sarkar's translation of a passage in *Viromitrodaya* to the effect that "for partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed what is effected by partition is only the adjustment of the proprietary right into specific shares". When a member of a family obtains on partition property in which he had already a proprietary right it cannot be said that there is a transfer. With respect we agree with the learned Judges of the Madras High Court that partition as such does not involve a transfer of any property or right to or interest therein.

16. In this case, however, it must be remembered that a day prior to the partition, Srinivasarao had declared his intention to convert the self-acquired property into joint family property by means of an affidavit in these terms :

I, Govindaraju Venkata Srinivasa Rao, son of Venkata Krishnarya Garu, Brahmin Aged 84 years, retired Advocate, resident of Arundalpet Guntur do hereby solemnly affirm and state as follows :

1. The properties I now own and possess are (a) my dwelling house known as Dattatreya vilas, situated in 4th line, Arundalpet Guntur, (b) 24 terraced shop rooms in Srinivasa Buildings situated between 2nd and 3rd road lines, Arundalpet Guntur, (c) Ac 14-72 Cents of Seri Wet land in Zampani Village, Tenali Taluk (d) Rs. 7,505 cash.

2. All these properties are my self-acquisitions.

3. In view of the facts that I am an old man aged 84 years and that my 4 sons are all elderly persons each having a number of children, I have decided to treat the properties mentioned in Para. 1 above as properties belonging to the joint family consisting of myself and my four sons, and am accordingly treating them as joint family properties from this moment onwards.

4. In exercise of my inherent right to do so, I hereby declare that my properties mentioned in Para. 1 above are the joint family properties of myself and my sons.

The question is whether in converting admittedly the self-acquired properties into joint family properties there is not a transfer and therefore a gift within the meaning of the relevant definitions of the Gift Tax Act. Mr. Krishnamurthy contended that, when a father governed by the Mitakshara converts his self-acquired property into joint family property of himself and his sons, there is no transfer as the sons have a right by birth in their father's self-acquired property. It is true that the son's interest even in their father's self-acquired property is 'Aprathibandhadaya' but

whether or not the conversion of self-acquired property into joint family property amounts to a transfer of right to property will have to be viewed in the context of the father's powers in relation to his self-acquired properties.

17. In *Viravan Chettiar v. Srinivasa Chariar*, ILR 44 Mad 499 = (AIR 1921 Mad 168) (FB) a Full Bench of the Madras High Court, dissenting from the decision in *Mana Tawker v. Ramchandra Tawker*, (1909) ILR 32 Mad 377, held that an undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship. Kumaraswami Sastri, J. observed thus :

"It is difficult to see how there can be any coparcenary between the father and the sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Coparcenary and survivorship imply the existence of co-ownership and of rights of partition enforceable at law, and a mere moral injunction can hardly be the foundation of a legal right. As observed by the Privy Council in *Sartaj Kuari v. Deoraj Kuari*, (1888) ILR 10 All 272 (PC), the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with a right to partition that it does not exist where there is no right to it. A contention was raised during the course of the argument before the Privy Council in *Raja Chelikani Venkataramanayamma v. R. C. Venkayamma Garu*, (1902) 12 Mad LJ 299 (PC), that sons acquire a right by birth in the father's self-acquired property. Lord MacNaghten stated that he did not quite understand what that right was and observed :

"He is his father's son, and if his father does not dispose of it, it will come to him but is it anything more than a spes?" So far as a father's self-acquisitions are concerned the son, though undivided has only a spes successionis and he stands in relation to that property in the same position as an heir under Hindu law. The very essence of the distinction between *apratibandha* and *sapatibandhadaya* is the existence of an interest in the son in respect of properties got by his father".

18. Though the son of a Hindu father governed by the Mitakshara School may have a right by birth even in the self-acquired properties of the father, it is settled law that that right such as it is, is subject to the plenary control and power of the father. In *Balwant Singh v. Rani Kishori*, (1898) ILR 20 All 267 (PC), the Privy Council, after a close examination of the relevant passages in the Mitakshara which obviously were inconsistent with one another, held that a father governed by the Mitakshara School, even though he is a member of an undivided family, can exercise full power of disposition, at his own discretion of the properties which he has himself acquired as distinguished from ancestral properties. In *Arunachala Mudaliar v. Muruganatha Mudaliar*, 1953 SCJ 707 =

(AIR 1953 SC 495), the Supreme Court referred to the two contradictory passages in the Mitakshara. Placitum 27, Chapter I Section 1 of Mitakshara would seem to suggest that, though a person has himself acquired immovable or other properties, he cannot make a gift or sell them without convening all the sons, as it is the religious duty of a man not to leave his family without means of support. Their Lordships observed that quite at variance with this precept suggesting a limited right of the father in respect of disposition of his self-acquired property, there were other texts in the commentary which deny any right of interference by the sons with the father's power of alienation over his self-acquired property. Summing up the position, their Lordships observed thus:

"Clearly the latter passages are in flat contradiction with the previous ones and in an early Calcutta case, *Muddun Gopal v. Ram Buksh*, (1863) 6 Suth WR 71, a reconciliation was attempted at by taking the view that the right of the sons in the self-acquired property of their father was an imperfect right incapable of being enforced at law. The question came pointedly for consideration before the Judicial Committee in the case of (1898) ILR 20 All 267 (PC) and Lord Hobhouse, who delivered the judgment of the Board, observed in course of his judgment that in the text-books and commentaries on Hindu Law, religious and moral considerations are often mingled with rules of positive law. It was held that the passages in Chapter I, Section 1, Verse 27 of Mitakshara contained only moral or religious precepts while those in Section 5 Verses 9 and 10 embodied rules of positive law. The latter consequently would override the former. It was held, therefore, that the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. This statement of the law has never been challenged since then and it has been held by the various High Courts in India, and in our opinion, rightly, that Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons, but he can make a gift of such property to one of his own sons to the detriment of another; and he can make even an unequal distribution amongst his heirs."

From these authorities, it is clear that the father has a plenary dominion over his self-acquired properties. He can dispose of them by transfers inter vivos, such as sale or gift, or he can dispose them of by testamentary devise. His powers are, therefore, unrestricted. The sons have no power to intervene in the full enjoyment of the father in his self-acquired properties or seek the interdiction of his dispositions thereof. It follows therefore, that the sons have no right in praesenti in the self-acquired properties of their father though, on his death intestate the properties

may devolve upon them as unobstructed heritage.

18-A. It is in the context of the aforesaid legal position that the conversion of the self-acquired property into joint family property has to be viewed. It cannot be said that in such a process a transfer of right is not involved. We are, therefore, unable to agree with the view of the Madras High Court in *M. K. Stremann v. Commissioner of Income Tax, Madras*, (1961) 41 ITR 297 = (AIR 1962 Mad 26), that there is no element of transfer in the merging of the self-acquired property with the joint family property. Nor are we able to agree with the reasoning of the Madras High Court in *M. P. K. Kandaswami Chettiar v. Commissioner of Agricultural Income Tax*, (1967) 66 ITR 169 (Mad). It must be remembered that these cases arose under Income-tax Act as to whether or not a merger of the self-acquired property with joint family property and a subsequent partition thereof would attract the provisions of Section 16 (3) (a) (iv). In those decisions, the question was whether a partition of the joint family properties came within the scope of Section 16 (3) (a) (iv). The effect of conversion of self-acquired property into joint family property did not directly fall to be decided, though that question was also dealt with. Further in the Income Tax Act there are no provisions analogous to Section 2 (xii) or 2 (xxiv) or Section 4 (d) with which we are concerned in this case. Even so, the High Court of Gujarat in *Keshavlal Lallubhai v. Commissioner of Income Tax, Gujarat*, (1962) 44 ITR 266 = (AIR 1962 Guj 6), held as follows:

"We are inclined to accept the view urged before us by the learned Advocate General that by reason of operation of law a transfer of property takes place when a member of a joint family throws his separate property into the hotchpot of the joint family. The real question which we have to consider is whether there has been a transfer of assets directly or indirectly by the assessee to his wife and minor son. The assessee, while throwing the property into the hotchpot, has effected a change of ownership of the property. The same may be said to be transferred from the assessee, the individual, to the Hindu Undivided family."

The decision of the Madras High Court in (1961) 41 ITR 297 = (AIR 1962 Mad 26) and the decision of the Gujarat High Court in (1962) 44 ITR 266 = (AIR 1962 Guj 6), were taken in appeal to the Supreme Court (vide *Commissioner of Income Tax, Madras v. M. K. Stremann*, (1965) 56 ITR 62 = (AIR 1965 SC 1494) and *Commissioner of Income Tax, Gujarat v. Keshavlal Lallubhai Patel* (1965) 55 ITR 637 = (AIR 1965 SC 866)). Their Lordships of the Supreme Court affirmed the decisions of the two High Courts. In (1965) 55 ITR 637 = (AIR 1965 SC 866), Sikri J., speaking for the Court observed:

"There is some difference of opinion whether act of throwing self-acquired property into the hotchpot is a transfer or not. We need not settle this controversy in this case. Let us assume that it is. But is a partition of Joint Hindu family property a transfer in the strict sense? We are of the opinion that it is not".

The aforesaid decisions do not lend support to the contention of Mr. Krishna Murthy that, when a father converts his self-acquired property into the joint family property, there is no element of transfer. We are of opinion that, in the process of converting the self-acquired property into joint family property, there is an element of transfer of rights to property. It also involves the diminution of the father's right and the conferment and enlargement of rights to others.

19. Mr. T. Anantababu, the learned counsel for the department has cited before us a decision of this Court in Commissioner of Gifts Tax Andhra Pradesh, Hyderabad v. Satyanarayana Murthy, (1965) 1 Andh WR 69 = (AIR 1965 Andh Pra 95). The facts in that case are almost identical with the facts of the present case. In that case a leading lawyer of Nellore who acquired properties, made a declaration on 1st of May 1957, of his intention to convert all the properties owned by him into joint family properties to be held by him and by his five undivided sons, each of them having 1/6th share. The question arose whether the declaration by the father converting his self-acquired properties into joint family properties amounted to a transfer so as to attract the provisions of the Gift Tax Act. On a close scrutiny of the authorities bearing on the question Chandra Reddy, Chief Justice, held that such a transaction would fall within the ambit of clause (d) of Section 2 (xxiv). The learned Chief Justice observed thus:

"This definition is of wider import than that contained in the Transfer of Property Act. The only requirement of this clause is that, the transaction which seeks to accomplish certain results should have the effect of diminishing directly or indirectly the value of his own property and to enhance the value of the property of any other person. Incontestably, by the declaration made by Sri Malakondaiah, by the conversion of his self-acquired properties into joint family properties there was a decrease in the value of the property of Shri Malakondaiah and it enhanced the value of the property of the joint family. That joint Hindu family answers the description of any other person is seen by clause (xviii) of Section 2 which says that a person includes a Hindu undivided family or a company or an association or a body of individuals or persons whether incorporated or not. Since the conversion in this case has the effect of diminishing the value of the declarant's property and raising the value of the property of joint Hindu family, it falls within the purview of cl. (d). The transfer contemplated by this clause is

a transfer as a result of which the income accrues to the joint family from the properties, the subject-matter of the declaration. There can be little doubt that by this transaction the owner of the property has divested himself of it and vested it completely in the joint Hindu family. He has thus effected a change of ownership of the property. If it is a transfer of property within the terms of clause (xxiv) (d) it is a gift as envisaged in clause (xii) and Section 4 (a)."

(4 (a) is presumably a misprint for 4 (d).)

20. This case directly deals with the question we have to determine and we are in respectful agreement with the conclusion of the Chief Justice.

21. A decision of the Mysore High Court in Smt. Laxmibai Narayana Rao v. Commissioner of Gift Tax, (1967) 65 ITR 19 (Mys), has been relied upon by the learned counsel for the petitioners where the learned Judges took the view that even where a father blends his self-acquired property with joint family properties, it would be an act of 'pitru prasada' and that there was no creation of any new right in the son or transference of a new right by the father to the son. The learned Judges dissented from the view of this High Court in 1965-1 Andh WR 69 = (AIR 1965 Andh Pra 95). With great respect, we are unable to agree with the view of the Mysore High Court in the decision aforesaid.

22. We are, therefore, of opinion that by means of his declaration contained in the affidavit dated 26-3-1958 late Srinivasa Rao was diminishing his rights to property and increasing the rights of others within the meaning of Section 2 (xxiv) (d) and therefore would fall within the meaning of the gift as defined in Section 2 (xii) and Section 4 (d) of the Act.

23. It is then contended that even though the conversion of self-acquired property into joint family property is a transfer within the meaning of Section 2 (xxiv) (d) and Section 4 (d) inasmuch as there is no instrument duly stamped and registered it is not a valid gift in law. Section 123 of the Transfer of Property Act requires that for the purpose of making a gift of immoveable property, the transfer must be effected by registered instrument signed by or on behalf of the donor and attested, by at least two witnesses. There is no such limitation or condition imposed upon the gift as defined in Section 2 (xii) or 2 (xxiv) of the Gift Tax Act. In construing the terms of 'gift' and 'transfer' one should look into the provisions of this Act only. There is no warrant for the importation of considerations arising from the definition of gift or transfer in the Transfer of Property Act. The definitions of gift and transfer in the Gift Tax Act, are exhaustive and it is those terms that we should look into.

24. In this connection we may observe that there is no provision under the Hindu law that the conversion of separate property into joint family property requires a formal

registered instrument. All that is required is that there should be a clear intention on the part of the member of the joint family to waive his separate rights in the properties in question and to impress them with the character of joint family properties.

25. It is next contended that the transfer in the instant case is not to a person referred to in Sections 2 (xii), 2 (xxiv) and 4 (d). We are unable to assent to this contention. The word 'person' is defined in clause (xviii) of Section 2 as follows:

"'Person' includes a Hindu undivided family or a company or an association or a body of individuals or persons whether incorporated or not."

The definition is an inclusive one and will certainly take in the transferees in the instant case.

26. It is contended that where a coparcener of a Hindu joint family converts his self-acquisitions into joint family property he does not enter into any transaction within the meaning of Section 2 (xxiv) (d). The argument is that the expression any transaction entered into postulates a bilateral act and inasmuch as the conversion of self-acquired property into joint family property is wholly a unilateral act, such a conversion would not be a transaction. In support of this contention, reference has been made to a decision of the Kerala High Court in *P. K. Subrahmanya Iyer v. Commissioner of Gift Tax, Kerala*, (1968) 67 ITR (SN) 36 = (AIR 1968 Ker 190) and to *Grimwade v. Federal Commissioner of Taxation*, (1949) 78 CTR 199. The word "transaction" is not used either in Section 2 (xii) or Section 4 (d). The word 'transaction' must be given its ordinary grammatical meaning. In the Oxford Dictionary Volume XI at page 251, 'transaction' is defined as meaning 'the action of passing or making over a thing from one person to another, transference, and the action of dealing with or handling a subject; treatment.' The conversion of self-acquired property of the father into the joint family property means the abridgment of the father's absolute rights therein and the transference of right in the property to sons who had no such right in praesenti. In our opinion, such a process would fall within the normal meaning of the expression 'transaction'. The Australian case referred to above is not of much assistance as the question there was whether, on the facts of that case, there was an intention on the part of the so-called donor, to dispose of his property by gifts. It was held, that as the formation of a holding company though amounting to a transaction on the part of the donor had no connection between the donor and the donee or any of the donees, it was held to be not a gift within the meaning of Section 4 (f) of the Gift Duty Assessment Act, 1941-42.

27. The next contention of the learned counsel is that, in any event, the petitioners are not the persons liable to pay the gift tax

within the meaning of Section 31 of the Act and that they were not given any notice of such proceedings before raising the demand. It is contended that the demand now made on the donees is not in conformity with Section 29 of the Act. It is also contended that Section 29 of the Act in so far as it authorises the recovery of the gift tax from the donee, is violative of Article 19 (1) (f) of the Constitution and therefore unconstitutional. Sections 29 and 31 are as follows:

"29. Gift tax by whom payable: Subject to the provisions of this Act, gift tax shall be payable by the donor. But when in the opinion of the Gift Tax Officer the tax cannot be recovered from the donor, it may be recovered from the donee:

Provided that where the donees are more than one, they shall be jointly and severally liable for the amount of tax determined to be payable by the donor:

Provided further that the amount of tax which may be recovered from each donee shall not exceed the value of the gift made to him as on the date of the gift."

"31. Notice of demand: When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Gift Tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

28. In this case, originally *G. V. Srinivasa Rao* filed a return of gift on 7-7-1959 declaring his gifts valued at only Rs. 11,225. During the course of the enquiry a claim was made that the transfer of his property to the Hindu undivided family did not amount to a gift. At the enquiry the assessee was represented by a Chartered Accountant and the respondent completed the assessment on 31-10-1962. A sum of Rs. 15,629-80 P. was directed to be payable as tax before 5-12-1962. The demand notice was acknowledged by the second petitioner, *Brahmananda Rao*, who signed for *G. V. Srinivasa Rao*. By that time, *Srinivasa Rao* was dead. On 19-11-1962 the second petitioner wrote to the respondent a letter stating that his father died on 9-1-1962 and that fresh demands on the donees in respect of the gift tax may be made. Accordingly the respondent raised fresh demands on the donees on 30-11-1962. The first petitioner *Krishna Rao*, wrote to the respondent acknowledging the notice of demand and stating that they were filing an appeal to the Appellate Assistant Commissioner under Section 22 of the Gift Tax Act and asking in the meanwhile that the collection of the tax may be kept in abeyance. On 29-12-1962, *Chalapathirao*, the 5th petitioner wrote to the respondent stating that it will not be difficult for the respondent to divide the tax payable and demand the same separately from all the parties concerned and that he may be informed as to what portion of the tax he has to pay. He further stated that he will pay his portion of the tax on or before 15-2-1963 and prayed for time till then. By an order dated 9-1-1963, the res-

pondent apportioned the tax payable between the Petitioners 1 to 6 in this petition and two others specifying the amount due from each one of them and directing them to pay their proportionate tax specified on or before 10-2-1963.

29. From the statement of the above facts which are on record and which have not been disputed before us, there is no substance in the contention that the petitioners have had no notice of the proceedings in respect of the demand under Section 31 of the Act. Nor is there any substance in the contention that the demand under Sec. 31 issued to the donees is not in conformity with Section 29. The terms of Section 29 have been extracted supra. The present section substituted for the old section under Gift Tax (Amendment) Act, 53 of 1962 and came into force on 1-4-1963. This section contemplates that normally the gift tax is payable by the donor. That is what the charging section — S. 3 — provides for. But where in the opinion of the Gift Tax Officer, the tax cannot be recovered from the donor, it may be recovered from the donee. It also indicates that in such a situation if there are more donees than one, they are liable jointly and severally for the amount of the tax and further it is provided that the amount of tax due from which donee shall not exceed the value of the gift made to him as on the date of the gift. The recourse to the donees can be had only when the Gift Tax Officer is of opinion that the tax cannot be recovered from the donor. In coming to that opinion the Gift Tax Officer must not act arbitrarily. He should apply his mind to all the relevant circumstances of the case to find out whether he can collect the money from the donor or not and only on coming to a conclusion that the money cannot be recovered from the donor, can he start the proceedings for recovery of the tax against the donees.

30. In this case, one of the donees, Brahmanandaram, has expressly written to the respondent on 19-11-1962 that his father, Srinivasa Rao, had died on 9-1-1962, and that as such he was no more to meet the above demand. He further stated that out of the properties he acquired on the partition he gifted away the rooms in Srinivasa Buildings during his lifetime. He willed away the agricultural land of 3.72 acres as on the date of his death to his daughters and cash for the obsequies and other expenses. The purport of that communication is that there were no assets available in the name of Srinivasa Rao from which the tax could be collected. It is on the information so supplied by one of the petitioners and after a discussion with their Chartered Accountant that the apportionment of the tax was made between the donees by the respondent in his order dated 9-1-1963. In these circumstances, it is not correct to say that the proceedings for the recovery of the tax from the donees were sought to be taken without the formation of the opinion by the Gift Tax Officer that tax cannot be collected from the donor.

31. It is then contended that, quite apart altogether whether or not the procedure laid down in Section 29 had been complied with the section itself in so far as it seeks to fasten the tax liability on the donees is violative of the donees' right to hold and acquire property.

32. Before we examine this contention, it is necessary to remember that Section 30 of the Act provides that gift tax payable in respect of any gift comprising immovable property shall be a first charge on that property. It is a well-settled principle of law that the Government has a priority in respect of arrears of tax. The English common law doctrine of the priority of Crown debts has been given judicial recognition in India prior to 1950 and by virtue of Article 372 (1) of the Constitution, that doctrine continues to be in force, vide the decision in *Builders Supply Corporation v. Union of India*, (1965) 56 ITR 91 = (AIR 1965 SC 1061). In seeking therefore, to realise the arrears of tax from the immovable property comprised in the gift, the department is proceeding well within its rights.

33. In support of his contention that Section 29 in so far as it provides a recourse against the donees is violative of Article 19 (1) (f) of the Constitution, the learned counsel for the petitioner placed very strong reliance on the decision of learned single Judge of the Calcutta High Court in *Rahaman Tea and Lands Co. (P.) Ltd. v. Gift Tax Officer*, (1962) 45 ITR 528 = (AIR 1963 Cal 127). Dealing with the invalidity of Section 29 in the context of Article 19 (1) (f) of the Constitution, the learned Judge observed as follows:

"I find that (i) no notice is required to be served on him, (ii) there is no procedure by which a donee can obtain rectification of mistakes committed by taxing authorities, (iii) there is no procedure prescribed for obtaining the opinion of a superior civil Court on questions of law, by application for reference or otherwise at the instance of the donee and (iv) nor has he any right of appeal. Therefore the tax has been made recoverable from the donee under Section 29 of the Act, without giving him any opportunity to contest the correctness of the demand and that makes the demand an unreasonable restriction on the donee's right to hold property guaranteed by Article 19 (1) (f) of the Constitution."

34. In regard to the last of the reasons referred to by the learned Judge viz., failure to give the donee an opportunity to contest the correctness of the demand, we may straightway observe that, on the facts of this case, it is obvious that it is at the instance of one of the petitioners that the demand under Section 31 was raised on the donees and it is at their instance and after discussion with their representative that the tax was apportioned between all the donees.

35. Mr. Anantababu, the learned counsel for the department, has contended that the other reasons suggested by the learned Judge

are not also sustainable. The word 'assessee' is defined in Section 2 (iii) as follows :

'Assessee' means a person by whom gift tax or any other sum of money is payable under this Act, and includes :

(a) Every person in respect of whom any proceeding under this Act has been taken for the determination of gift tax payable by him or by any other person or the amount of refund due to him or such other person;

(b) Every person who is deemed to be an assessee under this Act;

(c) Every person who is deemed to be an assessee in default under this Act."

This definition of 'Assessee' in Sec. 2 (iii) is couched in very wide terms. It will take in every person in respect of whom proceedings have been taken under this Act including every person who is deemed to be an assessee. By reason of the notice of demand issued under Section 31 read with Section 29 of the Act, the petitioners must be deemed to be assessee within the meaning of Section 2 (iii) (a) of the Act. They are, therefore, entitled to take advantage of their remedies prescribed under the Act. Under Section 22 (b) of the Act any person objecting to the amount of gift tax determined as payable by him under the Act has a right of appeal to the Appellate Assistant Commissioner from the orders of the gift tax officer. He has a further right of appeal to the appellate tribunal under Section 23. There is also the right of applying to the Commissioner under Section 24 for revising the orders of his subordinates. Eventually, there is also a right to ask for a reference to the High Court under Section 26 of the Act. In this case, appeals have actually been filed before the Appellate Assistant Commissioner under Sec. 22 of the Act. Further, the absence of a provision for an appeal does not by itself constitute an infringement of property rights. An appeal does not rest upon an inherent right; but it is the creature of a statute. In *Rangoon Botatoung Co., Ltd. v. Collector of Rangoon*, (1913) ILR 40 Cal 21 (PC), Lord MacNaghten, speaking for the Privy Council, cited with approval the following passage of Bramwell, J., in *Sandback Charity Trustees case*, 1877-3 QBD 1.

"An appeal does not exist in the nature of things: A right of appeal from any decision of any tribunal must be given by express enactment."

In *Narayana Chetty v. Income Tax Officer, Nellore*, (1959) 35 ITR 388 = (AIR 1959 SC 213), the Supreme Court observed that the validity of a rule cannot be challenged merely on the ground that no appeal has been provided against the order passed under the impugned rule.

36. We are of opinion therefore that even on the assumption that there is no right of appeal expressly provided for donee called upon to pay the tax, that circumstance by itself will not invalidate Section 29.

37. With great respect to the learned Judge of the Calcutta High Court, we are

unable to agree with his conclusion that Section 29 of the Act is violative of Article 19-1 (f) of the Constitution.

38. We, therefore, hold that there are no merits in this writ petition. We understand that some appeals have been filed before the Appellate Assistant Commissioner by some of the petitioners. We should be understood as having expressed no opinion on the merits of those appeals.

39. The writ petition fails and is dismissed with costs. Advocate's fee Rs. 100.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 137 (V 57 C 18)

N. KUMARAYYA, ACTG. C. J. AND
KONDAIAH, J.

Burhanuddin Hussain, Appellant v. State of Andhra Pradesh, represented by its Secy. Govt., Rev. Dept. and others, Respondents.

Writ Appeal No. 163 of 1967, D/-2-7-1969, against Order of Andhra Pradesh, Hyderabad in W. P. No. 1229 of 1966, D/-23-11-1967.

(A) Revenue Recovery Act (1890), S. 57-A. (1) — Government exercises powers quasi-judicially and not administratively — Principles of natural justice have got to be followed — Application by auction purchasers at a revenue sale against an order forfeiting their deposits under Section 36 (3) and for re-sale — No notice to debtor — Government allowing the application by setting aside the order of forfeiture and resale without any notice to debtor — Order is illegal being violative of principles of natural justice. W. P. No. 1229 of 1966, D/-23-11-67 (AP), Reversed. AIR 1958 Andh Pra 131, Rel. on. (Para 2-A)

(B) Constitution of India, Article 226 — Principles of natural justice stated.

The principles of natural justice are well settled. The first and foremost principle is what is commonly known as Audi Alteram Partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on notice of the case before any adverse order is passed against him. Another principle of natural justice is popularly known as rule against bias. A third one is that the party when requested should be given a copy of the order passed against him, containing the reasons for the adverse order. (Para 2-A)

Cases Referred: Chronological Paras
(1958) AIR 1958 Andh Pra 131

(V 45) = 1957 Andh LT 554, Deva-
dattam v. Union of India 2

Upendralal Waghry, for Appellant; P. A. Sarma for 2nd Govt. Pleader, for 1st Respondent; K. Pratap Reddy, for G. Haridatta Reddy, for Respondents 2 and 3.

KUMARAYYA. A. C. J.: This appeal is from the order of Seshachalapathi, J. refusing to quash the order of the Government passed in revision in exercise of its powers under Section 57-A of the A. P. Revenue Recovery Act.

2. Briefly stated the facts are these: The appellant herein is an agriculturist residing in Pasalawadi village, Sangareddy Taluk, Medak District. He had obtained a loan from the Government in a sum of Rs. 16,000 for purchasing a tractor for cultivating his lands. The amounts due from him swelled to Rs. 19,456-67. As the petitioner appellant did not repay the loan in spite of demand, after some correspondence between him and the revenue authorities as to the payment of amount and adjustment of accounts, proceedings under Section 36 of the A. P. Revenue Recovery Act were started. His lands were notified for sale.

The date of sale originally fixed was January 15, 1964. It was not held that day, but actually held on 4th March 1964. Of the 4 survey numbers, 3 survey numbers 110, 28 and 109 were knocked down in favour of the 2nd respondent for a total sum of Rupees 12,000. Another survey No. 158 was knocked down in favour of the 3rd respondent for a sum of Rs. 6,100. There was yet another survey number which was also put to sale. It was knocked down in favour of one Veeraiah whose case does not come up for our consideration in these proceedings.

Section 36 of the Revenue Recovery Act, 1864 embodies the procedure to be followed in sale of immoveable property. It makes in clause (3) a provision for deposit to be made by a purchaser. It says: "a sum of money equal to fifteen per cent of the price of the land shall be deposited by the purchaser in the hands of the Collector, or other officer empowered by the Collector in that behalf, at the time of the purchase and where the remainder of the purchase-money be not paid within thirty days, the money so deposited shall be liable to forfeiture." In cl. (4), it further provides that if the purchaser does not make the initial deposit or does not pay the remaining purchase money the property shall be resold at the expense and hazard of such purchaser, and the amount of all loss or expense which may attend such refusal or omission shall be recoverable from such purchaser in the same manner as arrears of public revenue.

In this case, the initial deposit was not made on the date of sale either by the second respondent or by the third respondent. They made these deposits on 5th and 11th March, 1964. The balance of the purchase money

was not paid within 30 days as enjoined by Section 36. Thereupon, the Revenue Divisional Officer in exercise of his powers directed forfeiture of the deposits made by respondents 2 and 3 and ordered resale in August, 1964. By that time on 31-3-1964 the appellant herein had already filed an application objecting to set aside sale on grounds of material irregularities and fraud in publication and conduct of sale. That was filed well within time as enjoined by Section 38 and no sale therefore could be confirmed unless that application was rejected. It is stated that that petition has not yet been disposed of. Aggrieved by the order passed by the Revenue Divisional Officer directing forfeiture of the deposits and resale respondents 2 and 3 went in appeal to the Collector, Medak under Sec. 158 of the A. P. (Talangana Area) Land Revenue Act. These appeals, were however, dismissed. They did not move the Board of Revenue which had powers of revision under Section 57-A (3) instead went to the State Government invoking their powers under sub-clause (1) of Section 57-A. That clause reads thus:

"The State Government may, either suo motu or on application made to them, call for and examine the record relating to any decision or order passed or proceeding taken by any authority or officer subordinate to them under this Act for the purposes of satisfying themselves as to the legality or propriety of such decision or order or as to the regularity of such proceeding and pass such order in reference thereto as they think fit."

The Government after considering the petition on merits set aside the order relating to forfeiture of the deposit and ordered that respondents 2 and 3 herein be directed to pay the balance of the bid amount together with interest thereon according to the rules within 30 days from the date of communication of the orders to them. The Collector of Medak was directed to take necessary action accordingly. This order which reversed the order of the original and the appellate authorities was made without any notice to the appellant herein, even though the order as made was adverse to the interests of the appellant. It may be recalled that the appellant had filed an application for setting aside the sale, which application was still pending disposal. Further by reason of the order of re-sale, he virtually got what he wanted as previous sale was no longer in force. The order passed by the Government was definitely adverse to the appellant as it upset the orders of the Revenue Divisional Officer and the Collector which were obviously favourable to the appellant herein. As this order was made without prior notice to him, he has invoked the jurisdiction of this Court praying that the said order be quashed as it was made without complying with the principles of natural justice and was against law.

Our learned brother Seshachalapathi, J., refused to quash this order on the basis that

no question of jurisdiction had arisen as the Government had power to revise the order suo motu or on an application of the party under Section 57-A and while exercising revisionary jurisdiction had all the powers exercisable by the Revenue Divisional Officer and the Collector. The Government therefore could direct that the deposit may not be forfeited or re-sale may not be held. The learned Judge referred in this behalf to the decision of the Madras High Court, which was followed by our High Court in *Devadattam v. Union of India*, 1957 Andh LT 554 at p. 568 = (AIR 1958 Andh Pra 131 at p. 134). They are the cases decided under Section 36 of the Revenue Recovery Act. The learned Judge dismissed the writ petition. Aggrieved by this the appellant has come up in appeal.

2-A. In our opinion, this appeal must be allowed on the short ground that there has been contravention of principles of natural justice inasmuch as the Government has passed an adverse order against the appellant without giving any notice to him or giving a reasonable opportunity of being heard. The revisionary jurisdiction of the Government in relation to the order made by the Collector or subordinate authorities is not at all open to question. Further it is indisputable that the Government while exercising revisionary jurisdiction was determining the questions affecting the rights of the parties. It follows that while exercising this legal authority to determine the question affecting rights, it (the Government) was bound to act judicially, as this was a quasi-judicial act and not an administrative act. Such an order is subject to judicial review under Article 226 of the Constitution of India. The order will be open to interference and liable to be quashed not only if it was passed without jurisdiction or in excess of jurisdiction but also if there has been contravention of the principles of natural justice or there was an error of law apparent on the face of the record. These in fact are the various considerations which should weigh in any proceeding, for quashing the proceedings started under Article 226 of the Constitution.

The adherence to principles of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties. These principles are well settled. The first and foremost principle is what is commonly known as Audi Alteram Partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on

notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair-play. Another principle of natural justice is popularly known as rule against bias. A third one which is of some consequence for our purpose is that the party when requested should be given a copy of the order passed against him, containing the reasons for the adverse order. In this case, not only notice was given to the party but also when the party came to know of the order and requested for a copy of the order, he was denied the same. In these circumstances we are of the view that an adverse order passed by the Government without due notice to the party affected thereby cannot stand by reasons of the contravention of the principles of natural justice, which the Government was duty-bound to follow.

This rule of fair-play and justice could not have been lawfully contravened but should have been strictly adhered to. The absence of the party on account of want of notice besides has led to certain misstatement of facts as well in the order. It is unnecessary for us to refer to this aspect of the case in view of the fact that we have come to the conclusion that the order is bad as it is vitiated by reason of contravention of one of the most important principles of natural justice.

Of course, Sec. 57-A does not contain any provision which in terms cast a duty on the Government to give notice to the party who may be adversely affected by its order. But that is fundamental being part and parcel of the principles of natural justice which no authority exercising quasi-judicial powers can lawfully ignore. On this very basis we are of the view that the order of the Government is liable to be quashed.

3. We therefore allow this appeal on this very basis and quash the order of the Government dated 26-5-1966. It will still be open to the Government to exercise its powers under revisionary jurisdiction under Section 57-A after giving due notice to the party and decide the matter in accordance with law. The appellant will be entitled to costs of both the Courts. Advocate's fee is fixed at Rs. 100 in the writ petition and also in the writ appeal.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 139
(V 57 C 19)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
PARTHASARATHI AND
RAMACHANDRA RAO, JJ.

Kesireddi Appala Swamy and others, Appellants v. Special Tahsildar, Land Acquisition Officer, Central Rly., Vijayawada, Respondent.

KL/IM/F591/68/SSG/B

Cases Referred: Chronological Paras
(1958) AIR 1958 Andh Pra 131
(V 45) = 1957 Andh LT 554, Deva-
dattam v. Union of India 2

Upendralal Waghry, for Appellant; P. A. Sarma for 2nd Govt. Pleader, for 1st Respondent; K. Pratap Reddy, for G. Haridatta Reddy, for Respondents 2 and 3.

KUMARAYYA, A. C. J.: This appeal is from the order of Seshachalapathi, J. refusing to quash the order of the Government passed in revision in exercise of its powers under Section 57-A of the A. P. Revenue Recovery Act.

2. Briefly stated the facts are these: The appellant herein is an agriculturist residing in Pasalawadi village, Sangareddy Taluk, Medak District. He had obtained a loan from the Government in a sum of Rs. 16,000 for purchasing a tractor for cultivating his lands. The amounts due from him swelled to Rs. 19,456-67. As the petitioner appellant did not repay the loan in spite of demand, after some correspondence between him and the revenue authorities as to the payment of amount and adjustment of accounts, proceedings under Section 36 of the A. P. Revenue Recovery Act were started. His lands were notified for sale.

The date of sale originally fixed was January 15, 1964. It was not held that day, but actually held on 4th March 1964. Of the 4 survey numbers, 3 survey numbers 110, 28 and 109 were knocked down in favour of the 2nd respondent for a total sum of Rupees 12,000. Another survey No. 158 was knocked down in favour of the 3rd respondent for a sum of Rs. 6,100. There was yet another survey number which was also put to sale. It was knocked down in favour of one Veeraiah whose case does not come up for our consideration in these proceedings.

Section 36 of the Revenue Recovery Act, 1864 embodies the procedure to be followed in sale of immoveable property. It makes in clause (3) a provision for deposit to be made by a purchaser. It says: "a sum of money equal to fifteen per cent of the price of the land shall be deposited by the purchaser in the hands of the Collector, or other officer empowered by the Collector in that behalf, at the time of the purchase and where the remainder of the purchase-money be not paid within thirty days, the money so deposited shall be liable to forfeiture." In cl. (4), it further provides that if the purchaser does not make the initial deposit or does not pay the remaining purchase money the property shall be resold at the expense and hazard of such purchaser, and the amount of all loss or expense which may attend such refusal or omission shall be recoverable from such purchaser in the same manner as arrears of public revenue.

In this case, the initial deposit was not made on the date of sale either by the second respondent or by the third respondent. They made these deposits on 5th and 11th March, 1964. The balance of the purchase money

was not paid within 30 days as enjoined by Section 36. Thereupon, the Revenue Divisional Officer in exercise of his powers directed forfeiture of the deposits made by respondents 2 and 3 and ordered resale in August, 1964. By that time on 31-3-1964 the appellant herein had already filed an application objecting to set aside sale on grounds of material irregularities and fraud in publication and conduct of sale. That was filed well within time as enjoined by Section 38 and no sale therefore could be confirmed unless that application was rejected. It is stated that that petition has not yet been disposed of. Aggrieved by the order passed by the Revenue Divisional Officer directing forfeiture of the deposits and resale respondents 2 and 3 went in appeal to the Collector, Medak under Sec. 158 of the A. P. (Telangana Area) Land Revenue Act. These appeals, were however, dismissed. They did not move the Board of Revenue which had powers of revision under Section 57-A (3) instead went to the State Government invoking their powers under sub-clause (1) of Section 57-A. That clause reads thus:

"The State Government may, either suo motu or on application made to them, call for and examine the record relating to any decision or order passed or proceeding taken by any authority or officer subordinate to them under this Act for the purposes of satisfying themselves as to the legality or propriety of such decision or order or as to the regularity of such proceeding and pass such order in reference thereto as they think fit."

The Government after considering the petition on merits set aside the order relating to forfeiture of the deposit and ordered that respondents 2 and 3 herein be directed to pay the balance of the bid amount together with interest thereon according to the rules within 30 days from the date of communication of the orders to them. The Collector of Medak was directed to take necessary action accordingly. This order which reversed the order of the original and the appellate authorities was made without any notice to the appellant herein, even though the order as made was adverse to the interests of the appellant. It may be recalled that the appellant had filed an application for setting aside the sale, which application was still pending disposal. Further by reason of the order of re-sale, he virtually got what he wanted as previous sale was no longer in force. The order passed by the Government was definitely adverse to the appellant as it upset the orders of the Revenue Divisional Officer and the Collector which were obviously favourable to the appellant herein. As this order was made without prior notice to him, he has invoked the jurisdiction of this Court praying that the said order be quashed as it was made without complying with the principles of natural justice and was against law.

Our learned brother Seshachalapathi, J., refused to quash this order on the basis that

no question of jurisdiction had arisen as the Government had power to revise the order suo motu or on an application of the party under Section 57-A and while exercising revisionary jurisdiction had all the powers exercisable by the Revenue Divisional Officer and the Collector. The Government therefore could direct that the deposit may not be forfeited or re-sale may not be held. The learned Judge referred in this behalf to the decision of the Madras High Court, which was followed by our High Court in *Devadattam v. Union of India*, 1957 Andh LT 554 at p. 568 = (AIR 1958 Andh Pra 131 at p. 134). They are the cases decided under Section 36 of the Revenue Recovery Act. The learned Judge dismissed the writ petition. Aggrieved by this the appellant has come up in appeal.

2-A. In our opinion, this appeal must be allowed on the short ground that there has been contravention of principles of natural justice inasmuch as the Government has passed an adverse order against the appellant without giving any notice to him or giving a reasonable opportunity of being heard. The revisionary jurisdiction of the Government in relation to the order made by the Collector or subordinate authorities is not at all open to question. Further it is indisputable that the Government while exercising revisionary jurisdiction was determining the questions affecting the rights of the parties. It follows that while exercising this legal authority to determine the question affecting rights, it (the Government) was bound to act judicially, as this was a quasi-judicial act and not an administrative act. Such an order is subject to judicial review under Article 226 of the Constitution of India. The order will be open to interference and liable to be quashed not only if it was passed without jurisdiction or in excess of jurisdiction but also if there has been contravention of the principles of natural justice or there was an error of law apparent on the face of the record. These in fact are the various considerations which should weigh in any proceeding, for quashing the proceedings started under Article 226 of the Constitution.

The adherence to principles of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties. These principles are well settled. The first and foremost principle is what is commonly known as Audi Alteram Partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on

notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair-play. Another principle of natural justice is popularly known as rule against bias. A third one which is of some consequence for our purpose is that the party when requested should be given a copy of the order passed against him, containing the reasons for the adverse order. In this case, not only notice was given to the party but also when the party came to know of the order and requested for a copy of the order, he was denied the same. In these circumstances we are of the view that an adverse order passed by the Government without due notice to the party affected thereby cannot stand by reasons of the contravention of the principles of natural justice, which the Government was duty-bound to follow.

This rule of fair-play and justice could not have been lawfully contravened but should have been strictly adhered to. The absence of the party on account of want of notice besides has led to certain misstatement of facts as well in the order. It is unnecessary for us to refer to this aspect of the case in view of the fact that we have come to the conclusion that the order is bad as it is vitiated by reason of contravention of one of the most important principles of natural justice.

Of course, Sec. 57-A does not contain any provision which in terms cast a duty on the Government to give notice to the party who may be adversely affected by its order. But that is fundamental being part and parcel of the principles of natural justice which no authority exercising quasi-judicial powers can lawfully ignore. On this very basis we are of the view that the order of the Government is liable to be quashed.

3. We therefore allow this appeal on this very basis and quash the order of the Government dated 26-5-1966. It will still be open to the Government to exercise its powers under revisionary jurisdiction under Section 57-A after giving due notice to the party and decide the matter in accordance with law. The appellant will be entitled to costs of both the Courts. Advocate's fee is fixed at Rs. 100 in the writ petition and also in the writ appeal.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 139
(V 57 C 19)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
PARTHASARATHI AND
RAMACHANDRA RAO, JJ.

Kesireddi Appala Swamy and others, Appellants v. Special Tahsildar, Land Acquisition Officer, Central Rly., Vijayawada, Respondent.

KL/IM/F591/68/SSG/B

S. R. Nos. 36789 and 34481 of 1967, D/-17-9-1968, from Order of Reference made by Basi Reddi and Chandrasekhara, JJ., reported in AIR 1969 Andh Pra 55 (FB).

Court-fees and Suits Valuations — Andhra Pradesh Court Fees and Suits Valuation Act (7 of 1956), S. 48 — Land Acquisition Act (1894), Ss. 54, 23, 26 — Solatium as awarded under Sec. 23 is not part of award within meaning of Sec. 26 — Appeal to High Court — No court-fee is payable on difference of solatium as a result of increase in compensation awarded by Court and that awarded by Collector — AIR 1964 Andh Pra 216, Overruled; AIR 1930 Mad 45, Dissented from; AIR 1955 Trav-Co 110, Not followed.

Under Land Acquisition Act, while solatium under Section 23 (2) may form part of the compensation to be awarded by the Collector under Section 11, it does not form part of the award which the Court has to pass under Section 26, though it is required under Section 23 (2) to add 15% on the amount of market-value awarded by it, which will be in the nature of a direction to the Collector to pay the amount just in the same way as he is directed to pay interest. The reason for excluding solatium from the award to be passed by the Court is perhaps due to the solicitude of the Legislature not to overburden the owner whose lands are acquired against his will with payment of court-fee thereon. Section 48 of the A. P. Court-fees and Suits Valuation Act itself requires payment of court-fee on the difference between the amount awarded and the amount claimed. The amount which an owner is required to claim includes neither solatium nor interest, but only compensation for all his interests in that land. Thus, solatium under Section 23 (2) of Land Acquisition Act forms part of neither the claim nor of the award, and consequently, in appeal under Section 54 thereof no court-fee is payable on such amount. (Para 9)

The award which is the subject-matter of the appeal to the High Court is the award under Sec. 26, which is the award that is referred to in S. 48 of the A. P. Court-fees and Suits Valuation Act, and that award does not contain solatium payable under Section 23 (2) of the Land Acquisition Act. (Para 13)

Thus, 15% of the market-value to be added under Sec. 23 (2) of Land Acquisition Act to the compensation awarded under Section 23 (1) thereof is not part of the award which has to be passed by the Court within the meaning of Section 26 of the same Act. Accordingly, in appeal under Sec. 54 of Land Acquisition Act no Court-fee under Sec. 48 of A. P. Court-fees and Suits Valuation Act is payable on the difference of the solatium which the appellant is entitled as a result of the increase in compensation awarded by the Court and that awarded by the Collector. AIR 1964 Andh Pra 216, Overruled; AIR 1930 Mad 45, Dissented from; AIR 1927 Cal 533, Appld.; AIR 1955 Trav-Co. 110, Not followed. (Para 14)

Cases Referred: Chronological Paras
 (1969) AIR 1969 Andh Pra 55 (V 56) = S. R. No. 33447 of 1966 (FB), Suryanarayana Rao v. Revenue Divisional Officer 2
 (1964) AIR 1964 Andh Pra 216 (V 51) = (1964) 1 Andh WR 185, Dodla Malliah v. State of Andh Pra 2, 10, 11
 (1955) AIR 1955 Trav-Co. 110 (V 42) = ILR (1954) Trav-Co. 1275, M. K. Abdulrahiman Kunju v. State 11
 (1949) 1949 AC 530 = 1949-2 All ER 452, Hill v. William Hill (Park Lane) 20
 (1930) AIR 1930 Mad 45 (V 17) = ILR 53 Mad 48 = 57, Mad LJ 357, Brahmanandam v. Secy. of State 2, 10, 11
 (1927) AIR 1927 Cal 533 (V 14) = ILR 54 Cal 312, Bansidhur Marwari v. Secy. of State 12

M. S. R. Subrahmanyam, for Appellant (in S. R. No. 34481/67); Y. Suryanarayana, for Cross-objectors (in S. R. No. 36789/67); Principal Govt. Pleader, for Respondents (in both S. Rs.)

P. JAGANMOHAN REDDY, C. J.: A Bench of this Court consisting of one of us (Chief Justice) and Kuppuswami, J., referred to a Full Bench the question whether court-fee is payable under Section 48 of the Andhra Court Fees and Suits Valuation Act (VII of 1956 hereinafter referred to as the Court Fees Act) on 15% of the compensation which has to be awarded as solatium under subsection (2) of Sec. 23 of the Land Acquisition Act (hereinafter called the Acquisition Act).

2. This reference was occasioned by certain observations of our learned brother, Venkatesam, J., delivering the judgment of the Bench in Dodla Malliah v. State of Andh Pra, 1964-1 Andh WR 185 = (AIR 1964 Andh Pra 216), that court-fee should be payable not only on the excess market value, but also on the 15% thereon, following the Bench decision in Brahmanandam v. Secy. of State, ILR 53 Mad 48 = (AIR 1930 Mad 45), which held that where a person being dissatisfied with the amount of compensation awarded to him under Section 18, Land Acquisition Act, wants to appeal, insisting in case of his success that not only the excess market value but also 15 per cent. of the same should be decreed in his favour, he must pay court-fees not only on the excess market value, but also on 15 per cent. thereon. Our learned brother stated; "it is also needless to point out that since the appellants were claiming interest on that amount, they were bound to pay court-fees on that amount as well." In S. R. No. 33447 of 1966 = (AIR 1969 Andh Pra 55) (FB), Basi Reddi and Chandrasekhara Sastri, JJ., while referring the question to a Full Bench stated that there was force in the contention that the observations in Dodla Malliah's case, 1964-1 Andh WR 185 = (AIR 1964 Andh

Pra 216), were obiter and that even if those observations are not treated as such, that decision requires reconsideration.

The Full Bench consisting of one of us (Chief Justice), Seshachelapati and Chinnappa Reddi, JJ., held that in so far as interest awarded under Section 28 of the Acquisition Act was concerned, no court-fee was payable under Section 48 of the Court Fees Act. The Full Bench while observing that neither solatium under sub-section (2) of Section 23, nor interest under Section 28 of the Acquisition forms part of the award, however, stated: "Though in respect of solatium the Court is enjoined in every case to award a sum of 15% on the market value of the subject-matter in consideration of the compulsory nature of the acquisition, there is no duty on the Court to award interest on that amount; but statutory liability is imposed on the Collector to pay the amount awarded with interest thereon from the time of taking possession until such time as it shall have been paid or deposited. We are not here concerned with the question whether solatium is part of compensation within the meaning of Section 48 of the Court-Fees Act, because that question is neither argued, nor pressed upon us inasmuch as court-fee has already been paid thereon".

Since that question has now arisen for determination, Sri Suryanarayana contends that the reasons which weighed with the Full Bench in coming to the conclusion that interest was no part of the compensation or the award or the decree no court-fee is payable under Section 48 of the Court-Fees Act should be applied mutatis mutandis while determining the further question whether court-fee is payable under Section 48 of the said Act on the excess of solatium awarded under Section 23 (2) of the Acquisition Act.

The Full Bench had held that compensation to be awarded for the land acquired under the Acquisition Act is the market value of the land together with damages or expenses or the loss of profits occasioned by the acquisition of the said land or property, that the compensation as computed under Sec. 23 (1) is the amount which has to be set out in the award passed under Section 26 (1) and it is that award which is deemed to be a decree under sub-section (2) of Sec. 26 and that it may be pertinent to notice that neither solatium under sub-section (2) of Section 23, nor interest under Section 34 forms part of the award. While so holding, they said: "it appears to us whether solatium is part of compensation or not—a matter upon which we do not wish to express our views in this reference—interest certainly is not. As already stated, compensation can only be computed in the manner laid down in Section 23 (1) which does not include interest either under Section 34 or on the excess amount awarded by the Court over that awarded by the Collector under Section 28."

3. Sri Ramachandra Reddy, the Principal Government Pleader, contends that under Section 15 of the Act, it is provided that "in determining the amount of compensation, the Collector shall be guided by the provisions contained in Sections 23 and 24", and therefore, he submits that solatium under Section 23 (2) is also a part of compensation; as such, court-fee is payable thereon.

4. It is, in our view, profitable in order to appreciate the rival contentions, to examine the provisions of Section 48 of the Court Fees Act and the relevant provisions of the Acquisition Act. Under Section 48 of the Court-Fees Act, the fee payable under Section 48 of the Court Fees Act, the fee payable under that Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of property for public purposes shall be computed on the difference between the amount awarded and the amount claimed by the appellant. A question would naturally arise as to what is "the amount awarded" and what is "the amount claimed" for the purpose of determining the court-fees payable under the above section. It may be noticed that under Section 49 of the Court-Fees Act, generally in appeals other than appeals against orders relating to compensation in respect of property acquired for public purposes under any Act, not necessarily the Acquisition Act the fee payable should be the same as the fee that would be payable in the Court of first instance on the subject-matter of the appeal. There are 5 Explanations to that section, which clarify what is included and what is not included in the subject-matter of the appeal.

For instance, Explanation (2) says that costs shall not be deemed to form part of the subject-matter of the appeal, except where such costs form themselves the subject-matter of the appeal or relief is claimed as regards costs on grounds additional to, or independent of, the relief claimed regarding the main subject-matter in the suit. Explanation (3) thereof says that in claims which include the award of interest subsequent to the institution of the suit, the interest accrued during the pendency of the suit till the date of decree shall be deemed to be part of the subject-matter of the appeal except where such interest is relinquished. Explanation (5) provides that where the market value of the subject-matter of the appeal has to be ascertained for the purpose of computing or determining the fee payable such market value shall be ascertained as on the date of presentation of the plaint. There are however no such specific rules in relation to solatium or compensation, in Section 48 of the Court-Fees Act. We have, therefore, to look into the provisions of the Acquisition Act for the meaning of the terms "award" and "claim" for the purpose of determining the court-fee payable under Section 48 of the Court-fees Act.

5. Where property of a citizen is intended to be acquired under the provisions of the Acquisition Act, the Collector has to give notice to the persons interested in the land, under Section 9. Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice) and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections, (if any) to the measurements made under Section 8. Sub-section (3) of S. 9 further provides that the Collector has to serve notice to the same effect on the occupier of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

After the requirements of Section 9 have been complied with, the Collector will have to proceed with the enquiry under Section 11 into the objections which any person interested has stated pursuant to a notice given under Section 9: (a) to the measurements made under Section 8, (b) into the value of the land at the date of the publication of the notification under Section 4 sub-sec. (1) and (c) into the respective interest of the persons claiming the compensation, and has to make an award under his hand of (i) the true area of the land (ii) the compensation, which in his opinion should be allowed for the land; and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.

6. It will be observed from these provisions that what is required to be claimed by the person interested in the land acquired, is the nature of his interest in the land and the amount and particulars of his claims to compensation for such interest and objections, if any, to the measurements made under Section 8, in respect of which an enquiry has to be held under Sec. 11, and thereafter the Collector has to make an award in respect of the matters enumerated in that section. The claim and the award is in respect of the value of the interest in the land, which is the compensation for such interest. There is no specific mention either in Section 9 or Section 11 of any claim for solatium or interest, nor has the Collector been enjoined to make an award in respect thereof. It is however provided that in determining the amount of compensation, the Collector has, under Section 15, to be guided by the provisions contained in Sections 23 and 24. Sub-section (1) of Section 23 pro-

vides for 6 matters to be considered in determining the amount of compensation for the land acquired under the Acquisition Act, by the Court to which a reference has been made by the Collector under Section 18 at the instance of a person interested in the land who has not accepted the award, whether in respect of the measurement of the land, the amount of compensation, the person to whom it is payable or to apportionment of the compensation among the persons interested. Section 24 provides for the matters to be neglected in determining the compensation. These two sections are as under:

Sec. 23 (1). "In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

first, the market value of the land at the date of the publication of the notification under Section 4, sub-section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under Section 6 and the time of the Collector's taking possession of the land.

(2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition."

Section 24. "But the Court shall not take into consideration—

first, the degree of urgency which has led to the acquisition;

secondly, any disinclination of the persons interested to part with the land acquired;

thirdly, any damage sustained by him, which, if caused by a private person, would not render such person liable to a suit;

fourthly, any damage which is likely to be caused to the land acquired, after the date of the publication of the declaration under

Section 6, by or in consequence of the use to which it will be put;

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;

sixthly, any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired, will be put; or,

seventhly, any outlay or improvements on, or disposal of, the land acquired, commenced, made or affected without the sanction of the Collector after the date of the publication of the notification under Section 4, sub-section (1)".

7. Where the Court passes an award, the question is whether the award will not only include the compensation as fixed after taking into consideration matters specified in clauses first to sixthly of sub-section (1) of Section 23, but also the amount mentioned in sub-section (2) thereof. It appears to us that Sections 26 and 27 answer that question. Sub-section (1) of Section 26 provides: "Every award under this part (part III) shall be in writing signed by the Judge, and shall specify the amount awarded under clause 1 of sub-sec. (1) of S. 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section, together with the grounds of awarding each of the said amounts." Under sub-section (2) of that section, "Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of Section 2, clause (2), and Section 2, Clause (9) respectively, of the Code of Civil Procedure, 1908." Section 27 further provides that every such award shall also state the amount of costs incurred in the proceedings under that Part, and by what persons and in what proportions they are to be paid.

8. There is nothing in Section 26 to show that the award should include the 15% solatium to be awarded under Section 23 (2). On the other hand, where the Legislature intended something which is not part of the compensation, namely, costs, it has specifically directed under Section 27 that the same shall be included in the award. There is therefore no doubt that in an award passed by the Court under Section 26, only those matters which are specified in Section 23 (1) and costs under Section 27 are to be included. Solatium under sub-section (2) of S. 23 is not part of the award. Though no doubt in Section 15 there is a reference to Sec. 23, it however does not specify that compensation has to be fixed by the Collector by taking into consideration only matters referred to in sub-section (1) of Section 23. As every word in the section has to be given a meaning and significance, in our view Section 15 by referring to the entire Section 23 and not merely specifying sub-section (1) of that section, was providing a guidance to the Collector to determine compensation under Section 11, and in so doing, was directing the inclusion in the award to be

passed by him after taking into consideration not only the matters specified in Sec. 23 (1) but also in Sec. 23 (2).

In other words, though there is no definition of what an "award" is, nonetheless when an award is made by the Collector under Section 11, the item relating to compensation has to be fixed in accordance with the guiding principles specified in Ss. 23 and 24, which includes the amount specified in Sec. 23 (2). It may be pointed out that Sec. 34 enjoins on the Collector, if the amount of compensation is not paid or deposited on or before taking possession of the land, to pay the amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited. But it does not form part of the award to be passed by the Collector under Sec. 11. While this is so, payment of interest nonetheless is a mandatory provision directing the Collector to pay the money, which any person aggrieved can enforce by recourse to law. It may be, even without the statutory provision, interest can be awarded on rules of equity. Where, however, an award is passed by the Court, the Legislature specifies the amounts which have to be included in the award, namely, those amounts which are arrived at after taking into consideration the matters which are mentioned in sub-sec. (1) of Section 23 and costs under Section 27, and nothing else. It excludes by omission to make a reference to Section 23 (2) to the 15% solatium on the market-value of the property as also the difference in the interest awarded by the Collector under Section 34 and that which is payable on the excess of compensation awarded by the Court, in respect of which the Court is required to direct the Collector to pay the amount of such excess at the rate of 6% per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

9. An examination of the provisions of the Acquisition Act unfettered by any authority would incline us to the view that while solatium under Section 23 (2) may form part of the compensation to be awarded by the Collector under Section 11, it does not form part of the award which the Court has to pass under Section 26, though it is required under Section 23 (2) to add 15% on the amount of market-value awarded by it, which will be in the nature of a direction to the Collector to pay, the amount just in the same way as he is directed to pay interest. The reason for excluding solatium from the award to be passed by the Court is perhaps due to the solicitude of the Legislature not to overburden the owner whose lands are acquired against his will with payment of court-fee thereon. This assumption of ours is fortified by the provisions of Section 48 of the Court-fees Act itself, which require payment of court-fee on the difference between the amount awarded and the amount claim-

ed. We have already shown that the amount which an owner is required to claim includes neither solatium nor interest, but only compensation for all his interests in that land. It is therefore clear that solatium under Section 23 (2) forms part of neither the claim nor of the award, and consequently, no court-fee is payable on such amount.

10. We propose now to refer to some of the decisions cited before us to examine whether they militate against the prima facie view we have taken on a reading of the relevant provisions of the Court-fees Act and the Acquisition Act. The Bench in *Dodla Malliah's case*, 1964-1 Andh WR 185 = (AIR 1964 Andh Pra 216) supra, was considering the question whether court-fee at all is payable in appeal to the High Court under Section 54 against an award passed by the Court to which a reference has been made under Section 18. It was contended that as under Section 49 of the Court-fees Act, court-fee payable in appeal is the same as in the Court of the first instance and as no court-fee is payable in the Court of first instance, namely, in the Court to which the reference was made under Section 18, no court-fee is payable in appeal to the High Court.

The argument advanced by Sri Sankara Sastry in that case was that according to Section 48 of the Court-fees Act, court-fee is no doubt payable on the difference between the amount awarded and the amount claimed by the appellants, but it applies only to appeals against an order relating to compensation under any Act; that Sec. 54 of the Acquisition Act provides an appeal to the High Court from the award or from any part of the award of the Court, which is now deemed to be a decree by reason of Sec. 26 (2) (added by Amendment Act 19 of 1921), and as such it does not refer to an award of the Land Acquisition Court, and that since Section 48 of the Court-fees Act is not applicable Section 59 thereof governs the case. Though this contention was negatived, we do not, except for one sentence in the observations of Venkatesam, J., relying on the case of 57 Mad LJ 357 = (AIR 1930 Mad 45), find any such contentions as those raised before us, nor any detailed consideration of the question referred to us.

11. In 57 Mad LJ 357 = (AIR 1930 Mad 45), which was a judgment of a single Judge, no doubt the question referred in this case was considered. The learned Judge in that case was considering Section 8 of the Court-Fees Act, 1870, which is in pari materia to Sec. 48 of the present Court-fees Act. It was contended in that case that under Sec. 23 (1) of the Acquisition Act, the amount of compensation to be awarded is determined by the considerations mentioned in clauses (1) to (11) of the section and that in construing Section 8 of the Court Fees Act, the expression "the amount awarded" should be taken to cover only the amount awarded having regard to the considerations mentioned in clauses (1) to (6) only of S. 23

and that the expression "amount claimed" in Sec. 8 (of the Court-fees Act) should also receive a similar construction. In rejecting the contention, the learned Judge observed at page 358: "As I understand the Act" the amount of compensation to be awarded includes 'not only the market-value but also the 15% on "such market-value". After referring to Sections 11, 15 and 38 of the Acquisition Act he proceeded to state; "it seems to me to be clear that the extra amount of "compensation claimed" by the appellant in an appeal should under Section 8 of the Court Fees Act include also the 15 per cent. of the market-value and that he should pay Court-fee on the total amount including the 15 per cent."

It will be observed that there was absolutely no reference to Section 9 or Section 26 or Section 27 of the Acquisition Act or to the other sections to which we have referred; nor was there any attempt made to ascertain what an "award" and a "claim" is under the provisions of the Acquisition Act, for the purpose of Section 48 of the Court-fees Act. Section 31 to which the learned Judge referred, deals with payment of compensation or deposit of the same in Court by the Collector after he has made the award. We do not understand how the provision requiring the Collector to tender payment of the compensation awarded by him to the person interested, or where it is not received, his being required to deposit the same in Court to which a reference under Section 18 would be submitted, is germane to the question whether solatium is included in the award passed by a Court, for purposes of payment of Court-fee under Section 8 of the Court-fees Act, 1870.

Even if, as the learned Judge held and as we also have held, the 15 per cent solatium on the market-value is included in the amount of compensation awarded by the Collector, that does not by itself resolve the further question whether court-fee is payable on the difference in the solatium awarded by the Collector and that which the appellant is entitled on the award of increased compensation, which, in our view, would depend upon the interpretation to be given to the provisions of Sections 9 and 23 of the Acquisition Act. We are therefore unable to accept the reasoning of the learned Judge in *Brahmanandam's case*, ILR 53 Mad 48 = (AIR 1930 Mad 45) (supra) or the observations of the Bench in *Dodla Malliah's case*, 1964-1 Andh WR 185 = (AIR 1964 Andh Pra 216) (supra), based on that decision as being in accord with our reading of the relevant provisions of the Court-Fees Act and the Acquisition Act. A decision of a Bench of the Travancore Cochin High Court in *Abdulrahiman Kunju v. State*, AIR 1955 Trav-Co. 110 was also cited by the learned Government Pleader, but that case does not advance the matter any further because the Bench without further consideration, merely followed *Brahmanandam's case*, ILR 53 Mad

48 = (AIR 1930 Mad 45) (supra) in holding that Court-fee is payable on 15 per cent solatium also.

12. In support of our view that the award for purposes of appeal is the award which is the one that is specified in Section 26 of the Acquisition Act, we may refer to a decision of a Bench of the Calcutta High Court in *Banshidhur Marwari v. Secretary of State*, 54 Cal 312, 314 = (AIR 1927 Cal 533 at p. 533). In that case, it appears that on a reference by the Collector, the matter came up before a Land Acquisition Judge and on the 21st May, 1924 it was dismissed for default in the absence of the petitioner. On the 11th June, 1924, the petitioners applied under Order 9 Rule 9 for restoration of the case. That application was also dismissed for default on the 10th January 1925. On the 6th March, 1925, the petitioners applied before the Land Acquisition Judge for review of his order dated the 10th January, 1925. That application for review was dismissed on the 26th June, 1926. The petitioners thereafter presented a memorandum of appeal to the High Court on 30-7-1926 directed against the order of 10-1-1925 and almost simultaneously made the application under consideration for extension of time under Section 5 of the Limitation Act. The contention on behalf of the opposite party was that the order against which the petitioners sought to appeal was an order from which no appeal lies under the Land Acquisition Act. In dealing with the contentions raised before them, Suhrawardy, J., observed at page 315:

“Award” has not been properly defined in the Act; but what is or may be supposed to be an award has been sufficiently indicated in several sections of which reference may be made to S. 11. Section 26 also indicates as to what an award should be. Under that section an award shall specify the amount awarded under Section 23. The order against which the petitioners want to appeal cannot be said to be an award within the meaning of Section 26 of the Act.”

13. There is no doubt that the award which is the subject matter of the appeal to the High Court is the award under Section 26, which is the award that is referred to in Section 48 of the Court-fees Act, and that award, as we have already stated, does not contain solatium payable under Section 23 (2) of the Acquisition Act.

14. In our view, the result of the foregoing discussion is that 15 per cent of the market-value to be added under Section 23(2) to the compensation awarded under Section 23(1) is not part of the award which has to be passed by the Court within the meaning of Section 26. Accordingly, no Court-fee under Section 48 of the Court-fees Act need be paid on the difference of the solatium to which the appellant is entitled as a result of the increase in compensation awarded by the Court and that awarded by the Collector. The Office is directed to register the

memorandum of appeal and the cross-objections without calling on the appellant or the cross-objectors to pay court-fee thereon.

15. PARTHASARATHI, J.: I agree and wish to make some observations on the construction of Sections 48 and 49.

16. The latter Section of the Court Fees Act provides for the payment of Court-fee in respect of the “subject-matter” of appeals. This is a provision applicable generally to appeals. Section 48 is of limited application and is intended for a special category of appeals. The effect of Section 48, in so far as it is material for the present discussion, is that Court-fee is payable on the difference between the amount awarded and the amount claimed.

17. The very fact that the legislature had chosen to classify appeals coming within the purview of Section 48 as a special category, is an unmistakable indication of the legislative intendment to make an exception from the general rule enacted in Section 49. The position is that, the subject-matter of an appeal is made the basis for valuation in Section 49. But, this general provision furnishes a contrast or distinction, when one considers it in juxtaposition with the Section 48, which enacts a special rule in respect of a distinct category of appeals.

18. It was thus clearly designed that the range of valuation in cases coming under Section 48, should be narrower than the range of valuation, comprehended in the expression, “subject-matter of appeal”. If “subject-matter of appeal” and difference between “amount awarded and amount claimed” are to be regarded as coincident in their sweep or range, what was the need for a special provision?

19. The contention of Sri Ramachandra Reddy is that the word “awarded” occurring in Section 48 should be deemed to include the entire amount payable to the owner of a land and takes in the statutory solatium also. Likewise, his submission is that the “amount claimed” includes the solatium. If this contention is accepted, it would mean that the entire subject-matter of the appeal becomes the basis of valuation for Court-fee. In my opinion, this the legislature not only did not intend, but also guarded against by making a special provision.

20. The rule of construction suggested by the learned counsel would result in both the provisions being equated in their result and operation. This method of construction leading to the conclusion that there is a superfluity is not permissible. In *Hill v. Willaim Hill (Park Lane), Ltd.*, 1949 AC 530 at p. 546, Viscount Simon said:—

“It is to be observed that though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what had already been said once, this repetition in an Act of Parliament is not to be assumed. When the legislature enacts a particular

phrase in a statute, the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which has not been said immediately before."

21. The alternatives are: Firstly, to regard the two provisions as identical in their effect and to equate the difference in amount awarded and amount claimed, with the "subject matter" of appeals. This, in my opinion, would be to ignore the meaning attributable to the words "awarded" and "claimed" and also to impute to the legislature the error of repetition.

22. The second alternative is to hold that the two provisions do not constitute an example of legislative tautology and that they should be so interpreted in such a manner as not to render Section 48 superfluous.

23. There can be no doubt that the former alternative is to be preferred as being not only in consonance with precedent and principle but also with the "equity of the statute" thereby giving due recognition to the spirit and meaning of Section 48.

24. I agree with the reasoning and conclusions of my Lord the Chief Justice as to the meaning of the words "awarded" and "claimed" and I concur in the directions given by him.

Order accordingly.

AIR 1970 ANDHRA PRADESH 146 (V 57 C 20)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
VENKATESAM AND SAMBASIVA RAO JJ.

Bayya Pitchaiah, Petitioner v. The State of Andhra Pradesh, Respondent.

Tax Revn. Case No. 53 of 1964, D/- 25-3-1969, Decided by Full Bench on order of reference made by Basi Reddy and Sambasiva Rao JJ. D/- 25-3-1968.

Sales Tax — Andhra Pradesh General Sales Act (6 of 1957), Ss. 20, 14 (As amended in 1963) — Powers of revisional authority under S. 20 — Extent of — Assessment of additional turnover can be made — (1963) 2 Andh LT 201, Overruled.

By making the assessment to tax on the additional turnover, the Commercial Tax Officer exercises a power which is within his competence under S. 20(2) as the revisional authority and thereby he does not trench on the powers of the assessing authority. The language of S. 20 in no way curtails the power of revisional authority to make assessment to the best of his judgment, nor Section 14 in any way curtails the power under S. 20. (1963) 2 Andh LT 201, Overruled. (Case law discussed.) (Para 24)

HM/HM/D554/69/DVT/B

- Cases Referred: Chronological Paras
(1969) Civil Appeals Nos. 803 and 804 of 1967, D/-18-2-1969 = (1969) 1 SC WR 610, Deputy Commr. of Agrl. Income-tax and Sales Tax Quilon v. Dhanalakshmi Vilas Cashew Co. Quilon 23
(1968) AIR 1968 SC 843 (V 55) = (1968) 21 STC 383, Swastic Oil Mills Ltd. v. H. B. Munshi 22, 23, 24
(1967) AIR 1967 SC 1537 (V 54) = (1967) 20 STC 273, State of Madras v. P. N. Batcha and Co. 21
(1965) AIR 1965 SC 1585 (V 52) = (1965) 16 STC 875, State of Kerala v. K. M. Charia Abdulla and Co. 20, 22, 23, 24
(1965) 16 STC 54 = ILR (1966) Andh Pra 689, State of Andhra Pradesh v. Ravuri Narasimloo 19
(1964) AIR 1964 SC 1413 (V 51) = (1964) 15 STC 153, State of Orissa v. Debaki Debi 18
(1963) AIR 1963 SC 796 (V 50) = (1963) 14 STC 242, State of Kerala v. M. Appukutty 17, 23
(1963) 1963-2 Andh LT 201 = (1964) 15 STC 222, State of Andhra Pradesh v. Varre Pothuraju 1, 4, 6, 13, 15, 24, 25
(1956) AIR 1956 Mad 659 (V 43) = 1955-6 STC 318 (FB), State of Madras v. Louis Dreffus and Co. Ltd. 13, 15, 17
K. Ranganadhachary, for Petitioner; Advocate General, on behalf of State.

VENKATESAM, J.: This case has been referred to a Full Bench by Basi Reddy, J., and one of us (Sambasiva Rao, J.) on the ground that the view of the Division Bench in State of Andhra Pradesh v. Varre Pothuraju, (1963) 2 Andh LT 201 = (1964) 15 STC 222 as to the scope and meaning of Section 14 (4) of the Andhra Pradesh General Sales Tax Act, 1957, vis-a-vis the revisional jurisdiction under Section 20 of the said Act has cut down the amplitude of the powers of the revisional authority, although there are no restrictive words in Section 20 of that Act, and that the decision therefore, requires re-consideration.

2. The facts relevant for a determination of the question referred to us are as follows:— The petitioner is an individual carrying on business in butter and ghee, and registered as a dealer under the Andhra Pradesh General Sales Tax Act (No. 6 of 1957) (hereinafter referred to as the Act). For the assessment year 1956-57, he reported a gross turnover of Rs. 1,58,514-7-9 and a net turnover of Rs. 35,824-13-6, claiming exemption on a turnover of Rs. 1,22,689-13-0. The Deputy Commercial Tax Officer, Gudivada, who was the assessing authority, checked the accounts for that year and found that the gross turnover was Rs. 1,58,524-12-0, and after allowing the exemptions to which he was entitled the taxable turnover as per his accounts was found to be Rs.

35,984-14-9. The Deputy Commercial Tax Officer inspected the petitioner's shop on 17-5-1956, and found that certain bills were not issued for cash and credit sales till the time of his inspection. He made a second inspection on 9-10-1956, and recovered some slips of paper. By his order dated 27-3-1958, the Deputy Commercial Tax Officer held that Rs. 1,500 had to be added to the turnover of October, 1956, for not accounting for the advances and other defects and Rs. 2,000 had to be added towards the estimated suppressions, but determined the net turnover of the dealer for 1956-57 at Rs. 37,984-14-9, and assessed him to tax on the same. The Commercial Tax Officer, Masulipatnam, examined the accounts on 19-5-1959, and found that in fact Rs. 1,500 was not added to the turnover for the month of October, 1956, on account of suppressions.

He also found that as per the slips of paper and the Anamath Book recovered by the Deputy Commercial Tax Officer on 9-10-1956, the sales amounted to Rupees 1,574-5-6 during the period 1-10-1956 to 9-10-56, while the cash and credit sales shown in the regular accounts amounted only to Rs. 579-0-3, and that during that period the proportion between the turnover in the regular accounts and the turnover suppressed was 1:3. For these reasons, he was of the opinion that the assessment made by the Deputy Commercial Tax Officer required revision, and issued notice of the proposed assessment. He declined to accept the explanation on behalf of the dealer, and assessed him to tax on a further turnover of Rs. 71970.

3. Against the order of the Commercial Tax Officer, an appeal was preferred to the Assistant Commissioner Commercial Taxes, Guntur, who, by his order dated 28-3-62 refused to interfere and dismissed the appeal. Against that decision, an appeal was preferred to the Sales Tax Appellate Tribunal, Hyderabad, in T. A. No. 473 of 1962, and the Tribunal by its order dated 3rd March 1964 dismissed the appeal, and upheld the order of the Commercial Tax Officer. Against the order of the Tribunal the Revision petition has been preferred under Section 22 (1) of the Act.

4. The contention raised before the Appellate Tribunal was that the turnover of Rs. 71,970 on which additional tax was levied by the C. T. O. was an escaped turnover, which he had no jurisdiction to assess, and relied on (1963) 2 Andh LT 201 = (1964) 15 STC 222. The Tribunal held that the facts and the observations in that case were distinguishable from the instant case, as the authority which assessed the escaped turnover is the Commercial Tax Officer, who is also the assessing authority under G. O. Ms. No. 1091, Revenue, dated 10-6-1957, published at pages 107-112 of the Rules Supplement to Part I of the Andhra Pradesh Gazette, dated 15-6-1957. According to this G. O., it may be noted, the Governor of Andhra Pradesh

in exercise of his powers under Section 2(1) (b) of the Act and in supersession of the previous Notifications, authorised Commercial Tax Officers to exercise the powers of an assessing authority in the case of dealers whose total turnover is Rs. 8 lakhs or more a year; and by the proviso, he was authorised in his discretion to exercise the powers of a lower authority within his jurisdiction in respect of any dealer. It is, therefore, clear that the Commercial Tax Officer, Masulipatnam, could exercise the powers in respect of the petitioner. The Tribunal thus held that the Commercial Tax Officer assessed the escaped turnover as an assessing authority, but not as a revisional authority, and that he was competent to do so. The Tribunal distinguished the decision cited on the ground that in that case the Commissioner purported to exercise his revisional jurisdiction for assessing the escaped turnover.

5. In assailing the correctness of this decision, Sri Ranganadhachari, the learned counsel for the petitioner contended that even if the Commercial Tax Officer acted as an assessing authority, he could only take note of the slips seized by the Deputy Commercial Tax Officer, but could not, on the strength of those slips, draw an inference regarding the escaped turnover for the entire assessment year, and make an assessment, as it amounted to a best of judgment assessment, which he could not do. It was also contended that the assessment by the Deputy Commercial Tax Officer itself was to the best of his judgment under Section 14 (1) of the Act, and that the same power could not be exercised by the Commercial Tax Officer as an assessing authority; alternatively it was argued that if the Commercial Tax Officer purported to act as a Revisional authority, he could not do so de hors the record of assessment proceedings, and that in this case as they consisted only of certain slips seized by the Deputy Commercial Tax Officer, the Commercial Tax Officer could add only the turnover covered by those slips under Section 14(4) of the Act, but not make them the basis for increasing the turnover threefold, as it amounted to a re-determination of turnover to the best of his judgment, which is not warranted by Section 20, and that the decision of the Bench of this Court is good law.

6. The learned Acting Advocate-General, appearing for the State, in refuting the contentions on behalf of the dealer, submitted:

(1) The Commercial Tax Officer acted as a revisional authority under Section 20(2) of the Act, and made the assessment to the best of his judgment, and the language of Section 20 in no way curtails that power.

(2) The curtailment of the revisional powers under Section 20 ought not to be inferred by reference to Section 14; further even escaped turnover can be assessed by an assessing authority by way of best judgment after the addition of Section 14 (4-A) in 1963.

(3) The decision of this Court in (1963) 2 Andh LT 201 = (1964) 15 STC 222 holding that a revisional authority cannot make a best judgment assessment cannot be accepted as good law.

7. In order to decide the questions debated before us, it is necessary to advert to the relevant provisions of the Act before referring to the decisions cited.

8. Section 14 of the Act deals with the assessment of tax and is in the following terms:

“14 (1): If the assessing authority is satisfied that any return submitted under Section 13 is correct and complete, he shall assess the amount of tax payable by the dealer on the basis thereof but if the return appears to him to be incorrect or incomplete he shall, after giving the dealer a reasonable opportunity of proving the correctness and completeness of the return submitted by him and making such inquiry as he deems necessary, assess to the best of his judgment, the amount of tax due from the dealer. An assessment under this section shall be made only within a period of four years from the expiry of the year to which the assessment relates.

(2) When making an assessment to the best of judgment under sub-section (1) the assessing authority may also direct the dealer to pay in addition to the tax assessed, a penalty not exceeding one and half times the tax due on the turnover that was not disclosed by the dealer in his return.

(3) If no return is submitted by any dealer liable to tax under this Act before the date prescribed in that behalf, the assessing authority may, at any time within a period of four years from the expiry of the year to which assessment relates, after issuing a notice to the dealer and after making such inquiry as he considers necessary assess to the best of his judgment, the amount of tax due from the dealer on his turnover for that year, and may direct the dealer to pay, in addition to the tax so assessed a penalty not exceeding one and half times the amount of that tax.

(4) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, or has been under-assessed or assessed at too low a rate, or where the licence fee or registration fee has escaped levy or has been levied at too low a rate, the assessing authority may, at any time within a period of four years from the expiry of the year to which the tax or the licence fee or registration fee relates, assess the tax payable on the turnover which has escaped assessment or levy the correct amount of licence fee or registration fee, after issuing a notice to the dealer and after making such inquiry as he considers necessary. Such authority may also direct the dealer to pay in addition to the tax so assessed, a penalty not exceeding one and half times the amount of that tax, if the turnover had escaped assessment or had been under-assessed or

assessed at too low a rate by reason of its not being disclosed by the dealer:

Provided that before issuing any direction for the payment of any penalty under sub-section (2) sub-section (3) or sub-section (4), the assessing authority shall give the dealer a reasonable opportunity to explain the omission to disclose the information, and make such inquiry as he considers necessary”.

9. Section 19 deals with appeals against orders passed or proceedings recorded by an authority under the Act. Section 20 deals with revision by the Board of Revenue, and other prescribed authorities, and is as follows:

“20 (1): The Board of Revenue may suo motu call for and examine the record of any order passed or proceeding recorded by any authority, Officer or person subordinate to it, under the provisions of this Act, including sub-section (2) of this section, for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceeding and may pass such order in reference thereto as it thinks fit.

(2) Powers of the nature referred to, in sub-section (1) may also be exercised by the Deputy Commissioner and the Commercial Tax Officer in the case of orders passed or proceedings recorded by authorities, Officers or persons subordinate to them.

(3) In relation to an order of assessment passed under this Act, the powers conferred by sub-sections (1) and (2) shall be exercisable only within such period not exceeding four years from the date on which the order was served on the dealer, as may be prescribed.

(4) No order shall be passed under sub-section (1) or sub-section (2) enhancing any assessment unless an opportunity has been given to the assessee to show cause against the proposed enhancement.”
Section 39 relates to the power to make rules.

10. Rules 8 to 27 deal with the submission of returns, the permissible deductions, and the method of assessment by the assessing authority. Rule 12 enables the assessing authority to assess a dealer to the best of his judgment, where no return is submitted or even where submitted is incomplete. Rules 33 to 44 deal with appeals and revisions. The relevant rule is Rule 44 which is in the following words:

“44. (1) The powers of the nature referred to in sub-section (1) of Section 20 may be exercised by the Deputy Commissioner of Commercial Taxes and the Commercial Tax Officer in the case of orders passed or proceedings recorded by authorities, officers or persons subordinate to them.

(2) In relation to order of assessment passed under the Act, the powers referred to above shall be exercised:

(i) by the Commercial Tax Officer only within a period of three years from the date on which the order was served on the assessee;

(ii) by the Deputy Commissioner of Commercial Taxes and the Board of Revenue only within a period of 4 years from the date on which the order was served on the assessee; and

(iii) No order shall be passed under sub-rule (1) or (2) enhancing any assessment, unless an opportunity has been given to the assessee to show cause against the proposed enhancement."

11. It may be noticed that the Board of Revenue is given the power, suo motu to call for and examine the record of any order or proceeding by a subordinate authority for satisfying itself as to the legality or propriety of that order or the regularity of such proceedings, and to pass such orders in reference thereto as it thinks fit. It cannot be doubted that the expression "legality, propriety and regularity" is of wide import especially having regard to the fact that the Board of Revenue is empowered to pass such order in reference thereto as it thinks fit. It may then be noted that under Section 20(2), the powers of the Board of Revenue under Section 20 (1) may also be exercised by the Deputy Commissioner of Commercial Taxes, and the Commercial Tax Officer, in respect of orders passed by officers subordinate to him, and the powers under Section 20 (1) as well as Section 20 (2) can be exercised only within a period not exceeding four years from the date on which the order was served on the dealer. Section 20(4) makes it clear that in exercise of the powers under Section 20 of the Act an assessment may be enhanced, but only after giving an opportunity to the assessee against the proposed enhancement.

12. The order of the Commercial Tax Officer, in the instant case, makes it abundantly clear that he did not act as assessing authority, but only exercised the revisional powers, though the provision of law (viz. Section 20(2)) had not been quoted, and in the exercise of that power he levied tax on an additional turnover, which, in his judgment, had escaped. The argument on behalf of the assessee is that what is empowered by Section 20(4) is enhancement of assessment, and that there is clear distinction between escaped turnover and escaped assessment as brought out in Sections 14 (1) and 14 (4) of the Act.

13. Reliance was placed by the learned counsel on the decision of a Bench of this Court in (1963) 2 Andh LT 201 = (1964) 15 STC 222. But before adverting to that judgment, it may be necessary to refer to the Full Bench decision of the Madras High Court in *State of Madras v. Louis Dreffus and Co. Ltd.*, (1955) 6 STC 318 = (AIR 1956 Mad 659) (FB). In that case, the question that arose for consideration was, whether Rule 14 of the Madras General Sales Tax Rules prior to the amendment in 1948 was valid, and, if so, whether the powers of revision thereunder could be exercised in cases to which Rule 17 relating to escaped

assessment was applicable. Section 12 of the M. G. S. T. Act as amended by Madras Act XXV of 1947 and Rule 14 of the M. G. S. T. Rules, which were considered by the Full Bench, are in pari materia with Section 20(1), (2) and (3) of the Act except that in the Madras Act and Rules no power was conferred on the revisional authority to enhance the assessment, as in Section 20(4) of the Act.

The procedure to be followed by the assessing authority has been laid down in Section 9 of the Madras General Sales Tax Act, and Rule 17 of the Madras General Sales Tax Rules as amended in 1948, which is in pari materia with Section 14(4) of the Act. Section 19(1) of the Madras General Sales Tax Act empowered the Government to make Rules to carry out the purpose of the Act, and Section 19(2)(f) provided that without prejudice to the generality of that power the rules may provide for the assessment to tax under that Act of any turnover which has escaped assessment within three years. It may be mentioned that in that case, the Deputy Commercial Tax Officer determined the turnover of the assessee for the assessment year 1944-45. The assessee preferred an appeal to the Commercial Tax Officer, and the appeal was dismissed. Later the Commercial Tax Officer issued a notice to the assessee to show cause why that assessment should not be revised by including in the turnover an additional sum and ultimately the Commercial Tax Officer increased the turnover.

14. The contention of the assessee before the Full Bench was that on a proper construction of the provisions of that Act, the Board of Revenue was intended to be the sole and exclusive revising authority, and Rule 14(2) which authorised the Commercial Tax Officer to exercise powers of revision was beyond the rule-making power. It was further contended that Section 19(2)(f) referred to above specifically provides for rules being made for the assessment of escaped turnover of an assessee and the period within which re-assessment proceedings could be started, and as Rule 17 framed for this purpose vested the jurisdiction to assess an escaped turnover with the assessing authority, viz., the Deputy Commercial Tax Officer, it would be contrary to the Rules of construction to read Rule 14(2) as conferring upon the Commercial Tax Officer an unfettered jurisdiction to reopen assessment and effect a reassessment even after a lapse of the period of two years prescribed by Rule 17 (1).

15. Rajamannar, C. J., speaking for the Full Bench, stated the position thus:

"No doubt in a general sense both Rule 14(2) as well as Rule 17(1) serve a common purpose, viz., to gather revenue which has improperly escaped but while Rule 14 (2) is directed to the correction of improper or illegal assessment orders which have levied less or more tax than justified, Rule 17(1) lays emphasis on escaped turnover.

The distinction between the two provisions might be expressed by saying that R. 14 (2) deals with escaped assessments and Rule 17(1) with escaped turnover, notwithstanding that the latter also would mean that a lesser amount of tax has been paid. So understood, the two provisions would be completely reconcilable and the two jurisdictions to revise assessments and to reopen them would each be assigned to the proper authority.

The language of Rule 17 (1) is consistent with this construction. The 'escape' that serves as the foundation for the jurisdiction to reopen an assessment is that of 'turnover' and not, be it noted, an assessment.

'Turnover' escaped when it is not noticed by the officer either because it is not before him by reason of an inadvertence, omission or deliberate concealment on the part of the assessee, or because of want of care on the part of the officer the turnover though in the books has not been taken notice of. This would be the natural and normal meaning of the expression 'turnover which has escaped' in Rule 17(1)."

It was further held that a close examination of Rule 14(2) also supported the view that the two rules were intended to be mutually exclusive, and the reference to the Full Bench was answered thus:

(1) Rule 14(2) is intra vires the rule making power of the Provincial Government under Section 19 of the Act. (2) The revisional powers under Rule 14(2) cannot be exercised in cases to which Rule 17 applies. (3) Rule 17 applies only to cases of escaped turnover as described earlier".

In (1963) 2 Andh LT 201 = (1964) 15 STC 222, the assessee firm was provisionally assessed by the Deputy Commercial Tax Officer for the assessment year 1955-56. In the return filed by the assessee for that year, they showed certain gross and net turnover, but the assessing authority was not satisfied that the books of account were correctly maintained, and holding that there were suppressions in the course of 2½ months during that year, estimated the turnover to the best of his judgment at a higher figure. The Deputy Commissioner, who was apprised of that estimate by the Commercial Tax Officer, purporting to act in the exercise of his revisional jurisdiction, called upon the assessee to show cause why the turnover should not be enhanced by him, and eventually enhanced the turnover. On appeal to the Tribunal, majority of the members took the view that the revising authority could not enhance the turnover as that was the function of the assessing authority. It was against that order that revision was preferred by the State to the High Court, Chandra Reddy C. J. speaking for the Bench, compared Section 20 of the Act with Section 12 of the M. G. S. T. Act, and held that it was in identical language except for a minor difference, and that, therefore, the argument on behalf of the State

that the revising authority could deal with the orders of the assessment in any way he liked, could not be accepted.

The Bench took the view that the precise contents of the power to revise must be gathered from Sections 20 and 14 of the Act, analogous to S. 9 of the M. G. S. T. Act and the Rules thereunder. The learned Chief Justice summed up the position thus:

"In the context of this enquiry, we have to bear in mind the fact that it is not the Deputy Commissioner of Commercial Taxes that is the assessing authority within the contemplation of the General Sales Tax Act, that duty being allotted only to the Assistant and Deputy Commercial Tax Officers. That being the position, we have first to decide whether this matter falls within the sweep and range of sub-section (1) or within the scope of sub-section (4) of Section 14. In our considered opinion, the function performed by the Deputy Commissioner in this case is the one within the connotation of Section 14(4). As already mentioned, the Deputy Commissioner felt that a considerable part of the turnover escaped assessment to tax. At the risk of repetition, we may state that the Commercial Tax Officer estimated the turnover at about Rs. 2,40,000. The revising authority determined it at about Rupees 5,00,000. In other words, he felt that turnover of nearly Rs. 3,00,000 escaped assessment to tax and that it should be brought to tax. This is not a case where the whole of the turnover, was before the assessing authority and he thought that the entirety of the turnover could not be subjected to tax but only a part of it or that reduction should be granted in regard thereto. This is a case where the revising authority increased the turnover by more than two and a half lakhs. That being so, there can be little doubt that what the revising authority did falls under sub-section (4). Sub-section (1) and sub-section (4) embody two different concepts and they are mutually exclusive. It is only in regard to matters coming under sub-section (1) that the revising authority is empowered to invoke Section 20 of the Andhra Pradesh General Sales Tax Act or Section 12 of the Madras General Sales Tax Act, as the case may be. It does not extend to powers vested in the assessing authority by sub-section (4) of the Andhra Pradesh General Sales Tax Act or R. 17 (1) of the rules framed under the Madras General Sales Tax Act, which resembles Section 14(4). The duty to be discharged under Section 14(4), is vested in the assessing authority and not in the officers that constitute appellate or revisional authority." In coming to this conclusion, the Bench relied upon the decision of the Madras High Court in (1955) 6 STC 318 = (AIR 1956 Mad 659) (FB) on the ground that Rules 14 (2) and 17 (1) of the M. G. S. T. Rules, 1939, are analogous to the Rules to be dealt with in that case, and that the principle enunciated in that case had full vigour in the context of the enquiry before them.

16. We have already pointed out that the question for consideration before the Full Bench of the Madras High Court was, whether Rule 14 of the M. G. S. T. Rules was valid, and if so, whether the powers thereunder could be exercised in cases to which Rule 17 relating to escaped assessment was applicable. The Full Bench in answering that question, as stated above, pointed out the distinction between the two rules, that Rule 14 (2) was *intra vires*, and that the revisional power under Rule 14 could not be exercised in a case to which Rule 17 applied. In the case before the Bench of this Court, the question turned upon the construction of Section 20 which has already been extracted. We have noticed how the language of Section 20 (1) is of wide amplitude, and Section 20 (4) expressly empowered the revising authority to enhance the assessment. In that situation, the question for consideration is, whether the amplitude of the language used in Section 20 in relation to revisional powers can be whittled down by a reference to Section 14 (4), which specifically relates to the power of an assessing authority who has already made an assessment, but not of a revisional authority.

17. In support of his argument that the revisional powers cannot be so restricted or circumscribed, the learned Acting Advocate-General has invited our attention to some decisions of the Supreme Court. In the State of Kerala v. M. Appukutty, (1963) 14 STC 242 = (AIR 1963 SC 796) after the assessment was made by the Deputy Commercial Tax Officer and an appeal against that order was dismissed, the Deputy Commissioner of Commercial Taxes, after issuing a notice proposing to determine the escaped turnover for the period of assessment, levied the tax on enhanced turnover. An appeal against that order was dismissed by the Tribunal, and in revision before the High Court a contention was raised that the notice issued by the Deputy Commissioner was without jurisdiction. That contention was upheld, and the order of the Appellate Tribunal was set aside. On appeal to the Supreme Court against that judgment, two contentions were raised, one on behalf of the State that the notice issued by the Deputy Commissioner was not without jurisdiction, and the other on behalf of the assessee that if the notice was not without jurisdiction, the Rule under which the notice was issued was *ultra vires* as it was beyond the substantive provisions of the Act. The Act which governed that case was the Madras General Sales Tax Act, No. 9 of 1939. Kapur, J., who spoke for the Court, referred to Sections 9, 12 and 19 of the Act, and Rules 17, 17 (1), 17 (1-A) and 17 (3-A) of the M. G. S. T. Rules. It was contended that the power under Section 12 (2), which corresponds to Section 20 of the Act, was distinct from Rule 17(3-A) which empowered the revising authority also to exercise the powers of the assessing authori-

ty under sub-rules (1) and (3), viz., determining to the best of judgment the turnover which has escaped assessment. That contention was accepted by the Tribunal, but reversed by the High Court.

The Supreme Court first of all held that Rule 17 and the various clauses thereof made under Section 19 were not beyond the rule-making power of the State under Section 19. Adverting to the argument that Rule 17 was *ultra vires* of the provisions of the Act, the Supreme Court held that Section 2(b) authorised the State Government to appoint as many Deputy Commissioners of Commercial Taxes as it thinks fit for performing the functions conferred on them under the Act, and such officers shall perform their functions within such local limits as the Government may assign. Rule 17 conferred on the Deputy Commissioner the power to determine and tax the escaped turnover in cases where revisions have been taken to them (under sub-rule (1-A) and also where revisions have not been taken to them (sub-rule (3-A))). It was further held that Section 9 does not deal with escaped turnover, but is a provision to determine the turnover of a dealer in the first instance, and that Rule 17 cannot be said to be in conflict with Section 12(2). That section, it was held, dealt with cases where the Deputy Commissioner, *suo motu*, or on application, called for the record and determined the legality or propriety of an order made by one of the subordinate officers.

In view of Rule 17, their Lordships held that the power of revision of the Deputy Commissioner is not limited to the powers under Section 12(2), and that Rule 17 dealt with a separate and independent jurisdiction in regard to determining and taxing escaped turnovers, and that the provisions of Section 12(2) are in no way in conflict with the powers conferred under Rules 17 (1-A) and 17 (3-A). The argument that Rule 17 (3-A) was confined to cases of revisions filed under Section 12(2) was also rejected. Referring to the decision of the Full Bench of the Madras High Court in (1955) 6 STC 318 = (AIR 1956 Mad 659) (FB), the Supreme Court, observed that that case did not deal with sub-rule (3-A), which came into force later. It must, therefore, be noted that in this case, the Supreme Court no doubt, held that the revisional Authority, viz., the Deputy Commissioner, could tax an escaped turnover by reason of the language of Rule 17 (3-A).

18. In State of Orissa v. Debaki Debi, (1964) 15 STC 153 = (AIR 1964 SC 1413) the Supreme Court, by a majority, construed the second proviso to Section 12(6) of the Orissa Sales Tax Act, 1947, which laid down that an order assessing an amount of tax passed after a lapse of 36 months from the expiry of the period, was not in substance a real proviso to that section, but an independent legislative provision of the Act, and is

not limited to orders of assessment made under Sec. 12, but on its language applies to and governs any order assessing the amount of tax which will include an assessment under any provision of the Act besides Section 12. It was accordingly held that an order of assessment made in the exercise of revisional powers under Section 23 of that Act was governed by that period. It was also held that the power of revision under Section 20(3) is a distinct and separate power from the power to assess under Section 12(7) of the Act, calling for a return in case of under-assessment or escaped assessment, and that Section 12 (7) does not include reassessment made by a revising authority under Section 23 (3).

19. In *State of Andhra Pradesh v. Ravuri Narasimloo*, (1965) 16 STC 54 (Andh Pra), Chandra Reddy, C. J., and Narasimham, J., held that while sub-sections (1) and (3) of Section 14 of the Act deal with the power to make best of judgment assessment at the time of original assessment, sub-section (4) of that section concerns itself with bringing to tax turnover which has escaped assessment, and it is confined to assessing such turnover as is shown to have escaped assessment, and has not extended it to estimates depending upon inferences to be drawn by the Department from certain circumstances, and it does not clothe the department with power to make a best of judgment assessment. Relying upon this decision, the learned counsel for the assessee contends that it was not open in the instant case for the Commercial Tax Officer to have made a best of judgment assessment under Section 14 (4). But that contention lacks substance because the learned counsel himself had to admit that the assessment was made by the Commercial Tax Officer not as an assessing authority, but as a revisional authority.

20. The Supreme Court in *State of Kerala v. K. M. Charia Abdulla and Co.*, (1965) 16 STC 875 = (AIR 1965 SC 1585) held that the words in Section 12(1) of the M. G. S. T. Act, that the revisional authority "may pass such orders with respect thereto as he thinks fit", mean such order as in the circumstances of the case for rectifying the defect be regarded as just. It was held that that power may in some cases include power to make or direct such enquiry as the Deputy Commissioner may find necessary for rectifying the illegality or impropriety in the Order or irregularity in the proceeding. It was pointed out that while the Act in that case conferred on the prescribed authority the power to entertain an appeal under Section 11, and a petition in revision under Section 12, it did not prescribe the procedure to be followed by the authorities, and it was left to the State Governments to prescribe by the Rules under Section 19 the procedure of the appellate and revising authorities, and that a provision authorising the making of further en-

quiry for effectively exercising the appellate or revisional power would, in the case of a taxing statute, fall within the scope of the Rules.

Meeting the objection that even so, Rule 14-A was ultra vires, it was observed by Shah, J., speaking for the majority, that the Tribunal in that case had held that Rule 14-A must be so read as to deal with the "Arithmetical aspect rather than on the aspect of the merits of an assessment", and that there was no such restriction in either Rule 14-A or in Section 12(2) of the Act. It was further held that the power to hold an enquiry to take additional evidence is a procedural power in aid of the exercise of the revisional jurisdiction and if the revisional jurisdiction was not restricted only to cases of arithmetical errors or "arithmetical aspect", there was no reason to assume that the power under the Rule to make such enquiry as the appellate or the revising authority considered it just to order or to make would be so restricted. It was pointed out:

"The revisional power has to be exercised for ascertaining whether the order passed is illegal or improper or the proceeding recorded is irregular and it is in aid of that power that such orders may be passed as the authority may think fit. One of the inquiries in considering the legality or propriety of the orders passed by the subordinate officer which the revising or the appellate authority may make is about the correctness of the tax levied and if after perusing the record the authority is prima facie satisfied about the illegality or impropriety of the order or about the irregularity of the proceeding, it may in passing its order direct an additional enquiry. Neither Section 12 nor Rule 14-A authorises the revising authority to enter generally upon enquiries which may properly be made by the assessing authorities and to reopen assessments."

21. The decision in *State of Madras v. P. M. Batcha and Co.*, (1967) 20 STC 273 = (AIR 1967 SC 1537) is not of much assistance in deciding the question before us, as it was laid down there in that in a case where an assessee was not levied with tax, there was no rule which compelled the assessing authority to inform the assessee that the tax levied against him was nil. Since there was no assessment to tax against the respondent, it was held there could be no appeal under Section 11 of the Madras Act of 1939 against an order of nil assessment, and no bar to the jurisdiction of the Deputy Commissioner under Section 32(1) of the M. G. S. T. Act of 1959 could arise, and that the proceedings taken by him under that Section were, therefore, valid.

22. In *Swastik Oil Mills Ltd. v. H. B. Munshi*, (1968) 21 STC 383 at p. 400 = (AIR 1968 SC 843 at p. 848) one of the contentions was that the revisional authority exercising its power of suo motu revision under Section 31 of the Bombay Sales

Tax Act, 5 of 1953, could not travel beyond the order sought to be revised, and that he cannot order a further enquiry or rely on material extraneous to the record of the order under revision. Bhargava, J., speaking for the Court, followed the decision in (1965) 16 STC 875 = (AIR 1965 SC 1585), and stated the position thus:

"In fact, when a revisional power is to be exercised, we think that the only limitations to which that power is subject, are those indicated by this Court in *K. M. Cheria Abdulla & Co.'s Case*, (1965) 16 STC 875 = (AIR 1965 SC 1585). These limitations are that the revising authority should not trench upon the powers which are expressly reserved by the Acts or by the Rules to other authorities and should not ignore the limitations inherent in the exercise of those powers. In the present case, the Deputy Commissioner, when seeking to exercise his revisional powers, is clearly not encroaching upon the powers reserved to other authorities In this case, as we have indicated earlier the first assessment of tax was made by the Sales Tax Officer, and the turnover now in question was assessed to tax by him. Having once assessed that turnover to tax, he could not initiate a fresh proceeding in respect of it under Section 11-A. The assessment made by him was set aside in appeal by the Assistant Collector and it is this order of the Assistant Collector which is sought to be revised by the Deputy Commissioner. This is therefore, not a case where the powers are being exercised for the purpose of assessing or reassessing an escaped turnover. The case is one where the revisional powers are sought to be exercised to correct what appears to be an incorrect order passed in appeal by the Assistant Collector, and for such a purpose, proceedings could not possibly have been taken under Section 11-A. In exercising his revisional powers, therefore, the Deputy Commissioner is not encroaching upon the jurisdiction of any other authority specially entrusted with taking such proceedings."

23. Our attention has been drawn to the Supreme Court Short Notes, Note No. 195, Deputy Commr. of Agricultural Income-Tax and Sales Tax Quilon v. Dhana-lakshmi Vilas Cashew Co., Quilon (C. A. Nos. 803 and 804 of 1967) to the effect that the Deputy Commissioner, while exercising revisional jurisdiction would be restricted to the examination of the record for determining whether the order of assessment was according to law, and that the Rule which confers power to assess escaped turnover is normally to be exercised "on matters dehors the record of assessment proceedings before the assessing authority." The Supreme Court followed the decision in (1963) 14 STC 242 = (AIR 1963 SC 796). The full report has not been made available, and we are not in a position to say

from the Short Note placed before us that the Supreme Court has taken a view differing from what has been laid down in (1965) 16 STC 875 = (AIR 1965 SC 1585) and (1968) 21 STC 383 = (AIR 1968 SC 843).

24. Applying the principle enunciated by the Supreme Court in (1965) 16 STC 875 = (AIR 1965 SC 1585), and (1968) 21 STC 383 = (AIR 1968 SC 843), we hold that by making the assessment to tax on the additional turnover, the Commercial Tax Officer has not trenched on the powers of the assessing authority, and has exercised a power which is within his competence under Section 20 (2) as the revisional authority. We, therefore, express our respectful dissent with the contrary view stated in (1963) 2 Andh LT 201 = (1964) 15 STC 222. We may also point out that there cannot be any doubt in this regard after the addition of Section 14 (4-A) in 1963.

25. The Tribunal distinguished the decision in 1963-2 Andh LT 201 = (1964) 15 STC 222 on the ground that the commercial Tax Officer acted not as a revisional authority, but only as an assessing authority a view which we have not accepted. But, even so, for the reasons stated above, the order passed by him is within his competence as revisional authority, and is not illegal or without jurisdiction. Though for different reasons, the order of the Sales Tax Appellate Tribunal is upheld, and the Tax Revision Petition is dismissed with costs. Advocate's fee, Rs. 100.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 153 (V 57 C 21) KONDIAH, J.

Rambuddi Veeraswamy, Petitioner v. Rambuddi Jangammayya and others, Respondents.

Civil Revn. Petns. Nos. 1907 and 1908 of 1968, D/- 24-4-1969.

Civil P. C. (1908), O. 1, R. 10 (2), O. 1, R. 3, O. 34, R. 1 — Scope — Suit on mortgage — Persons claiming adverse title paramount in some or all of mortgage properties but not through mortgagor or mortgagee — Whether should be impleaded as parties to suit — It is matter of discretion — Question is not one of jurisdiction — O. 31, R. 1 is subject to O. 1, R. 10 (2), but O. 1, R. 10 (2) is not controlled by O. 1, R. 3.

The position of the law on the question, whether the persons claiming paramount title independently but not through the mortgagor or mortgagee can be called necessary or proper parties to a suit for the redemption of mortgage, can be summarised as follows:

IM/KM/E420/69/RSK/D

(1) The provisions of Order 1, Rule 10 (2) Civil P. C., should be construed very liberally and all persons who are found to have direct interest in the mortgaged properties must be held to be proper, though not necessary, parties for a complete and effective adjudication of the rights of the parties. AIR 1958 SC 886, Foll.

(2) The object of the Legislature in making Rule 1 to Order 34 Civil P. C. is to define the scope of a mortgage suit, pure and simple. AIR 1928 Mad 2, Rel. on.

(3) The provisions of Order 34, Rule 1 Civil P. C. are subject to the provisions of Order 1, Rule 10 (2), but the provisions of Order 1, Rule 10 (2) are not controlled by O. 1, Rule 3 Civil P. C.

(4) The question as to who are all the necessary parties to be impleaded as party defendants in a suit on mortgage is not one of jurisdiction but at most one of misjoinder or non-joinder of parties. AIR 1955 All 4 (FB) and AIR 1936 Mad 338, Rel. on.

(5) Where a suit for redemption, foreclosure or sale of mortgaged property is brought by the respective parties to the mortgage, all persons interested in the equity of redemption and all those who claim right and interest through the mortgagee should ordinarily be necessary parties and the persons who claim adverse title paramount in some or all of the mortgage properties but not through the mortgagor or mortgagee, need not be impleaded as parties normally to such a suit. AIR 1920 Bom 96 and AIR 1932 Cal 512 and AIR 1951 Pat 352 and AIR 1964 Pat 44 and AIR 1961 Pat 28, Ref.

(6) But, the aforesaid rule is not inflexible or absolute and the Court, in each case, has to see whether such a course will lead to inconvenience or confusion and exercise its discretion judiciously and properly. AIR 1928 Mad 2, Rel. on.

(7) In certain cases, where the Court thinks it just, proper and necessary in the interests of all parties to adjudicate on the questions relating to paramount title, it is not only proper but even desirable to implead such parties and avoid multiplicity of litigation. AIR 1928 Mad 2, Ref.

(8) Where it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee, or is claiming to be in possession and enjoyment of all or some of the mortgaged properties, those who are likely to resist the decree-holder in case the decree is passed in terms of the plaint must be held to be proper, though not necessary, parties to such a suit on mortgage.

(9) Where the Court, on a consideration of the facts and circumstances of each case, is of the opinion that it would be just and convenient and desirable to decide the title of the persons who set up a paramount title, then those persons must be impleaded as party defendants, and in the interests of all

parties, the question of title also should be adjudicated upon after framing appropriate and proper issues and giving opportunity to all the parties concerned. AIR 1936 Mad 338 (340) and AIR 1937 Mad 176 and AIR 1968 Mad 142, Rel. on. (Para 10)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mad 142 (V 55) =
ILR (1966) 2 Mad 78, Krishnamachari
v. Dhanalakshmi 8
- (1964) AIR 1964 Pat 44 (V 51), Lach-
hmi Narain v. Ganga Mahton 7
- (1961) AIR 1961 Pat 28 (V 48),
Aneshwar Prasad v. Misri Lal 7
- (1958) AIR 1958 SC 886 (V 45) =
1959 SCR 1111, Razia Begum v.
Sahebzadi Anwar Begum 6, 10
- (1955) AIR 1955 All 4 (V 42) =
ILR (1955) 1 All 523 (FB), Mst.
Satwari v. Kali Shanker 7
- (1951) AIR 1951 Pat 352 (V 38),
Ramautar Singh v. Ramsewak Lal 7
- (1937) AIR 1937 Mad 176 (V 24) =
1937-2 Mad LJ 165, Kasi Chettiar
v. Ramaswami Chettiar 8
- (1936) AIR 1936 Mad 338 (V 23) =
43 Mad LW 525, Veeraraghavulu
v. Suryanarayana 8
- (1932) AIR 1932 Cal 512 (V 19) =
ILR 59 Cal 548, Tinkarhi Dasee v.
Narendranath 7
- (1928) AIR 1928 Mad 2 (V 15) = 53
Mad LJ 647, Duraiswami Iyengar
v. Varadarajulu Naidu 8
- (1928) AIR 1928 Mad 199 (2) (V 15) =
107 Ind Cas 814, Muthiah Servai
v. Somasundaram Chettiar 8
- (1928) AIR 1928 Mad 764 (V 15) =
113 Ind Cas 865, Ramasamy Pillai
v. Marimuthu Goundan 8
- (1920) AIR 1920 Bom 96 (V 7) =
ILR 44 Bom 698, Satagauda Appanna
v. Satappa 7
- (1916) AIR 1916 PC 18 (V 3) = ILR
38 All 488, Radha Kunwar v. Reoti
Singh 8
- (1914) AIR 1914 Mad 332 (V 1) =
1914 Mad WN 623, In re, O.
Ramalakshmana 8
- C. Poornaiah, for Petitioner in both Peti-
tions; C. N. Babu, for Respondents Nos. 2,
3, 4, 5 and 7.

ORDER: These two revision petitions give rise to an interesting question of law as to whether the persons claiming paramount title independently but not through the mortgagor or mortgagee can be called necessary or proper parties to a suit for redemption of the mortgage.

2. The relevant and brief facts that gave rise to these revisions may briefly be stated thus. O. S. No. 60 of 1967 on the file of the Court of District Munsif, Sompeta has been filed by the petitioner herein for redemption of the mortgage executed by his father late Rambuddi Rajayya on 11-9-1933 in favour of the father of the 1st defendant in respect of Items 1 to 9 of the plaint schedule for a sum of Rs. 200 repayable with

interest at 18% per annum. Defendants 2 to 4 had set up a case of adverse possession and paramount title to all the mortgaged properties. It is further averred in the written statement of the 2nd defendant that he sold away Items 7 to 9 in favour of one Ram-buddi Harikrishna. On enquiry, the plaintiff having come to know that the said Harikrishna since died, had sold a portion of those items in favour of one Kallepalli Chinnodu, Defendants 5 and 6, the legal representatives of late Harikrishna, Kallepalli Chinnodu, the 7th defendant and his wife Subhadra being alienees from Harikrishna, were sought to be impleaded as defendants 5 to 8 in I. A. No. 240/67 and I. A. No. 77/68. Defendants 5 to 8 resisted the applications contending inter alia that their presence in the suit would be unnecessary, as they do not claim title to the mortgaged property through the mortgagee but as alienees of the second defendant, who sets up an independent paramount title by adverse possession, and hence, it is beyond the scope of the suit. The learned District Munsif, upholding the objection of the respondents herein, dismissed the applications. Aggrieved by the order of the trial Court, these revision petitions have been filed by the plaintiff.

3. Sri C. Poornaiah, for the petitioners, contended that the defendants 5 to 8 are necessary and in any event, proper parties for a complete and effective adjudication of the rights of the parties as they are interested in the result of the suit; whereas Sri C. N. Babu for the respondents contended contra and urged that in a suit for redemption, they are not necessary or proper parties as they did not claim their right through the mortgagee but claimed title independently and the scope of the redemption suit being only limited to the parties who claimed interest either from the mortgagor or from the mortgagee, they would be prejudiced if they are made parties.

4. The point that arises for determination is whether the defendants 5 to 8 now sought to be impleaded by the plaintiff are necessary or proper parties to O. S. No. 60/67, a suit for redemption of the mortgage.

5. To appreciate the respective contentions advanced by the counsel, it is profitable to consider the provisions of Order 34, Rule 1 Civil P. C. which reads thus:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

It is true, as contended by Sri Babu, that the object of this rule is to make all persons having an interest in the mortgage-security or in the right of redemption join as parties with a view to avoid multiplicity of suits. It is also true that the defendants 5 to 8 who are sought to be impleaded as party-defendants by the plaintiff in the suit for

redemption, are not claiming any right through the mortgagee or mortgagor but claiming independent title through the 2nd defendant. The provisions of O. 34, Rule 1 Civil P. C. are subject to the provisions of the Code as disclosed from the opening words of the rule. Order 1, R. 2, Clause (2) Civil P. C. empowers the Court to add the name of any person who ought to have been joined as defendant and whose presence before the Court would be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit. Even on the admitted facts, it cannot be said that the defendants 5 to 8 are not interested in some of the mortgaged properties which according to them were in their possession on the date of suit, though they claimed to have got possession of the properties through the 2nd defendant, who is setting up an independent paramount title by adverse possession. Further, in case the plaintiff succeeds in getting a decree in the suit for redemption in respect of the suit properties, some of them being alleged or claimed to be in the possession of defendants 5 to 8, he will not be able to reap the fruits of the decree, until and unless they (defendants 5 to 8) are made parties to the suit.

6. I am unable to agree with the contention of Sri C. N. Babu that the provisions of Order 1, Rule 10 Civil P. C. are controlled by Order 1, Rules 1 and 3. As far as Order 1, Rule 1 is concerned, I must say that it has no application to the facts of the present case, as the same relates to the persons who may be joined in one suit as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist. Even Rule 3 of Order 1 which authorises all persons against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist, whether jointly or severally, to join as defendants, cannot be said to control the provisions of O. 1, R. 10, cl. (2), Civil P. C. The argument of Sri Babu is that as no relief against the defendants 5 to 8 relating to redemption of mortgage is sought for, they cannot be added in the same suit as party defendants. As observed by B. P. Sinha, J. (as he then was) in *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 (895):

"In a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of litigation."

Admittedly, in the present case, the defendants 5 to 8 are directly interested in Items 7 to 9 of the plaint schedule claiming as alienees from the 2nd defendant who has set up an independent title by adverse possession. The plea of the plaintiff that the 2nd defendant, who is setting up an adverse title, has colluded with the 1st defendant, who

remained *ex parte* and hence, the mortgagee is deemed in law to be in possession of the mortgaged properties, is material and relevant to determine the point at issue, whether defendants 5 to 8 are necessary or proper parties to the present suit. If on enquiry by the Court this point is found in favour of the plaintiff, the plaintiff must be able to get at the properties, pursuant to the decree and he will not be in a position to successfully execute the decree and get possession of the mortgaged properties, unless he makes the defendants 5 to 8 as party defendants who claimed to be in possession of those items.

7. From a perusal of the cases cited across the bar by both the counsel, it is evident that there is some conflict between several High Courts on this point. The Bombay, Allahabad and Calcutta High Courts and in some cases the Patna High Court have taken the view that in a suit for redemption of a mortgage, persons claiming paramount title independently of the mortgagor or mortgagee are not necessary or proper parties to the suit. In *Satagauda Appanna v. Satappa*, ILR 44 Bom 698 = (AIR 1920 Bom 96), it was held that parties in possession of mortgaged properties claiming independently of the mortgage are not necessary parties in a suit for redemption. In *Tinkarhi Dasee v. Narendranath*, AIR 1932 Cal 512, Buckland, J. has held that questions of paramount title should not ordinarily be decided in a suit to enforce a mortgage. A Full Bench of the Allahabad High Court, in *Mst. Satwari v. Kali Shanker*, AIR 1955 All 4, has held that a person having a paramount title is not a necessary party in a mortgage suit. In that case, their Lordships have observed that "the rule as to impleading persons having paramount title, is more a rule of convenience and prudence than a rule affecting the jurisdiction of the Court." In *Ramautar Singh v. Ramsewak Lal*, AIR 1951 Pat 352, a Division Bench of the Patna High Court has held that the person claiming paramount title is not a necessary party to a suit for redemption of mortgage. The same view has been taken by a single Judge of the same High Court in *Lachmi Narain v. Ganga Mahton*, AIR 1964 Pat 44. In that case, it was held that the suit for redemption of a mortgage could not be converted into one for investigation of title between the original mortgagee-defendant and the proposed intervening defendant whose interest was adverse to the original mortgagee, and hence, the proposed intervener could not be made a party defendant to such a suit. Another Division Bench of the Patna High Court, in *Aneshwar Prasad v. Misri Lal*, AIR 1961 Pat 28, has taken the contrary view to that expressed in AIR 1951 Pat 352.

8. As far as the Madras High Court is concerned, I must say that it has taken consistently the view that it is always convenient for effective and complete adjudication of the rights of the parties to implead the persons who claim to be in possession

of the mortgaged properties in a suit for redemption, though the questions of paramount title have to be decided. In *Doraiswami v. Varadarajulu*, AIR 1928 Mad 2, the questions that arose for determination were, whether a person claiming an adverse or paramount title was or was not a necessary or proper party in a mortgage suit and whether the Court, in such a suit, can adjudicate the title of such persons claiming title adverse to the mortgagor or mortgagee. *Vekatasubba Rao, J.*, at page 4, succinctly summed up the legal position thus:

"To a mortgage suit a person claiming an adverse or paramount title is not ordinarily a necessary or proper party; this rule is not absolute or inflexible, for, in certain circumstances, it may not only be proper but even desirable to implead him as a party. x x x The object of this rule (Order 34, Rule 1 Civil P. C.) is to define the scope of a mortgage suit as such, that is of a mortgage suit pure and simple, but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and, if it may be joined in what circumstances. x x x The question of ownership as a question of fact is bound up with the other questions that necessarily arise in the case and it seems to me that this is a strong reason for holding that the issue should be tried and decided in this action itself."

In *Muthiah Servai v. Somasundaram Chettiar*, AIR 1928 Mad 199 (2), Devadoss, J., while considering whether an issue relating to the property being self-acquired as claimed by one of the members of the family can be gone into in a suit for mortgage executed by a member of the family, had held that

"although in a mortgage suit it is not proper that a title of person who claims adversely to the mortgagor should be gone into it would be but fair that this issue ought to be raised and determined in course of the suit and should not be left to be determined in execution."

The same view had been taken by a Division Bench of the Madras High Court in *Ramasamy Pillai v. Marimuthu Goundan*, AIR 1928 Mad 764. In *Veeraraghavulu v. Suryanarayana*, AIR 1936 Mad 338, Venkataramana Rao J., as he then was, while considering this aspect of the case, observed at page 340:

"Ordinarily the title of persons who set up a claim adverse to the mortgagor and mortgagee should not be investigated in a suit upon a mortgage. The joinder of such persons as stated by the Privy Council in ILR 38 All 488 = (AIR 1916 PC 18) (*Radha Kunwar v. Reoti Singh*) is irregular and leads to confusion, but it is not an inflexible or invariable rule. Such joinder does not affect the jurisdiction of the Court, though it is always desirable that if a party sets up a paramount title and does not want to redeem the property he may be struck off from the record as he takes the risk of not

claiming redemption in case his title is found against in any subsequent litigation. But in each case the Court can exercise its discretion whether it will lead to inconvenience or confusion in trying the issue as to paramount title in the same suit. As observed by Venkatasubba Rao, J., in 53 Mad LJ 647, = (AIR 1928 Mad 2) (Duraismi Iyengar v. Varadarajulu Naidu) sometimes it may be necessary to do so. The Court is not bound to adjudicate on it, but the fact that the defendant objects to the trial of such an issue would not preclude the Court from trying it if it thinks necessary in the interests of all parties that such a trial should take place; vide 1914 Mad WN 623 = (AIR 1914 Mad 332) (In re O. Ramalakshman). As pointed out in AIR 1928 Mad 764, it is very desirable that before the property is brought to sale all questions of title relating to the mortgaged property should be settled and the Court should as far as possible avoid multiplicity of litigation. The effect of joining persons who claim a title paramount need not necessarily result in a dismissal of the suit. The Court can order a separate trial.

In this case for instance it cannot be said that the trial of the issue relating to the title set up by defendant 6 was altogether unnecessary. The claim set up by defendants 6 to 13 is based on a title derived from the branch of defendants 1 and 2 prior to the mortgage. x x x Defendant 6 and his alienees could not be said to be complete strangers who claimed by a title not derived from the parties. In such circumstances, I think it is very often desirable that the title to the mortgaged property should be set at rest before the property is brought to sale. x x x In the interests of all parties I think it is not desirable that they should be driven to another litigation."

In Kasi Chettiar v. Ramasami Chattiar, AIR 1937, Mad 176, a suit on mortgage against legal representatives of the mortgagor was brought. The legal representatives claimed title paramount to the mortgaged property and denied right of the mortgagor to bind over that property. In those circumstances, their Lordships, after considering the entire case law on the subject, have held that the question whether issues of paramount title should or should not be decided in a suit on mortgage was dependent on the facts and circumstances of each case and the facts of that case justified that it should be tried and decided before the mortgaged security was brought to sale. The same view has been taken by Ramamurti, J. in Krishnamachari v. Dhanalakshmi, AIR 1968 Mad 142.

9. The view of the Bombay, Calcutta, Allahabad and Patna High Courts is opposed in certain respects to the view of the Madras High Court. Though the Madras High Court agrees with the view expressed by the several High Courts normally that the persons who claim adverse independent title paramount in some or all of the mortgaged pro-

perties, need not be impleaded as parties to such a suit, it thinks it proper and desirable to implead such persons as parties to the suit where, on a consideration of the facts and circumstances of each case, the Court considers it just, proper and necessary in the interests of the parties to adjudicate on all the questions including that of paramount title in order to avoid multiplicity of suits without allowing the question of ownership of the said properties to be once again agitated or gone into at the stage of the execution proceedings.

10. From the aforesaid discussion, the following principles emerge: (1) The provisions of O. 1, R. 10 (2), Civil P. C., as held by the Supreme Court in Razia Begum's case, AIR 1958 SC 886, should be construed very liberally and all persons who are found to have direct interest in the mortgaged properties must be held to be proper, though not necessary, parties for a complete and effective adjudication of the rights of the parties.

(2) The object of the Legislature in making Rule 1 to Order 34 Civil P. C. is to define the scope of a mortgage suit, pure and simple.

(3) The provisions of Order 34, Rule 1 Civil P. C. are subject to the provisions of Order 1, Rule 10 (2), but the provisions of Order 1, Rule 10 (2) are not controlled by O. 1, Rule 3 Civil P. C.

(4) The question as to who are all the necessary parties to be impleaded as party defendants in a suit on mortgage is not one of jurisdiction but at most one of misjoinder or non-joinder of parties.

(5) Where a suit for redemption, foreclosure or sale of mortgaged property is brought by the respective parties to the mortgage, all persons interested in the equity of redemption and all those who claim right and interest through the mortgagee should ordinarily be necessary parties and the persons who claim adverse title paramount in some or all of the mortgage properties but not through the mortgagor or mortgagee, need not be impleaded as parties normally to such a suit.

(6) But, the aforesaid rule is not inflexible or absolute and the Court, in each case, has to see whether such a course will lead to inconvenience or confusion and exercise its discretion judiciously and properly.

(7) In certain cases, where the Court thinks it just, proper and necessary in the interests of all parties to adjudicate on the questions relating to paramount title, it is not only proper but even desirable to implead such parties and avoid multiplicity of litigation.

(8) Where it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee, or is claiming to be in possession and enjoyment of all or some of the mortgaged properties, those who

are likely to resist the decree-holder in case the decree is passed in terms of the plaint must be held to be proper, though not necessary, parties to such a suit on mortgage.

(9) Where the Court, on a consideration of the facts and circumstances of each case, is of the opinion that it would be just and convenient and desirable to decide the title of the persons who set up a paramount title, then those persons must be impleaded as party defendants, and in the interests of all parties, the question of title also should be adjudicated upon after framing appropriate and proper issues and giving opportunity to all the parties concerned.

11. I shall now turn to the facts of the present case and consider the same in the light of the aforesaid principles, with a view to arrive at a correct conclusion on the material points at issue. It is clear from the stand taken by the respondents herein that they claimed title to some of the suit properties through the 2nd defendant and not through the mortgagor or the mortgagee and also claimed to be in possession and enjoyment of them. If they are not impleaded as parties to the suit and in case the plaintiff finally succeeds in the suit, there is every likelihood of these defendants resisting the plaintiff from taking possession of the properties on the ground that they were the owners of those items and in which case, separate suit or suits have to be filed by the plaintiff once again. To avoid multiplicity of suits, on a close and careful consideration of the admitted facts and circumstances of the case, I think it not only desirable but just and convenient to implead the defendants 5 to 8 as supplemental defendants in this very suit and permit them to file written statements raising all the requisite pleas including the plea of paramount title by adverse possession to the suit properties. In the circumstances and for the reasons stated, I must hold that the plaintiff-petitioner is entitled to implead the defendants 5 to 8 as supplemental defendants and get adjudication on the question of title to some of the properties claimed to be in possession and enjoyment by them.

12. In the result, I allow these revision petitions, setting aside the order of the Court below, and direct the lower Court to permit the supplemental defendants 5 to 8 to file written statements raising all the pleas including the plea of paramount title available to them and frame proper and necessary issues and finally decide the case on merits. In the circumstances, I direct each party to bear their own costs.

Revision allowed.

AIR 1970 ANDHRA PRADESH 158
(V 57 C 22)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
CHINNAPPA REDDY AND
PARTHASARATHI, JJ.

Kanisetti Audilaxamana Rao, Appellant v. Attipalli Raghurami Reddi (died), Attipalli Mallareddi and others, Respondents.

Second Appeal No. 538 of 1963, D/-24-7-1969.

(A) Contract Act (1872), S. 127 — Execution of guarantee letter and promissory note by guarantor — Forbearance to sue debtor on that basis — Amounts to consideration.

Where on simultaneous execution of the promissory note and the guarantee letter by the guarantor the creditor abstains from taking any legal action against the debtor, such forbearance is a valid consideration though it does not emanate from an express promise to forbear. A surety's promise or security given by the debtor could be validly enforced if there is an agreement, express or implied, to give time, or if there is an actual forbearance which, ex post facto, may become the consideration to support it. Case law discussed. (Paras 15, 19, 20, 21)

(B) Hindu law — Debt by father — Son's liability — Father standing as surety for debt incurred by stranger — Surety is not personal — His sons are bound to make good that surety. AIR 1919 Mad 831, Rel. on.

(Para 22)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 727 (V 54) =

(1967) 2 SCJ 811, Faqir Chand v.

S. Harnam Kaur 21

(1939) AIR 1939 Mad 867 (V 26) =

ILR (1940) Mad 123, Lakshmadu

v. Ramudu 1, 2, 10

(1919) AIR 1919 Mad 831 (V 6) =

ILR 41 Mad 1071, Thangammal

v. Arunachalam Chettiar 22

(1909) 1909-1 Ch 291 = 78 LJ Ch

120, Wigan v. English and Scottish

Law Life Assurance Association 20

(1904) ILR 27 Mad 243 = 14 Mad

LJ 84 (FB), Periasami Mudaliar v.

Seetharama Chettiar 1, 10

(1903) 1903 AC 309 = 72 LJ PC 79,

Fullerton v. Provincial Bank of

Ireland 20

(1887) 19 QBD 341 = 57 LT 554,

Crears v. Hunter 16

Y. G. Krishna Murty, for Appellant; V.

Venkataramanaiah, (for Nos. 2 and 3), for

Respondents.

PARTHASARATHI J.: A question having arisen whether the decision in Lakshmadu v. Ramudu, ILR (1940) Mad 123 = (AIR 1939 Mad 867), requires reconsideration, this Second Appeal, which was heard in the first instance by one of us (Parthasarathi J.) was referred to a Division Bench. When the appeal was dealt with by a Division Bench consisting of Venkatesam and Kondayya, JJ.,

they shared the view that the above-mentioned decision requires to be re-examined as it is inconsistent with the decision of a Full Bench in Periasami Mudaliar v. Seetharama Chettiar, (1904) ILR 27 Mad 243. Accordingly, the entire case was referred by them for consideration by a Full Bench.

2. In addition to the question specifically dealt with in the order of reference, other matters were also argued before the Division Bench, as also at the earlier stage. On an examination of the position, we have come to the conclusion that this appeal has to be decided on a ground which renders it unnecessary to consider whether the authority in ILR (1940) Mad 123 = (AIR 1939 Mad 867), can be regarded as laying down the correct principle of law. The facts of the case and the questions debated before us may now be set-out.

3. The plaintiff in a partition action is the appellant in this second appeal. The plaintiff and the defendants 7 to 9 are brothers, and their father is the 10th defendant. The defendants 1 to 5 are the sons of one Sundararama Reddi, who is now dead. The deceased obtained a decree in O. S. No. 119 of 1956 for recovery of money against the 10th defendant and some others. The 6th defendant was impleaded in this action as a judgment creditor of the 10th defendant, whose decree in O. S. Nos. 151 and 153 of 1956 was impugned by the plaintiff. For the purposes of this appeal, no further reference need be made to the 6th defendant.

4. The plaintiff pleads, inter alia, that there was no debt due to Sundararama Reddi by his father and that the decree in O.S. No. 119 of 1956 does not impose any binding obligation on him and his brothers and that the properties of the family are to be partitioned on the footing that the decree debt does not bind the junior coparceners. The decree debt has devolved on the defendants 1 to 5 after the death of the original decree-holder, and in enforcement of the decree, they had an item of the property sold.

5. As generally happens in suit of this description, the father chose to remain absent and took no part in the proceedings. The brothers of the plaintiff (defendants 7 to 9) supported him. The defendants 1 to 5 resisted the suit and pleaded that the 10th defendant guaranteed the repayment of a debt due by one Venkatasubbayya and his son. A letter of guarantee dated 22-3-1954 was executed by the 10th defendant and another person. The principal debtors wanted time for payment, and the creditor (father of the defendants 1 to 5) gave him time for payment on condition of the debtors obtaining guarantee as to repayment. Pursuant to the understanding, the debtors made a promissory note agreeing to pay the debt; and the guarantors, the 10th defendant and another, passed on the same date, a letter of guarantee. The creditor sued on foot of

the promissory note and the guarantee and obtained the decree in O. S. No. 119 of 1956, whereunder the 10th defendant was made liable for the satisfaction of the debt.

6. The trial Court negatived the plea of the plaintiff and his brothers, held that the decree debt in O. S. No. 119 of 1956 was binding on them, and granted a preliminary decree for partition, subject to the liability of the junior members to discharge the decretal liability.

7. On appeal, the learned District Judge, Nellore, confirmed the decision of the trial Court. The case pleaded by the defendants 1 to 5 that the 10th defendant undertook the liability as guarantor as part of the same transaction under which the creditor granted time to the principal debtors by accepting a promissory note of theirs.

8. When the second appeal was heard by a single Judge, a two-fold argument was presented for the appellant. It was contended that the finding that there was in fact a subsisting debt of the father which was sued upon, was erroneous. It was also said that there was, in law, no valid or lawful consideration for the father's (10th defendant) undertaking and that there was consequently no debt in existence as could be enforced against the sons on the pious obligation doctrine. The contention rested on the major premise that there was no debt in existence, because there was no consideration for the promise made by the father. If this premise is well founded, the consequence is that the doctrine of pious obligation is not applicable and the decree does not affect the plaintiff and other sons of the 10th defendant. The second argument advanced for the appellant was that the fact that the creditor obtained a decree against the father is no impediment to the sons' attack that the foundation for their pious obligation did not exist. In other words, the plea is that though the decree against the father has become unimpeachable or final, this does not preclude a challenge by the sons to the existence of the very debt, which has been pronounced by a Court of law to be enforceable or actionable.

9. It will be noticed that if the true principle is that the decree obtained by a creditor in a suit which is not alleged to be collusive or fraudulent, gives rise to a fresh liability of the father, and the decree debt itself is a distinct and independent source of the pious obligation of the sons, no attempt to impugn the decree can be countenanced. The argument presented on behalf of the appellant that there was in fact no debt in existence, can arise only if the sons are allowed by law to question the decree that has become final and conclusive. Both aspects were gone into by the Courts below and their findings thereon were recorded.

10. The initial step is for the plaintiff to establish that there is no impediment caused by reason of the decree suffered to become final by the father. On this aspect,

the ruling in (1904) ILR 27 Mad 243 (FB) Supra, was to the effect that independently of the alleged debt arising from the original transaction, the decree against the father, by its own force, creates a debt as against him, which his sons are under an obligation to discharge, unless they show that such debt was illegal or immoral. This was the principle emerging from the answer to the question referred to the Full Bench in that case. In AIR 1939 Mad 867, Supra a Division Bench of the Madras High Court expressed the opinion that the principle stated above does not constitute the ratio decidendi of the Full Bench ruling and was no more than an obiter dictum.

11. Since then, other High Courts had considered the question. It is obvious that it merits a re-examination; but, in the instant case, it need not be done inasmuch as the Courts below have come to the definite conclusion that there was in fact a debt of the father in existence. If this finding is correct, the consideration of the validity of the rule in AIR 1939 Mad 867 Supra becomes academic. We accordingly addressed ourselves, in the first instance, to the question whether the plaintiff has established that there was no actionable claim in existence against the 10th defendant.

12. The primary or material facts bearing on this point were already adverted to by us. The respective pleas of the parties and the findings may be set out in a broader outline. The plea of the defendants 1 to 5 is that one Venkata Subbayya and his son became indebted to the father of the defendants one to five in a sum of Rs. 3,000. The liability arose prior to 22-3-1954. The creditor was pressing for payment. The debtors wanted time for payment. But, the creditor refused to forbear unless a guarantee of third parties was forthcoming. Then the 10th defendant and another person were persuaded by the debtors to guarantee the payment of debt. The creditor accepted the guarantee and granted time. As a result of the arrangement on 22-3-1954, the creditor obtained a promissory note of the debtors as well as the letter of guarantee. When the suit O. S. No. 119 of 1956 was filed, the 10th defendant admitted the execution of the letter of guarantee. It is significant that he is keeping himself aloof in this suit and has not chosen to give evidence rebutting any of the details pleaded by the defendants 1 to 5.

13. The trial Court held that the forbearance to sue is sufficient consideration for the letter of guarantee and it was of opinion that there was an enforceable debt against the father.

14. Mr. Y. G. Krishnamurthy contends on behalf of the appellant, that the 1st defendant gave evidence as D. W. 1 and purported to give evidence as to the origin or genesis of the guarantee. Learned Counsel seeks to draw support from the comment made by the District Judge on the evidence of D. W. 1. The District Judge observed

that the 1st defendant was barely 17 years of age then and was obviously not present at the relevant time and his evidence as to the execution of the letter of guarantee is not creditworthy. But the inability of D. W. 1 to give cogent evidence of the transaction is immaterial as the 10th defendant himself admitted in O. S. No. 119 of 1956 that the letter was executed by him. The plaintiff's admission as P. W. 1 is also not without significance. It was clearly found that the letter and promissory note were parts of the same transaction. The inference drawn was that it was in consideration of the creditor's acceptance of the promissory note and his promise to stay his hand for some time, that the guarantee was given. We do not see any reason for rejecting the inference of fact which constitutes the basis for the finding of the lower appellate Court.

15. The appellant's Advocate relies on Section 127 of the Indian Contract Act, and urges that there was nothing done by the promisee for the benefit of the debtor contemporaneously with the surety's undertaking and the guarantee is, therefore, devoid of consideration. The answer to this is obvious. The circumstances of the case point to the strong probability of the truth of the case of the defendants 1 to 5. They pleaded that the creditor's forbearance was the quid pro quo for the guarantee. We are, as stated already, inclined to agree with the inference drawn by the lower appellate Court which was in concurrence with the view of the trial court. It is submitted that there is no definite finding of the District Judge about the creditor's forbearance. Granting this criticism to be well founded we have, even on our own appraisal of the evidence, no hesitation in finding that time was in fact given by the creditor. In this context, it is necessary to bear in mind that the two principal debtors and the two guarantors were, at the relevant time, trading as partners. And when the guarantors saw that their partners were under pressure of their creditor, they went to the rescue of their partners by guaranteeing the repayment, thereby obtaining a valuable respite to their partners. This was the basis of the plaint in O.S. No. 119 of 1956, a copy of which was tendered as additional evidence on behalf of the appellant.

We find no ground for the admission of the additional evidence, which, apart from other arguments against its reception at this stage, cuts at the root of the appellant's argument. The simultaneous execution of the promissory note and the guarantee letter, affords the clearest indication that they constituted a single transaction and the acceptance of the promissory note by the creditor was because of the inducement of the guarantee. The request of the guarantor is clearly implied in the delivery of the guarantee letter and the acceptance thereof by the creditor. It follows that at the desire of the guarantor, the creditor agreed to take the promissory note from

filed Criminal Revisions Nos. 143 and 87 of 1968 respectively for quashing of the charges and the State has filed Criminal Revision No. 112 of 1968 against the order of discharge of K. K. Banerjee and the three employees of the contractor. All these cases are covered by our judgment in Criminal Revision No. 63 of 1968. In the result the petitions in Criminal Revisions Nos. 143 and 87 of 1968 are allowed and the charges framed against the petitioners are quashed. The petition in Criminal Revision No. 112 of 1968 is rejected.

23. K. C. SEN, J.: I agree.

Ordered accordingly.

AIR 1970 ASSAM & NAGALAND 49
(V 57 C 10)

P. K. GOSWAMI
AND M. C. PATHAK, JJ.

Maniram Gunju, Petitioner v. The State of Assam, Opposite Party.

Criminal Revn. No. 159 of 1965, D/- 6-5-1969, against Judgment of Addl. S. J. L. A. D. Nowgong, D/- 28-9-1965.

Prohibition — Assam Liquor Prohibition Act (1 of 1953) (as amended in 1956 and 1963), Ss. 4, 3A (1963), 3A (1956) and 2 (3) — 'Liquor' — Offence under S. 4 for consuming liquor — Burden of proof — State of drunkenness established by prosecution — Presumption under S. 3A (1963) can be invoked — Presumption rebuttable — Accused not submitting any explanation — He must be held guilty of offence — Effect of introduction of S. 3A (1956) and S. 3A (1963) stated — (Evidence Act (1872), S. 106).

Section 3A as inserted in 1963 has introduced a rule of evidence by which a person who is found in a state of drunkenness shall be presumed to have consumed liquor within the prohibited area. This is, of course, a rebuttable presumption. Once the prosecution establishes by evidence to the satisfaction of the Court that the accused was found in a state of drunkenness, the prosecution can rely on the presumption and it is then up to the accused to rebut the presumption. Where the accused has not submitted any explanation, there is nothing wrong in invoking the presumption under S. 3A (1963) and the accused must be held to have consumed liquor within the prohibited area. Case law discussed.

(Paras 6, 11)

Under the Act with the definition of 'liquor' as amended and introduction of S. 3A (1956) and in view of presumption under S. 3A (1963), S. 106 of Evidence Act may be justifiably called in aid to tackle such a case. If the accused was in a state of drunkenness showing signs and manifestations supporting that state,

the prosecution will be at a great disadvantage to establish as to what particular things the accused had taken which led him to that state. It will be certainly especially within the knowledge of the accused as to what he had already taken for which he was found in that state by the witnesses. (Para 9)

Liquor under the definition includes all liquid consisting of or containing alcohol and at the same time toilet or medicinal preparations etc. containing alcohol which are unfit for use as intoxicating liquor are excluded from the definition separately under section 3A (1956). 'section 3A (1956) is not an exception, but has explained what liquid containing alcohol will be excluded from the general definition of liquor after the deletion of the Explanation. Section 3A (1956) clearly suggests that but for this exclusion the definition of liquor would include the articles mentioned in this section. Case law discussed. (Paras 4, 6)

Dealing with the prosecution for offences under Section 4 for violating the provisions of section 3 of the Assam Act, so far as import, transport or possession, selling, or buying or manufacture of liquor is concerned, the prosecution has to satisfy the Court that the liquor which is produced in Court is intoxicating liquor and contains alcohol and is not excluded by the provisions contained in Section 3A (1956). The onus is entirely on the prosecution to establish the offence, which includes proof of the incriminating article as liquor within the meaning of the Act and that the same is not unfit for use as intoxicating liquor, as described under Section 3A (1956). Mere introduction of section 3A (1956) separately under the Act after deletion of the explanation in the original definition would not have the effect of shifting the onus in this matter on the shoulders of the accused. However so far as the offence of consumption of liquor is concerned the position has become different after the introduction of S. 3A in 1963. (Para 8)

Case law discussed: Observation in AIR 1967 Assam 56 with regard to S. 3A (1963) that it is otiose and completely unnecessary, held obiter and not followed.

(Para 6)

Cases Referred: Chronological Paras

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| (1968) Criminal Revn. No. 65 of 1965 | |
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S. N. Bhuyan, for Petitioner; D. C.
Goswami as Public Prosecutor, for State.

GOSWAMI, J. :— This Criminal revision is directed against the petitioner's conviction under Section 4 of the Assam Liquor Prohibition Act, for consuming liquor in the prohibited area, and sentence of three months' rigorous imprisonment and a fine of Rs. 100/-, in default one month's rigorous imprisonment.

2. Briefly the prosecution case is that on the night of 22nd of March, 1964 at about 9 P. M. the accused petitioner was found in a drunken state at the platform of Jakhalabandha Railway Station. He was caught by the Excise staff and then produced before the Medical Officer at Silghat Dispensary, who examined him then and there, and found as follows:

- "(1) Smell of alcohol in breath found.
- (2) Conjunctiva congested.
- (3) Gait unsteady.
- (4) Speech incoherent."

In the opinion of the doctor, the accused took alcohol in sufficient quantity as to make him intoxicated.

3. The accused pleaded not guilty to the charge and stated that he did not take liquor. The learned Magistrate examined the doctor and two Excise officials. The accused did not adduce any evidence. The learned Magistrate relying on the evidence of the prosecution convicted the accused, and the learned Additional Sessions Judge on appeal affirmed the conviction.

4. The State Legislature of Assam passed the Assam Liquor Prohibition Act (Assam Act I of 1953), hereinafter called "the Act", in 1953. This Act has since been amended. The preamble of the Act shows that it was passed in order to prohibit consumption and manufacture of liquor in and smuggling thereof into the Sub-division of Barpeta and in other areas of the State as may be necessary from time to time. The Act has since been extended to other areas and it is not disputed that the place, where the offence is said to have been committed in this

case, is within the prohibited area. This Act has since been amended by four successive Acts, namely, Assam Act XXXI of 1953, Assam Act XIII of 1956, Assam Act XIX of 1956 and Assam Act XI of 1963, and we will describe them hereinafter as the first, second, third and fourth amendment, respectively. The definition of liquor is given under Section 2 (3) and it has been amended under the second and third amendments. The third amendment besides deleting the Explanation inserted new Sections 3A, 3B and 3C. In the fourth amendment, inter alia, another Section 3A is added regarding presumption as to the State of drunkenness. Section 3A in this amendment is not numerically correct as there had already been a Section 3A introduced in the third amendment. We will, therefore, refer to this section as Section 3A (1963) and the earlier Section 3A as Section 3A (1956) to avoid confusion. The original definition of liquor under Section 2(3) runs as follows:

"'Liquor' means any intoxicating liquor and includes all liquid consisting of or containing alcohol, also tari and pachwai in any form and any substance which the State Government may, by notification, declare to be liquor for the purposes of this Act.

Explanation. — This definition shall not apply to any toilet preparation or medicine containing alcohol."

This definition as it stands after the amendments reads as follows:

"'Liquor' means any intoxicating liquor and includes all liquid consisting of or containing alcohol, also Tari containing alcohol and Pachwai in any form and any substance which the State Government may, by notification, declare to be liquor for the purpose of this Act.

Explanation. — Tari in an unfermented stage is not included within the term liquor and is exempted from the operation of this Act."

By the third amendment, as noted earlier, the following new sections were inserted:

"3A. Provisions of the Act not to apply to certain articles. — Nothing in this Act shall be deemed to apply to —

(1) Any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;

(2) Any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor;

(3) Any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor;

(4) Any flavouring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor."

3B. Board of Experts, — (1) For the purpose of determining whether any of the preparations mentioned in 3A is fit or

likely to be used as intoxicating liquor the State Government shall constitute a Board of Experts.

(2) ** **

(3) It shall be the duty of the Board to advise the State Government on the question of whether any article or preparation containing alcohol is fit for use as intoxicating liquor and on such other matters incidental thereto as may be referred to it by the State Government.

3C. Restrictions on use of medicinal and toilet preparations. — On the advice of the Board constituted under Section 3A, the State Government may by notification in the official Gazette declare any such preparation to be liquor within the definition of the Act and thereupon the State Government may, notwithstanding anything contained in any other provision of the Act, impose such restriction and in such manner as may be prescribed.

By the fourth amendment, an important Section 3A has been introduced which we will, as stated earlier, describe as Section 3A (1963):

"3A. Presumption as the (sic) state of drunkenness. — Whenever any person is found in a state of drunkenness within a prohibited area, the Court shall presume that the person has consumed liquor within the prohibited area."

The result is that medicinal and toilet preparations containing alcohol which are unfit for use as intoxicating liquor, are excluded from the provisions of the Act. But if on the advice of the Board of Experts to the effect that such articles containing alcohol are fit for use as intoxicating liquor, the Government may declare such preparation to be liquor within the meaning of the Act and it may also impose such restrictions as may be necessary.

It is thus clear that liquor under the definition includes all liquid consisting of or containing alcohol and at the same time toilet or medicinal preparations etc. containing alcohol which are unfit for use as intoxicating liquor are excluded from the definition separately under Section 3A (1956).

Broadly speaking there are the following prohibitions under the Act which may be grouped under two categories. Firstly, no person shall import, transport, possess, sell or buy or manufacture liquor, use or keep any material for manufacture of liquor. These prohibitions are subject to condition for the issue of license under Section 21. The second category is that no person shall consume liquor except on a prescription from a registered medical practitioner. This prohibition is in terms conditional. Section 20 provides for permit for use or consumption of foreign liquor on certain conditions. So far as the first category is concerned, it is ap-

parent that the liquor must be produced in court in order to satisfy it that what is produced is liquor within the meaning of the Act. To illustrate, prior to the third amendment, suppose some liquid is produced in Court as liquor by the prosecution, it has to establish that the liquid produced is intoxicating liquor or contained alcohol and that it is not toilet or medicinal preparations containing alcohol. After the third amendment also, prosecution has to establish in addition to the above that what is produced in Court is not toilet or medicinal preparation etc. containing alcohol which is unfit for use as intoxicating liquor. Under Section 3C on the advice of the Board of Experts to the effect that such articles are fit for use as intoxicating liquor, Government may declare such toilet, medicinal or other preparations mentioned in Section 3A as liquor within the definition of the Act and impose such restrictions as may be prescribed. Our attention has not been drawn to any such declaration by the Government. Assuming there are some articles declared as liquor, the prohibitions of the Act will apply. But if there is no such declaration by the Government, it cannot be assumed that all such articles mentioned in Section 3A are unfit for use as intoxicating liquor in absence of proof to that effect. While dealing with the expression "unfit for use as intoxicating liquor" appearing in the Bombay Prohibition Act, in AIR 1962 SC 579, the Supreme Court observed as follows: (Naran Das's case)

"Again the preparation even if it is medicinal, toilet, antiseptic or flavouring must be unfit for use as intoxicating liquor i.e., it must be such that it must not be capable of being used for intoxication without danger to health. If the preparation, may be consumed for intoxication, it would still not attract the application of Sec. 24A provided the intoxication would not be accompanied by other harmful effects. A medicinal preparation which may, because of the high percentage of alcohol contained therein, even if taken in its ordinary or normal dose intoxicate a normal person, would be regarded as intoxicating liquor. The medicinal preparation containing a small percentage of alcohol may still be capable of intoxicating if taken in large quantities but if consumption of the preparation in large quantities is likely to involve danger to the health of the consumer, it cannot be regarded as fit for use as intoxicating liquor."

It will be useful to have a look at the Bombay Prohibition Act, 1949, some of the provisions of which were declared invalid by the Supreme Court in Balsara's case, AIR 1951 SC 318. For example, un-

like the definition of this term in the original Assam Act with the Explanation excluding toilet preparation or medicine containing alcohol, there was no such exclusion in the Bombay definition. Fazl Ali, J., who delivered the judgment of the Court, summarised his conclusions as follows:

"In the result I declare the following provisions of the Act only to be invalid:

(1) Clause (c) of Section 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(2) Clause (d) of Section 12, so far as it affects the selling or buying of such medicinal & toilet preparations containing alcohol.

(3) Clause (b) of Section 13, so far as it affects consumption or use of such medicinal and toilet preparations containing alcohol."

Section 2(24) of the Bombay Act, defines 'Liquor' as including

"(a) Spirit of wine, methylated spirits, wine, beer and toddy and liquids consisting of or containing liquor; and

(b) any other intoxicating substance which the Provincial Government may by notification in the Official Gazette declare to be liquor for the purposes of this Act."

The Act thereafter had to be amended by the Bombay Amendment Act, 26 of 1952, which added amongst others Section 24A, which without the two provisos in the Bombay Act corresponds to Section 3A of the Assam Act introduced by the third amendment. Another section was also introduced by the same amendment in the Bombay Act, namely Section 6A, of which Section 6A(1)(a), (b) and (c) materially correspond to Section 3B(1) of the Assam Act. Section 6A(2) materially corresponds to Section 3B(2) of the Assam Act. Section 6A(6) has two parts and the first part materially corresponds to Section 3B(3) and the second part in the Bombay Act introduces a presumption which is absent in Section 3C of the Assam Act.

In the above Naran Das's case, AIR 1962 SC 579 (Supra) while dealing with the burden of proof, the Supreme Court observed as follows:

"It was for the State to prove that the substance seized, if a medicinal preparation, was not unfit for use as intoxicating liquor. The State has even under the Prohibition Act to establish that the respondent has infringed the provisions contained in Sections 12 and 13" (which materially correspond to Section 3 of the Assam Act). "Undoubtedly by virtue of Section 24A, the prohibitions do not apply to certain categories of toilet, medicinal, antiseptic and flavouring preparations. Even if they contain alcohol but on that ground the burden lying upon

the State to establish in any given case, in which it is alleged that the accused has infringed the provisions contained in Sections 12 and 13, that the infringement was not in respect of an article or preparation which was covered by Section 24A, is not shifted on to the shoulders of the accused. Section 24A is in substance not an exception. It takes out certain preparations from the prohibitions contained in Sections 12 and 13. But the operation of Section 24A does not extend to all medicinal toilet, antiseptic or flavouring preparations containing alcohol; even if the preparation is a toilet, medicinal, antiseptic or flavouring preparation, if it is fit for use as intoxicating liquor, the prohibitions contained in Sections 12 and 13 will apply."

To summarise, in view of the relevant provisions of the Bombay Prohibition Act, which we have noticed above, as they stood prior to the amendment of Section 6A(6) and insertion of sub-section (7) therein, by the Bombay Act 22 of 1960, the Supreme Court held that in a prosecution for offences for import and possession of liquor under Section 65(a)(1) and 66(b)(1) of the Bombay Act (which materially correspond to S. 4 of the Assam Act), the State had to prove that the substance seized, if a medicinal preparation, was not unfit for use as intoxicating liquor and that the accused had infringed the provisions contained in Sections 12 and 13.

In the next case reported in AIR 1966 SC 722, the same question came up for decision. After the amendment of Section 6A(6) and insertion of sub-section (7) therein, by Act 22 of 1960, the Supreme Court gave effect to the presumption raised under sub-section (7). Sub-section (7) of Section 6A of the Bombay Act reads as follows:

"Until the State Government has determined as aforesaid any article mentioned in sub-section (1) to be fit for use as intoxicating liquor, every other article shall be deemed to be unfit for such use."

The Supreme Court, therefore, found that by the amendment of Section 6A and by insertion of sub-section (7) therein, there remained only one mode of proof regarding an article which is fit for use as intoxicating liquor and that is by obtaining the advice of the Board of Experts and recording its determination that the article is fit for use as intoxicating liquor and until so determined, every article mentioned in sub-section (1) of Section 6A is to be deemed as unfit for use as intoxicating liquor. This presumption under Section 6(7), however, has been held to be rebuttable. After this amendment in the Bombay Act in 1960, therefore, there was no onus on the accused to establish that he has possessed or

consumed medicinal or toilet preparation, which is unfit for use as intoxicating liquor as he can now rely on the presumption under sub-section (7) in absence of a determination by the Government that the particular articles are fit for use as intoxicating liquor. The law as it stood after the amendment clearly enables the accused to rely on the presumption and unless it is rebutted by the prosecution, it will be deemed in law that a medicinal or toilet preparation possessed by the accused is unfit for use as intoxicating liquor, and in that view of the matter, the Supreme Court set aside the conviction of the accused in the above decision. The Supreme Court has noticed that the Bombay High Court in this case relied on the earlier decision of the Supreme Court in Naran Das's case, AIR 1962 SC 579 (Supra) having lost sight of the amendment of the Act in 1960, and indeed in the aforesaid case the effect of sub-section (7) of Section 6A did not fall to be considered. This is the position under the Bombay Act.

We may now read Section 3 of the Assam Act:

"3. Prohibition. No person shall —

(1) import, transport or possess liquor;

(2) sell or buy liquor;

(3) consume liquor except on a prescription from a registered medical practitioner;

(4) manufacture liquor; and

(5) use or keep any material, utensil, implement or apparatus whatsoever for manufacture of liquor."

Section 4 after the fourth amendment, omitting the proviso, which is not material for our purpose, stands as follows:—

"4. Punishment for contravention. Whoever contravenes the provisions of Section 3 of this Act, shall be punished with imprisonment for a term which may extend to two years but not less than three months and also with fine which may extend to one thousand rupees but not less than one hundred rupees:

** ***"

5. The learned Counsel submits that even if it be assumed that the accused consumed liquor, there is no evidence to establish that he consumed prohibited alcohol. His submission is that although the definition of liquor has undergone a change, the insertion of a new Section 3A (1956) excludes some type of liquor from the definition and in that respect the effect of the original definition continues in force although in another place in the same Act. He further submits that the presumption under Section 3A (1963) cannot relieve the prosecution of the duty to establish the offence charged. In this context he draws our attention to a decision of the Supreme Court in the case of Behram Khurshid Pesikaka v. State of

Bombay, reported in AIR 1955 SC 123, and relies on the following passage:—

"The High Court was in error in placing the onus on the accused to prove that he had consumed alcohol that could be consumed without a permit merely on proof that he was smelling of alcohol. In our judgment, that was not the correct approach to the question. The bare circumstance that a citizen accused of an offence under Section 66(b) is smelling of alcohol is compatible both with his innocence as well as his guilt. It is a neutral circumstance. The smell of alcohol may be due to the fact that the accused had contravened the enforceable part of Section 13 (b) of the Prohibition Act. It may well be due also to the fact that he had taken alcohol which fell under the unenforceable and inoperative part of the section. That being so, it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus was not discharged or shifted by merely proving a smell of alcohol."

We should also read the following passage in the same decision:

"The onus thus cast on the prosecution may be light or heavy according to the circumstances of each case. The intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small dose of medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunkenness. Be that as it may, the question is one of fact, to be decided according to the circumstance of each case. It is open to the accused to prove in defence that what he consumed was not prohibited alcohol, but failure of the defence to prove it cannot lead to his conviction unless it is established to the satisfaction of the judge by the prosecution that the case comes within the enforceable part of Section 13(b), contravention of which alone, is made an offence under the provisions of Section 66 of the Bombay Prohibition Act."

Counsel also relies upon a decision of a Single Bench of this Court, in the case of Harendra Nath Das v. State of Assam, reported in AIR 1967 Assam and Nagaland, 56. As seen from the original records of the case, the date of offence in this case was 21-8-61. Nayudu, C. J. relying upon the above mentioned Supreme Court decision and also the decision of the Andhra Pradesh High Court in the case of Madiga Boosenna, reported in AIR 1964 Andh Pra 429, held as follows:

"Having regard to the merits of the case, as none of the scientific methods

open to the prosecution to follow had been adopted, they lost the opportunity of proving that liquor was present in the stomach contents of the petitioner or it got itself transferred into the urine and blood of the petitioner."

"Having regard to the evidence in this case of the doctor who admits that symptoms are consistent with the conclusion that these have been produced by reason of the accused having taken some medicine containing alcohol, the doubt which exists has remained unresolved and the accused is entitled to the benefit of doubt".

Referring to the presumption under Section 3A (1963), the learned Chief Justice further observed:—

"When the question is whether a person has taken liquor, to say that he should be presumed to have taken liquor because he was in a drunken state seems to be meaningless, as it would amount to a sort of argument in a circle. This is particularly so when the meaning of the word 'state of drunkenness' is not defined in the Act. If it is proved that a man is in a state of drunkenness, it amounts to a proof that he has taken liquor and there is no more necessity of invoking the presumption of the Amending Act. This amendment, in my opinion, becomes otiose and completely unnecessary. Further, if the invoking of this presumption under Section 3A of the Amending Act may be regarded as inescapable, then it would amount to countering the well known principle of criminal jurisprudence that the burden of proving the guilt of the accused in the case is on the prosecution and continues to be so until the guilt is established."

In Harendra Das's case, AIR 1967 Assam 56 (supra), the accused being found within a prohibited area exhibiting symptoms of a person who had taken liquor was charged and convicted under Section 4 for contravention of Section 3(3) of the Act. As noted earlier, the offence was committed on 21-8-61, that is, prior to the fourth amendment introducing a rule of presumption under Section 3A (1963). It was, therefore, not necessary in this case to consider the effect of Section 3A (1963). On the admission of the doctor in that case that the symptoms exhibited by the accused were consistent with taking of some medicine containing alcohol, the accused was entitled to an acquittal since the question of raising the presumption under Section 3A (1963) did not at all arise. The observations of the learned Chief Justice with regard to Section 3A (1963) are, therefore, mere obiter, and as will show hereinbelow that we are unable, with respect, to agree with the same.

6. Since the learned Counsel strenuously relies on Harendra Das's case, AIR 1967 Assam 56 (supra), even for the purpose of dealing with the present case, which arose after the fourth amendment, we have to give our views on the two above-quoted points that were dealt with by the learned Chief Justice and also pressed before us. Firstly, the learned counsel submits that the legal position has not been altered by Section 3A (1963) and that we should agree with the decision in Harendra Das's case, AIR 1967 Assam 56 (supra) even in the present case. It is clear that Section 3A (1963) has definitely introduced a rule of evidence by which a person who is found in a state of drunkenness shall be presumed to have consumed liquor within the prohibited area. This is, of course, a rebuttable presumption. Once the prosecution establishes by evidence to the satisfaction of the court that the accused was found in a state of drunkenness, the prosecution can rely on the presumption and it is then up to the accused to rebut the presumption. We are unable to agree, with respect, with the learned Chief Justice when he observed that Section 3A (1963) is "otiose and completely unnecessary." This section was introduced in 1963 in the wake of the third amendment whereby the Explanation in the definition of liquor was deleted and new Sections 3A (1956), 3B and 3C were added. Although the Explanation was deleted, the addition of Section 3A (1956) served the same object, which had earlier been fulfilled by the Explanation. The Explanation in the definition made the provision prima facie immune from such constitutional objections as were raised against the provisions of the Bombay Prohibition Act, 1949. Section 3A (1956) is not an exception, but has explained what liquid containing alcohol will be excluded from the general definition of liquor after the deletion of the Explanation. Section 3A (1956) clearly suggests that but for this exclusion, the definition of liquor would include the articles mentioned in this section. With regard to a case prior to the fourth amendment, the Act has defined the offence, viz., as consumption of liquor without a prescription from a registered medical practitioner. Prosecution is required under the law to establish the ingredients of the offence, that is to say, that the accused has consumed liquor and not one of the articles excluded under Section 3A (1956). Since section 3A (1956) is not an exception, there is no onus on the accused to prove that he comes under the exception. It is for the prosecution to prove that what the accused has consumed is liquor and that it does not come under the category of the articles mentioned in Section 3A (1956). The above would be the pos-

tion as the law stood prior to the fourth amendment. But after the introduction of Section 3A (1963) when the accused is proved to be found in a state of drunkenness within the prohibited area, the prosecution is relieved from further establishing that he has consumed liquor. By force of the presumption, prosecution establishes that the accused consumed liquor and it is open to the accused to rebut the presumption and satisfy the Court that what he has consumed is under a prescription from a registered medical practitioner or that he has consumed one of the articles mentioned under Section 3A (1956) which is unfit for use as intoxicating liquor. It, therefore, follows that Section 3A (1963) is a necessary provision to achieve the object of the Act in tackling the cases of consumption of liquor, within the prohibited area when people are found in a state of drunkenness, since it may be highly inconvenient and difficult, if not impossible, for the prosecution to establish what sort of liquor the accused has consumed earlier, a matter which may be said to be specially within the knowledge of the accused alone.

Secondly, in a case where the accused is charged for consumption of liquor on the allegation that he is found in a state of drunkenness within the prohibited area, there is no legal obligation to resort to any chemical test of his stomach contents to discover whether there is any alcohol present or if possible to find out what type of liquor the accused has consumed. The presumption under Section 3A (1963) shifts the onus in this respect to the accused and although the onus may be heavy or light in the circumstances of each case, it is for the accused to rebut the same to the satisfaction of the Court. The decision of the Supreme Court in Behram Khurshid's case, AIR 1955 SC 123 (supra), on which Harendra Das's case was based, was with regard to an offence for consumption of liquor after the decision in Balsara's case, AIR 1951 SC 318 (supra) and which was sought to be established from smell of liquor in absence of a rule of presumption in the Bombay Act, such as we find under Section 3A (1963) in the Assam Act. The ratio decidendi in Behram's case, AIR 1955 SC 123 on this aspect of the matter, with all respect, will not apply to the present case as the presence of section 3A (1963) makes all the difference.

For the reasons given above, with respect, we disagree with the observations of the learned Chief Justice in Harendra Das's case, AIR 1967 Assam 56 on the two points mentioned above.

7. The presumption under Section 3A (1963) of the Act is a rebuttable presumption. The Court shall presume that a

person who is found in a state of drunkenness within a prohibited area has consumed liquor within the same area. This does not, however, mean that the accused is deprived of an opportunity to show that the state of drunkenness, which is deposed to by the witnesses, is either not true or real or that the condition under which he was found was a result of taking something other than liquor. The burden on the prosecution to prove that the accused was found in a state of drunkenness never shifts and it is only when that is established to the satisfaction of the Court that the question of presumption under Section 3A (1963) arises, and when that stage is reached, in absence of an explanation from the accused, the Court will be justified in finding him guilty under the charge. The burden which the accused has to discharge in such a case is not as heavy as that of the prosecution. He has to make out a prima facie case to rebut the presumption.

8. To summarise, dealing with the prosecution for offences under Section 4 for violating the provisions of Section 3 of the Assam Act, so far as import, transport or possession, selling, or buying or manufacture of liquor, of the first category mentioned earlier, is concerned, the prosecution has to satisfy the Court that the liquor which is produced in Court is intoxicating liquor and contains alcohol and is not excluded by the provisions contained in Section 3A (1956). So far as the first category of offences mentioned above, there is no onus on the accused whatsoever, as the law stands now after the fourth amendment, to establish that liquor for import, transport or possession, selling or buying and manufacture of liquor of which he may be charged, is unfit for use as intoxicating liquor. The onus is entirely on the prosecution to establish the offence, which includes proof of the incriminating article as liquor within the meaning of the Act and that the same is not unfit for use as intoxicating liquor, as described under Section 3A (1956). Mere introduction of Section 3A (1956) separately under the Act after deletion of the explanation in the original definition would not have the effect of shifting the onus in this matter on the shoulders of the accused.

So far, however, the aforesaid second category of offence is concerned, namely consumption of liquor, the position has become different after the fourth amendment, as has been earlier noted.

9. While dealing with the above submissions we may only like to notice the provisions of Sections 105 and 106 of the Evidence Act, which read as follows:

"105. When a person is accused of any offence, the burden of proving the exist-

ence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

"106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

In a case under the present Act, with the definition as amended and introduction of Section 3A (1956) and in view of the presumption under Section 3A (1963), Section 106 of the Evidence Act may be justifiably called in aid to tackle a case involved in this revision petition. If the accused, as has been held by the courts below, was in a state of drunkenness showing signs and manifestations supporting that state, the prosecution will be at a great disadvantage to establish as to what particular things the accused had taken which led him to that state. It will be certainly especially within the knowledge of the accused as to what he had already taken for which he was found in that state by the witnesses.

Dealing with S. 106 of the Evidence Act the Supreme Court in the case of *Shambhu Nath Mehra v. The State of Ajmer*, reported in AIR 1956 SC 404, observed as follows:

"Section 106 is an exception to Section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that, it means facts that are pre-eminently or exceptionally within his knowledge."

This does not, however, mean that the burden shifts from the prosecution to the accused, but the latter has to satisfy the Court in order to rebut the presumption against him which the Court will be authorised to draw under Section 3A (1963).

10. The learned Counsel for the petitioner at one stage submitted that this will be doing violence to the well-settled principles of criminal jurisprudence. We are, however, not impressed with that argument. In *Bailey v. Alabama*, (1910) 55 Law Ed 191 (A) at p. 200, Hughes, J., who delivered the opinion of the Court, made the following observations:

"This Court has frequently recognised the general power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the Courts of its own Government In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law, or a denial of the equal protection of the law."

In another case, — *Mobile, J. & K. C. R. Co v. Turnipseed*, (1910) 55 Law Ed 78 at p. 80, the Supreme Court of the United States affirmed the same principle and held as follows:

"If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied to him."

We are clearly of the opinion that there is nothing wrong in invoking the presumption under Section 3A in the particular circumstances of the case and in absence of any explanation from the accused, we are satisfied that the evidence establishes a state of drunkenness of the accused and the conviction under Section 4 of the Act is fully justified.

11. Mr. Bhuyan also drew our attention to an unreported decision of my learned brother Pathak, J. in Criminal Revision No. 65 of 1965, disposed of on 29-2-1968. It was held in that case that the state of drunkenness was not proved by the prosecution in order to enable them to avail of the presumption under Section 3A. This decision does not assist the learned counsel in throwing out the presumption, when the state of drunkenness is established by the prosecution and the accused has not submitted any explanation. His Lordship was not prepared to hold from the outward symptoms found in that case that the state of drunkenness was established.

The learned Counsel also referred to another unreported decision of mine in Criminal Revision No. 170 of 1964, disposed of on 2-8-1967. That was a case in which the accused was a tea-stall owner and was charged for possession of liquor which was found in the dregs of one or two glass tumblers of his tea-stall. There was no question of presumption under Section 3A (1963) in that case and this

Court was not prepared to hold that the accused, on the state of evidence, as disclosed, could be guilty of possession of liquor. In the instant case, it cannot be said that from the evidence of the three prosecution witnesses including the doctor, the Courts below erred in law in holding that the accused was found in a state of drunkenness on the Railway Platform at Jakhlabandha Railway Station which is within the prohibited area. According to the doctor, he found in the breath of the accused smell of liquor, his conjunctiva was congested, gait unsteady and speech incoherent. According to him, he took sufficient quantity of alcohol. The doctor stated in cross-examination that the accused was very unsteady and that degree of unsteadiness cannot come when one becomes tired. He also stated that if an alcoholic tonic is taken to the extent of 2/3 bottles, a man can become unsteady. P. W. 2 also stated that he found the accused in a drunken state. The third witness also stated that he found the accused in a drunken state. The accused was not normal and his mode of speaking was also not normal. It is, therefore, clear from the prosecution evidence and particularly from the evidence of the doctor that the accused was in a state of drunkenness and that being so, he must be held to have consumed liquor within the prohibited area in absence of any explanation from him.

12. In the result, the conviction as well as the sentence are upheld and the petition is dismissed.

13. M. C. PATHAK, J. :— I agree.
Petition dismissed.

AIR 1970 ASSAM & NAGALAND 57 (V 57 C 11)

P. K. GOSWAMI AND M. C. PATHAK, JJ.
Narayan Das, Petitioner v. Deputy Commissioner of Darrang Tezpur and others, Respondents.

Civil Rule No. 261 of 1968, D/- 1-7-1969.

Constitution of India, Art. 311 — Applicability — Does not apply where appointment is by incompetent authority.

Article 311 is attracted in the case of a person who holds a civil post under the Union or a State. This holding of a civil post must at least be prima facie legal. If a person is appointed to a Government post by a competent authority, and removed therefrom it may attract the provisions of Article 311 in appropriate cases. But if a person is found to have been appointed in Government service by an authority who had no power or jurisdiction

to make such an appointment and on whom the Government has not delegated any such power of appointment, the person so appointed cannot be said to have held a post under the State Government which might attract the provisions of Article 311, even though that person might be functioning for the period from his appointment till he is removed, his initial appointment being without jurisdiction and without any authority.

(Para 8)

J. P. Bhattacharjee and S. N. Medhi, for Petitioner; A. M. Majumdar Jr. Govt. Advocate, for Respondents.

PATHAK, J. :— By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 20-7-68 passed by the Deputy Commissioner, Darrang, by which the order dated 14-7-68 passed by the Additional Deputy Commissioner, Darrang, appointing the petitioner a Gaonbura of village Chengelimora in the Barbhagia Mouza in place of Bangshidhar Das Gaonbura, Respondent No. 4, has been set aside.

2. The petitioner's case is that respondent no. 4 Bangshidhar Das was the Gaonbura of Chengelimora village who filed a petition on 6-5-67 before the Sub-Deputy Collector of Naduar Circle through the Mouzadar of Barbhagia Mouza stating inter alia that he had become unable to act as gaonbura and as such the said post might be offered to his eldest son, Liladhar Das and therefore the petitioner filed a petition on 18-5-67 before the Deputy Commissioner, Darrang, praying for his appointment as gaonbura of Chengelimora village in place of the gaonbura who was going to retire from service. On 3-7-67 the petitioner filed another petition before the Deputy Commissioner of Darrang alleging inter alia that Liladhar Das, the son of respondent no. 4, was a minor and that the people in the locality filed a petition praying for the appointment of the petitioner as the gaonbura. This petition was sent to the Sub-Deputy Collector, Naduar Circle for enquiry and report. Thereafter the Sub-Deputy Collector made necessary enquiry and submitted his report to the Additional Deputy Commissioner, who by his order dated 14-7-67 relieved respondent no. 4 from the office of the Gaonbura of Chengelimora village and appointed the petitioner as the new gaonbura and accordingly a sanad was issued to the petitioner by the Additional Deputy Commissioner. The petitioner was performing the duties of gaonbura since the date of his appointment. Thereafter he was served with a copy of the order dated 20-7-68 passed by the Deputy Commissioner whereby the order of the Additional Deputy Commissioner appointing the petitioner as gaonbura accepting the resignation of

respondent no. 4 and relieving him from the said office was cancelled and gaonburaship of respondent no. 4 was restored. The petitioner has challenged this order of the Deputy Commissioner.

3. Mr. J. P. Bhattacharjee, the learned counsel appearing for the petitioner, has submitted that the petitioner who was appointed a gaonbura was holding a post under the State Government and he could not be removed without following the procedure laid down in Article 311 of the Constitution and as such the impugned order dated 20-7-68 passed by the Deputy Commissioner was bad in law. The learned counsel further submitted that the appointment of the petitioner as gaonbura was under the provisions of the Assam Land and Revenue Regulation, 1886, and as such the powers that were vested in the Deputy Commissioner could be exercised by the Additional Deputy Commissioner inasmuch as the expression "Deputy Commissioner" included 'Additional Deputy Commissioner' as defined under Section 3(m) of the said Regulation. In the premises, the learned counsel submitted that the removal of the petitioner from the post of gaonburaship offended Article 311 of the Constitution of India.

4. Mr. A. M. Majumdar, the learned Junior Government Advocate, on the other hand, submitted that the appointment of a gaonbura was made by the Deputy Commissioner under Executive Instructions 162 and 163 and this was not made under any provision of the Assam Land and Revenue Regulation, that in appointing a gaonbura the executive power of the State Government was exercised by the Deputy Commissioner as delegated under Executive Instructions 162 and 163 and as such the appointment of the petitioner by the Additional Deputy Commissioner was without jurisdiction and it was no appointment in the eye of law and the petitioner could not be said to hold the post under the State Government inasmuch as he was not appointed by any authority on whom the executive power of the State Government regarding the appointment of gaonbura was vested. On that basis, the learned Junior Government Advocate submitted that the petitioner was not entitled to any protection under Article 311 of the Constitution of India.

5. The controversy therefore boils down to the question whether the petitioner can be said to have held a post under the State Government from which he was removed or discharged without following the provisions of Article 311 of the Constitution.

6. Gaonburas are appointed under the Executive Instructions 162 and 163 which are in the following terms:

"162. Gaonburas are appointed by the Deputy Commissioner. In the case of a vacancy, the Deputy Commissioner shall take into consideration (a) the claims of the family of the late gaonbura, (b) the wishes of the villagers and (c) the views of the mausadar, and shall appoint the person whom he considers most suitable for the post.

In charges consisting entirely of nisf-khiraj or lakhiraj estates the nomination of the gaonburas shall rest with the properties unless the nominee is plainly unfit.

The Deputy Commissioner may dismiss a gaonbura from office after recording his reasons in writing.

163. Appointment of gaonburas shall be marked by the grant, under the Deputy Commissioner's signature of a parchment sanad. On the death or dismissal of a gaonbura the sanad should be returned to the Deputy Commissioner's office for cancellation."

7. From the above two Executive Instructions, it is quite clear that the power of appointing a gaonbura has been vested in the Deputy Commissioner and not in any other authority. The appointment is not under any provisions of the Assam Land and Revenue Regulation and as such the definition of the 'Deputy Commissioner' laid down in Section 3(m) of the Regulation could not come to the aid of the petitioner. That the power of appointing a gaonbura vested at the relevant time only on the Deputy Commissioner is also confirmed by the subsequent Government Notification No. RLR: 68/65/83 dated 23rd September 1968, by which the provisions of the Executive Instructions 162, 163 and 167 have been amended by introducing Executive Instruction 163A, which runs as follows:

"For the purpose of the Executive Instructions 162, 163 and 167, the term "Deputy Commissioner" includes "Additional Deputy Commissioner" also.

Note: There should be specific allocation of works between Deputy Commissioner and Additional Deputy Commissioner. The Deputy Commissioner should specify the works to be done by the Additional Deputy Commissioner."

The order appointing the petitioner was passed by the Additional Deputy Commissioner on 14-7-67. Hence, at that time the Additional Deputy Commissioner was not invested with the power of appointing gaonburas. In the circumstances, it must be held that the appointment of the petitioner as gaonbura on 14-7-67 and the issue of the sanad to the petitioner on 14-7-67 by the Additional Deputy Commissioner was without any authority and it had no existence in the eye of law.

8. The learned counsel for the petitioner, however, submitted that from

14-7-67 till 20-7-68. the petitioner was functioning as the gaonbura and, therefore, he must be deemed to have held the post under the State Government and in that view Article 311 was attracted in the instant case and since there had been no compliance with the provisions of Article 311 in the matter, the impugned order of the Deputy Commissioner should be quashed. Article 311 is attracted in the case of a person who holds a civil post under the Union or a State. This holding of a civil post must at least be prima facie legal. In other words, if a person is appointed to a Government post by a competent authority, and removed therefrom it may attract the provisions of Article 311 in appropriate cases. But if a person is found to have been appointed in Government service by an authority who had no power or jurisdiction to make such an appointment and on whom the Government has not delegated any such power of appointment, the person so appointed cannot be said to have held a post under the State Government which might attract the provisions of Article 311. In the instant case the admitted position is that the petitioner was appointed a gaonbura and he was given the sanad by the Additional Deputy Commissioner, who had no jurisdiction to do so and who was not authorised by the State Government to exercise that power by any general or special order or by any Executive Instruction at the relevant time. That being the position, even though the petitioner might be functioning as the gaonbura for the said period, his initial appointment being without jurisdiction and without any authority, he cannot be deemed to be holding a post under the State Government. The petitioner was at the most an impostor to the office of the gaonbura. That being the position, the Deputy Commissioner while setting aside the order of the Additional Deputy Commissioner dated 14-7-67 was not required to follow the procedure laid down in Article 311 of the Constitution of India. After all, the remedy under Article 226 of the Constitution of India is a discretionary remedy and when the petitioner claims it under Article 226, he must satisfy the Court at least prima facie that he was appointed by an authority having jurisdiction to do so, which he failed to do in this case.

9. In the circumstances, we hold that the petitioner is not entitled to any remedy in this petition. The petition is dismissed. The Rule is discharged. We make no order as to costs.

10. GOSWAMI, J.:— I agree.
Rule discharged.

AIR 1970 ASSAM & NAGALAND 59
(V 57 C 12)

FULL BENCH

E. SANJEEVA ROW NAYUDU, C. J.,
P. K. GOSWAMI, K. C. SEN AND
M. C. PATHAK, JJ.

Amar Bahadur Thapa and another, Defendants-Appellants v. Abdul Hai and another, Plaintiffs, Respondents.

Second Appeal No. 34 of 1964, D/- 23-8-1967, from decision of Sub-J. Upper Assam Dist. at Jorhat, D/- 18-1-1964.

(A) Houses and Rents — Assam Urban Areas Rent Control Act (3 of 1956), S. 6 (1)(e) and (4) — Deposit by tenant not conforming to requirements of statute — Deposit held to be irregular — Finding that benefit of S. 6(4) is not available to tenant and therefore he cannot be treated as defaulter under S. 6(1)(e) proviso — Finding is on question of fact and is binding on second appellate court — (Civil P. C. (1908), Ss. 100-101).

(Para 4)

(B) Houses and Rents — Assam Urban Areas Rent Control Act (3 of 1956), Ss. 9, 6 — Scope of S. 9 — Deposit of rent made under S. 6(4) — Notice by Court to landlord to withdraw the same — There is no right of appeal under S. 9 — Because of non-filing of appeal, landlord in subsequent proceeding is not debarred from taking the plea of non-compliance with S. 6 (4) — S. A. No. 165 of 1962 D/- 15-2-1966 (Assam) Overruled.

S. 9 pre-supposes the existence of a decision or order, against which alone the appeal could be preferred. Unless there is a decision of a Court of competent jurisdiction or order passed by it pursuant to that decision, no appeal could be preferred as there is nothing which could be challenged in the appeal. Thus, when S. 9 refers to S. 6, the obvious reference is to the giving of the decision and the making of the order under Section 6(3), which alone provides for the same. If an order is made under Section 6(3) of the Act and it is not challenged by way of an appeal, that order becomes final and cannot be challenged. But that cannot, apply to any action taken under Section 6(4) which only contemplates that when a deposit is made by the tenant of the rent said to be due from him, the Court is bound to issue a notice to the landlord and permit him to withdraw the same. In the case of deposit of rent made under S. 6(4), there is no right of appeal under S. 9 and there is, therefore, no question of any legal consequence following the non-filing of an appeal by landlord under S. 9. Thus, omission to prefer such appeal does not preclude the landlord from contending in subsequent proceeding that there has been non-compliance with S. 6(4)

and that the tenant is a defaulter. S. A. No. 165 of 1962, D/- 15-2-1966 (Assam) Overruled. (Para 5)

Cases Referred: Chronological Paras
(1966) S. A. No. 165 of 1962, D/- 15-2-1966 (Assam) 5

D. C. Goswami, for Appellants; J. K. Barua, for Respondents.

NAYUDU, C. J. :— This reference has come before us as correctness of a Division Bench decision of this Court in Second Appeal No. 165 of 1962 had to be examined.

2. The second appeal in question has arisen out of a suit brought by the plaintiffs, respondents herein, for ejectment and for recovery of rent and compensation. It was claimed by the plaintiffs that the defendants are liable to ejectment on the ground that they did not deposit the amounts of rent accruing regularly or in time and they continued to occupy the house against the wishes of the plaintiffs.

3. The plaint itself is not sufficiently clear as to the exact nature of the default although in the Schedule (b) of the plaint compensation is claimed on the basis of rent for the period from 8th June to 31st December, 1960 and thereafter at Rs. 2/- per day independent of the term of the tenancy. The defendants, appellants herein, contended that they offered rent to the plaintiffs as and when it fell due but the plaintiffs deferred to receive the rent on the ground that they were in mourning on account of the death of the father of the defendants (sic) and that they would receive the rent later. In a similar way the plaintiffs refused to receive rent for the second and the third month following although the rent was tendered, and when the rent was tendered for the third month the plaintiffs apparently demanded rent at the rate of Rs. 60 per month, which is an enhanced rent because the rent as per tenancy was Rs. 30 per month.

The defendants then realised for the first time that the plaintiffs duped them by making them believe that their inability to receive the rent was due to their state of mourning. Then the defendants started depositing the rent into the Court and claimed that they had not committed any default and therefore they are not liable to ejectment under the provisions of the Assam Urban Areas Rent Control Act, 1955 (Assam Act III of 1956), hereinafter referred to as the Act. It would be useful to refer to the relevant provisions of the Act in this connection. Section 6 contains the bar against passing and execution of decree and orders for ejection. Section 6(1) is as follows:

"6(1) No order or decree for the recovery of possession of any house shall be made or executed by any Court so

long as the tenant pays rent to the full extent allowable under this Act and performs the conditions of the tenancy;

Provided that nothing in this sub-section shall apply in a suit or proceedings for eviction of the tenant from the house:

x x x x x x
(e) where the tenant has not paid the rent lawfully due from him in respect of the house;"

Section 6(4) is as follows:

"6(4). Where the landlord refuses to accept the lawful rent offered by his tenant, the tenant may, within a fortnight of its becoming due, deposit in Court the amount of such rent together with process-fees for service of notice upon the landlord, and on receiving such deposit, the Court shall cause a notice of the receipt of such deposit to be served on the landlord, and the amount of the deposit may thereafter be withdrawn by the landlord on application made by him to the Court in that behalf. A tenant who has made such deposit shall not be treated as a defaulter under clause (e) of the proviso to sub-section (1) of this section."

4. The question, therefore, that came to be considered by the courts below was whether the defendants were in default of the payment of rent or whether they had paid the rent in time as prescribed. On this question, the trial court on a careful examination of the materials placed before it came to the conclusion that the rent allowable under the Act was not regularly deposited as seen from the records of the four miscellaneous cases referred to in the judgment. It was found that the rent for November and December 1960 was deposited only on 4-1-61, the rent for January, February and March, 1961 was deposited on 21-4-61 and the rent for April and May, 1961 was deposited on 5-6-61. In view of the timings at which the deposits were made, the trial court held that the tenants were not entitled to the benefit of Section 6(4) of the Act. This finding has been confirmed by the lower appellate court which found that the defendants were defaulters as they had not paid the rent to the full extent and within the time allowed. This is what is observed by the lower appellate court:

"Admittedly, the defendants have not deposited rent in Court month by month but they deposited rent for 2 months or 3 months together which is quite apparent from the Misc. cases by which the defendants deposited rent in Court and Misc. Case No. 18/61 reveals that the defendants deposited rent in Court for the months of April and May, 1961 on 5-6-61."

Accordingly that Court held that under the provisions of Section 6(4) of the Act the defendants should have deposited the

rent for the month of April, 1961 on or before the 15th of May, 1961 and not later. That the period prescribed for the deposit of rent is a fortnight as laid down in Section 6(4), quoted above. We are, therefore, satisfied that both the courts below were correct in their finding that there has been an irregularity in the deposit of rent made by the defendants as the deposits did not conform to the requirements of the statute. Hence the view taken by the courts below that the benefit of Section 6(4) is not available to the defendants and that they, therefore, cannot claim that they shall not be treated as defaulters under clause (e) of the proviso to sub-section (1) of Section 6 of the Act, is apparently on the question of fact which is undoubtedly binding on a second appellate Court.

5. Another point that requires to be considered is whether, as already pointed out, the judgment of the Division Bench of this Court can be said to be correct. This decision was given in Second Appeal No. 165 of 1962 on 15-2-66 (Assam) (unreported). In that decision, the question that came to be considered was whether it would be open to a landlord who had not preferred an appeal under Section 9 of the Act, when a notice of deposit of rent under Section 6(4) had been given to him, to contend that the defendants were defaulters and whether that question could be gone into, and the learned Judges constituting the Bench held that the omission to file an appeal under Section 9 precluded the landlord from contending that there has been non-compliance with the provisions of Section 6(4). We have examined this case carefully and heard the learned Counsel on the point and with respect we feel that this case has not been correctly decided. Section 9 of the Act is as follows:

"9. Appeals — A landlord or a tenant aggrieved by any decision or order of the Court under the provision of Sections 4, 5, 6 and 8(2) of this Act shall have a right of appeal against the same as if such decision or order were a decree in a suit for ejectment of the tenant from the house and such appellate court's decision shall be final."

This section presupposes the existence of a decision or order, against which alone the appeal could be preferred. It is common knowledge that unless there is a decision of a Court of competent jurisdiction or order passed by it pursuant to that decision, no appeal could be preferred as there is nothing which could be challenged in the appeal. In the instant case, when Section 9 refers to Section 6, the obvious reference is to the giving of the decision and the making of the order under Section 6(3), which alone provides for the same. If an order is made under

Section 6(3) of the Act and it is not challenged by way of an appeal, that order becomes final and cannot be challenged. But that cannot, in our opinion, apply to any action taken under Section 6(4) which only contemplates that when a deposit is made by the tenant of the rent said to be due from him, the Court is bound to issue a notice to the landlord and permit him to withdraw the same. We are clearly of opinion that in the case of deposit of rent made under Section 6(4), there is no right of appeal under Section 9 and there is, therefore, no question of any legal consequence following from the non-filing of an appeal under Section 9.

6. The reference is accepted and the second appeal is dismissed, but in the circumstances we make no order as to costs. The appellants are allowed four months time from this day to vacate and hand over the house to the respondents.

Reference accepted and second appeal dismissed.

AIR 1970 ASSAM & NAGALAND 61 (V 57 C 13)

FULL BENCH

C. SANJEEVA ROW NAYUDU, C. J.
P. K. GOSWAMI AND K. C. SEN, JJ.

Maud Tea and Seed Co., Ltd. and another, Petitioners v. Agricultural Income Tax Officer, Shillong and others, Respondents.

Civil Rules Nos. 81 to 89 of 1965, D/- 9-2-1968.

(A) Income-tax Act (1922), S. 59—Validity — Provisions do not suffer from vice of excessive delegation — Rule 24 framed in pursuance of that power is also not ultra vires.

Section 59 of the Income-tax Act and Rule 24 of the Income-tax Rules do not suffer from vice of excessive delegation and are not ultra vires. Section 59 laid down the policy of the Legislature in clear terms, namely, the ascertainment and determination of any class of income and provided particularly for prescribing the manner in which and the procedure by which the income, profits and gains shall be arrived at in the case of incomes derived in part from agriculture and in part from business. The Legislature has indicated in Section 59(3) the circumstances in which the rule like Rule 24 could be framed. The object and the policy and the circumstances in which the rules have to be framed have all been set out in Section 59(3) and what was left to the Executive, in the Central Board of Revenue, was to work out the details of the proportion which Rule 24 has provided.

These are matters of detail which it is more convenient and proper to be left to the Executive to determine, and it is in accordance with the policy indicated, that Rule 24 of the Indian Income tax Rules had been framed providing for the income derived from the sale of tea, grown and manufactured by the seller in the taxable territories to be computed as if it were income derived from business, and 40 per cent of such income shall be deemed to be income, profits and gains liable to tax. What portion of the income is derived from agriculture in the matter of tea grown and what portion should be business income for the purpose of the Income-tax Act is a matter of detail which could only be effectively determined by the Executive, and Rule 24 lays down that the entire income derived from the growth and manufacture of tea is to be treated as if it were business income and 49 per cent thereof should be liable to income-tax assessment under the Indian Income-tax Act, 1922. AIR 1963 SC 760, Rel. on. (Para 22)

(B) Constitution of India, Arts. 245 and 246 — Delegation of legislative powers — Principles.

It is not unconstitutional for the Legislature to leave it to the Executive to determine details relating to the working out of the taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like. AIR 1958 SC 909 & AIR 1951 SC 332 & AIR 1948 PC 142 & (1928) 276 US 394 & AIR 1960 SC 554, Ref. (Para 22)

(C) Assam Agricultural Income-tax Act (9 of 1939), S. 8(2) 2nd proviso and Explanation to S. 2(a) — Provisions do not suffer from excessive delegation and are not ultra vires. AIR 1921 Cal 40 & AIR 1919 Pat 260 (FB) & AIR 1932 Nag 61 Dist. (Paras 26 & 28)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1895 (V 54)= 1967-20 STC 430, Devi Das v. State of Punjab	20
(1963) AIR 1963 SC 760 (V 50)= 1963-1 SCJ 265, Karimtharuvi Tea Estate Ltd. v. Kerala State	25, 26
(1961) AIR 1961 SC 4 (V 48)= (1961) 1 SCR 341, Vasanlal Maganbhai v. State of Bombay	20
(1960) AIR 1960 SC 554 (V 47)= 1960-2 SCR 671, Hamdard Dawa-khana v. Union of India	19
(1958) AIR 1958 SC 909 (V 45) = 1958 MPLJ 467, Banarsi Das v. State of Madhya Pradesh	18
(1954) AIR 1954 SC 569 (V 41)= 1955 SCR 290, Rajnarain Singh v. Patna Administration Committee, Patna	18

(1951) AIR 1951 SC 332 (V 38)= 1951 SCR 747, Art. 143, Constitu-tion of India and Delhi Laws Act (1912) etc., In re	18
(1948) AIR 1948 PC 142 (V 35)= 1948-16 ITR 270, English and Scottish Joint Co-operative Whole-sale Society Ltd. v. Commr. of Agri-cultural Income-tax, Assam	24
(1932) AIR 1932 Nag 61 (V 19)= 139 Ind Cas 316, Sheolal v. Income-tax Commissioner	27
(1928) 276 US 394=72 L Ed. 624, Hampton Jr. & Co. v. United States	18
(1921) AIR 1921 Cal 40. (V 8)= ILR 48 Cal 161, Killing Valley Tea Co., Ltd. v. Secy. of State	27
(1919) AIR 1919 Pat 260 (V 6)= 1919 PHCC 377 (FB), In re, Bhikan-pur Sugar Concern	27
(1885) 10 AC 282=54 LJ PC 7, Powell v. Appollo Candle Co., Ltd.	18

S. M. Lahiri, S. K. Ghose, N. M. Lahiri, J. P. Bhattacharjee, S. N. Medhi and D. C. Goswami, for Petitioners; B. C. Barua, Advocate-General, G. K. Talukdar, Senior Govt. Advocate, for Respondents.

SANJEEVA ROW NAYUDU C. J. : In all these Civil Rules, the petitioners are the Maud Tea & Seed Company Limited, Calcutta, and its Director. In the petitioners' tea garden, tea bushes are grown and maintained and tea leaves are plucked from them and then carried to the factory maintained by the petitioners' estate for the purpose of being put through a manufacturing process, at the end of which the tea fit for marketing is produced. The income derived by the sale of the manufactured tea, therefore, comprises partly of the income derived from the agricultural produce and partly by the manufacturing process through which the tea leaves are put to until they reach the final shape and sold as tea in the market. The petitioners were charged to income-tax on the forty per cent of the income and to agricultural income-tax under the Assam Agricultural Income-tax Act, 1939 (Act IX of 1939), hereinafter referred to as the Assam Act, in respect of the balance of income of sixty per cent, under Rule 24 of the Rules framed under the Indian Income-tax Act, 1922, read with the provisions of the Assam Act and the Rules made thereunder. The petitioners object for the apportionment of the income derived by the petitioners at forty per cent as business income assessable to income-tax and sixty per cent as agricultural income assessable under the Assam Act as unconstitutional, ultra vires the powers of the Legislature and, therefore, bad.

2. The argument of the petitioners is that the said apportionment is arbitrary.

that it is done under the rules framed by the Central Board of Revenue under the control of the Central Government, that the power to make the rules delegated to the Central Board of Revenue, as aforesaid, is a naked power, unrestricted and uncanalised and enables the executive to decide in an arbitrary manner for the aforesaid apportionment. The contention, therefore, is that the delegation of the rule-making power is excessive delegation and cannot be treated as valid inasmuch as, according to the petitioners, the delegation amounts to an abdication of the power of Parliament to decide the matter in question, leaving it exclusively for the rule making authority, namely the Central Board of Revenue under the control of the Central Government.

3. Before we consider the respective arguments of the counsel on either side, it would be useful to extract the relevant provisions which are the subject-matter of attack in these cases, we shall first refer to the provisions of the Assam Act. Section 2(a) of the Act defines 'agricultural income' as follows:

"(a) 'agricultural income' means:—

(1) Any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in Assam or subject to a local rate assessed and collected by officers of the Government as such.

(2) Any income derived from such land by —

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

* * * * *

Explanation:— Agricultural income derived from such land by the cultivation of tea means that portion of the income derived from the cultivation, manufacture and sale of tea as is defined to be agricultural income for the purposes of the enactments relating to Indian Income-tax."

4. Section 2(b) of the Act defines "agricultural income-tax" as the tax payable under the Act.

5. Section 3 of the Act, which is the charging section, is as follows:

"3. Agricultural Income-tax at the rate or rates specified in the annual Assam Finance Acts subject to the provisions of Section 6 shall be charged for each financial year in accordance with, and subject to, the provisions of this Act on the total agricultural income of previous year of every individual Hindu undivided or joint family, company, firm and other association of individuals."

6. Section 6 of the Act enacts the limit of the taxable income. It states that

the agricultural income-tax shall be payable by persons whose total agricultural income of the previous agricultural year exceeds Rs. 3,000 at such rates as may be laid down from year to year in the annual Assam Finance Acts. Section 8 of the Act deals with the determination of agricultural income mentioned in clause (a) of sub-clause (2) of Section 2 of the Act. The second proviso to the section is important and may be extracted:

"Provided further that in cases of agricultural income from cultivation and manufacture of tea the agricultural income for the purposes of this Act shall be deemed to be that portion of the income from cultivation, manufacture and sale which is agricultural income within the meaning of the Indian Income-tax Act and shall be ascertained by computing the income from the cultivation, manufacture and sale of tea as computed for Indian Income-tax from which shall be deducted any allowances by this Act authorised in so far as the same shall not have been allowed in the computation for the Indian Income-tax Act."

7. The petitioners attacked the vires and the validity of the Explanation to Section 2(a) of the Assam Act and also the second proviso to Section 8(2) of the Assam Act.

8. The Assam Agricultural Income-tax Rules, 1939, were framed by the State Government in exercise of the powers under Section 50, sub-sections (1) and (2) of the Assam Act, hereinafter referred to as the Assam Rules. Rule 5 of these Rules is attacked on the ground that the rule is ultra vires. This rule is as follows:—

"5. In respect of agricultural income from tea grown and manufactured by the seller in the Province of Assam, the portion of net income worked out under the Indian Income-tax Act and left unassessed as being agricultural shall be assessed under this Act after allowing such deductions under the Act and the rules made thereunder so far as they have not been allowed under the Indian Income-tax Act in computing the net income from the entire operation.

Provided that the computation made by the Indian Income-tax Officer shall ordinarily be accepted by the Assam Agricultural Income-tax Officer who may, for his satisfaction under Section 20 of the Assam Agricultural Income-tax Act, obtain further details from the assessee or from the Indian Income-tax Officer, but shall not without the previous sanction of the Deputy Commissioner of Taxes or when there is no Deputy Commissioner of Taxes, the Assistant Commissioner of Taxes empowered by the Commissioner of Taxes in this behalf require under the proviso to Section 49 the production of

account books already examined by the Indian Income-tax Officer for determining the agricultural income from tea grown and manufactured in Assam or refuse to accept the computation of the Indian Income-tax Officer."

A note is appended to this rule, which is also attached. This note is as follows:

"Note — (1) The Act applies to income from sales of tea grown and manufactured in Assam irrespectively whether the sale is made within or outside the Province of Assam."

9. It may be mentioned at the outset that it is not disputed that the Assam State Legislature is competent to make laws and levy taxation in respect of agriculture and agricultural income. The Assam Act was made under the provisions of the Government of India Act, 1935, under which "agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass" are included in item 20 of the Provincial List. S. 100 of the Government of India Act, 1935, laid down the powers of the Provincial Legislatures to make laws for the province or any part thereof in respect of any of the matters enumerated in List II in the Seventh Schedule to the Act, which is the Provincial List. Hence, the power to make laws in regard to the agriculture rests with the Provincial Legislature.

10. The expression 'agricultural income' is defined in Section 2(1) of the Indian Income-tax Act, 1922 (Act No. XI of 1922), which is as follows:

"(1) 'agricultural income' means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in the taxable territories or subject to a local rate assessed and collected by officers of the Government as such;

(b) any income derived from such land by —

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the

receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on:

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house, or as a store-house, or other out-building;"

11. It may be seen from the above that the definition of the expression 'agricultural income' adopted in the Assam Act is exactly the same as that adopted in Indian Income-tax Act, 1922, except for the addition of the Explanation to Section 2(a) of the Assam Act.

12. Under Section 59 of the Indian Income-tax Act, 1922, power is given to the Central Board of Revenue to make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income, subject to the control of the Central Government. The relevant portions of this section are as follows:

"59. Power to make rules. — (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of Income. Such rules may be made for the whole of the taxable territories or for such part thereof as may be specified.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of —

(i) incomes derived in part from agriculture and in part from business;

(ii) persons residing out of the taxable territories;

x	x	x	x	x	x
x	x	x	x	x	x

(3) In cases coming under clause (a) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may —

(a) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax;

Limitation Act of 1877 in regard to the extension of the period of limitation by reason of the minority of the plaintiff would not be applicable. The Full Bench held that the Registration Act, 1877, being an Act complete in itself, the provisions of Section 7 of the Limitation Act, 1877, did not apply. Support is to be found for the view taken by the Madras High Court in Veeramma's case, (1895) ILR 18 Mad 99 (FB) in the decision of a Full Bench of this Court in the case of Anjanabai v. Yashwant-rao, 63 Bom LR 98 = (AIR 1961 Bom 154). Though the question which arose in the latter case was whether the delay on the part of the applicant in making an application under Section 417(3) of the Criminal Procedure Code for the grant of special leave to appeal from the order of acquittal could be condoned under the provision of Section 5 of the Limitation Act, 1908, the learned Chief Justice in delivering the judgment of the Full Bench, has formulated in general terms what would be the meaning of the expression "special law". He has stated (at p. 103 of Bom LR) = (at p. 155 of AIR):

"In our opinion, the expression 'special law' means a provision of law which is not applicable generally, but which applies to a particular or specified subject or class of subjects".

The Full Bench then proceeded to hold that the provisions of Section 417 of the Criminal Procedure Code which apply only to applications made by private party for leave to appeal from orders of acquittal was a special law within the meaning of Section 29(2) of the Limitation Act, 1908, and Section 5 of the latter Act was inapplicable to the same. I agree with the view taken by the Madras High Court in Veeramma's case, (1895) ILR 18 Mad 99 (FB) and am bound by the observations of the Full Bench of this Court in Anjanabai's case, 63 Bom LR 98 = (AIR 1961 Bom 154) (FB). The Registration Act is, in my opinion, a complete code in itself and Section 77 thereof is a provision which is not applicable generally, but which applies to a particular subject viz. the enforcement of a right to get a document registered by filing a civil suit which, but for the special provisions of that section, would not be maintainable. I hold that Section 77 is a "Special law" and the jurisdiction of the Bombay City Civil Court is excluded by reason of Section 3(c) of the Bombay City Civil Court Act, 1948. On any view of the matter, therefore, the issue of jurisdiction must be decided in favour of the plaintiff.

10. That brings me to issues Nos. 2 and 3 which embody the main question that arises in the present suit on merits. That question, in effect, is whether the Deed in question can be said to be a Deed of Release. If it is a Deed of Release, there being no dispute that there is no consideration for the Deed, the contention of the registering authorities that it would be governed by Article 1(3) of the Table of Fees

would have to be upheld and there would be no occasion for invoking the applicability of the residuary provision in Article IV on which the plaintiff relies. The first point that must be noted in that connection is that the word "release" does not appear anywhere in the said Deed. Even so, however, if the document is in effect a Deed of Release neither the fact that it is labelled as being a Deed of Transfer nor the fact that the word "release" is not used in the body of it, can take it out of Article 1(3) of the Table of Fees. What the court has to determine is the substance of the document and not the label which it bears, and the court cannot allow the ingenuity of the draftsman to affect the question of the document before it which must be governed by the real nature of the document. The label of the document as a Deed of Transfer is an obvious misnomer for it does not operate to transfer any property. It is the contention of Mr. Bharucha that the Deed in question is in effect a Deed of Release. Mr. Zaiwalla has, on the other hand, contended that since the word "release" is not used in the document, the court should not read it into the Deed and change its legal effect. I must, therefore, proceed to consider what is the true nature of the Deed in respect of which the present suit has been filed.

11. A careful analysis of the Deed shows that the operative part thereof acknowledges receipt of the sums specified therein and states that the same have been received in full satisfaction of the respective shares of the parties in the property and effects of the deceased Dhundiraj. In the concluding portion, the heirs of the deceased discharge the plaintiff as administratrix from all their respective rights, claims and interest in the property and effects of the deceased Dhundiraj and from all actions, accounts, claims and demands in respect thereof. It is true that there is a distinction between a mere "receipt" and a "release". That distinction has been brought out clearly in the decision in the English case of Bowes v. Foster, (1858) 27 LJ Ex. 262 at p. 266 where it is stated in these terms:

"The distinction between a receipt and a release is, the release extinguishes the claim, and when given in, itself annihilates the debt; but a receipt is only evidence of payment, and if the proof be that no payment was made, it cannot operate as evidence of payment against such proof".

There can be no doubt that the Deed which I am called upon to construe is not a mere receipt. Mr. Zaiwalla has, however, contended that it is also not a Release for it does not annihilate the debt, but merely operates as a discharge of the administratrix as such. I am afraid I cannot accept that contention of Mr. Zaiwalla. In the case of East and West Steamship Co. v. Ramalingam, AIR 1960 SC 1058 in construing the expression "discharged from all liability" in Clause 3 of Para 6 of Article III in Schedule to Carriage of Goods by Sea Act, 1925, the Supreme

Court has stated (para 25) that the ordinary grammatical sense of that expression does not connote "free from the remedy as regards liability" but is more apt to mean a total extinction of the liability following upon an extinction of the right. In the case of *Sarada Prasad v. Jumna Prasad*, AIR 1961 SC 1074 the Supreme Court was called upon to construe the expression "discharge" occurring in Section 7 of the Limitation Act, 1908, Section 7 of that Act deals with the disability of one of the several plaintiffs or applicants in the matter of giving a discharge, and the Supreme Court defined the word "discharge" as meaning "to free from liability", whether the liability be in respect of monetary claims like debts, or in respect of possession of property, or in respect of taking some order as regards property, or in respect of any other matter. In both these cases, the Supreme Court has, therefore, given to the word "discharge" the connotation of total extinction of liability. The word "discharge" is ordinarily used only in the context of exonerating a person from liability or relieving him of his obligations, and is not used in the sense of a giving up of rights. The appropriate word to be used in connection with the renouncing of rights would be the word "release", though no doubt the word "release" is also used, as a matter of plain language, both for extinguishing liability as well as for annihilating the right corresponding thereto. It is a wider term which includes the concept of freeing a person from liability. When, therefore, in the concluding portion of the Deed before me the heirs of the deceased purport to discharge the administratrix from their rights, claims and interest in the estate of the deceased, what they are really doing is to release in favour of the administratrix whatever rights they had in the estate of the deceased, in consideration of the payment received by them in full satisfaction thereof. The word "discharge" which is used in the concluding portion of the Deed is also inappropriate in the context of actions, accounts, claims and demands. The draftsman of the Deed has for some reason, which it is not difficult to fathom scrupulously avoided using the word "release" in place of the word "discharge", though it would certainly have been the more appropriate word. As already stated by me above, ingenuity in drafting cannot however, be permitted to affect the decision of the question which arises for my consideration in this suit. In my opinion, the concluding clause in the operative portion of the Deed is neither a mere receipt evidencing payment, nor does it merely discharge the administratrix from all obligations, liabilities and claims, but it annihilates the debt due to the heirs, in the sense that it completely extinguishes all rights of the heirs of the deceased to share in his estate.

12. Mr. Zaiwalla has contended that the word "discharge" in the concluding portion of the operative part of the Deed governs the words "Leela the administratrix" and that

therefore, the Deed does not purport to annihilate any rights against any property but merely seeks to free the administratrix from liability. There is no substance in that contention of Mr. Zaiwalla. That is not the true effect of the Deed as already stated above. Moreover, even if that were the effect of the Deed, it would in my opinion, still be a Deed of Release. It has been held by this Court as far back as the case of *Chandrashankar v. Bai Magan*, 16 Bom LR 236 at p. 248 = (AIR 1914 Bom 55 at p. 57) which has been followed in the case of *In re Manekal Manilal*, 30 Bom LR 1396 at p. 1399 = (AIR 1928 Bom 553 at p. 554) that though the Stamp Act and the Registration Act cannot, strictly speaking be said to be enactments which are in *pari materia*, the two Acts may be read together and the definitions in the Stamp Act apply to the Registration Act. There is no definition of 'Release' in the Registration Act, but there is a definition of that term to be found incorporated in Article 55 of the Indian Stamp Act, 1899. That definition is that a 'Release' is an instrument whereby a person renounces a claim upon another person, or against any specified property. Therefore, it makes no difference whether, under the Deed in suit, the heirs of the deceased renounce their claims upon the administratrix or renounce their claims against the property comprised in the estate of the deceased, and the distinction which Mr. Zaiwalla has sought to draw cannot help him. I, therefore, hold that the Deed in question is a Deed of Release because it is an instrument whereby the heirs of the deceased Dhundiraj renounce all their claims and demands upon the administratrix in her capacity as such, and also renounce all their rights as heirs against the property comprised in the estate of the deceased.

13. Even if I am wrong in the view which I have taken above and the Deed in question is construed merely as freeing the administratrix of all liability, it would, in my opinion, still fall within the caption of a Deed of Release as known to the law of Conveyancing. Reference may be made in this connection to Butterworth's *Encyclopaedia of Forms and Precedents* (3rd Edn.) Vol. 13 p. 594, Form No. 14, in which a document of precisely the same nature as the one before me is called a Deed of Release, though no doubt the operative portion thereof uses the more appropriate word "releases" instead of the word "discharge" which is to be found in the Deed in suit. In the 4th Edition of Butterworth's *Encyclopaedia of Forms and Precedents* Vol. 1 at page 31, there is to be found a form (Form No. 32) of a Receipt by a residuary legatee to the executors accepting the sum paid to him, receipt whereof is acknowledged. In the form of that Receipt the residuary legatee states that he has received that amount in full satisfaction of all his claims against them and that he undertakes "on request to execute a formal Release to the said executors." A referen-

ce to other standard works on Conveyancing also shows that a document whereby the legatees give a full discharge to the executor on payment of their respective shares is called a Deed of Release. Priedeaux's Forms and Precedents in Conveyancing (25th Edn.) Vol. 3 page 564 Form No. IX Clause 1 of the operative Part, and Elphinstone on Conveyancing (1906 Edn.) page 516 show that that is the position under the law of Conveyancing. In Halsbury (3rd Edn.) Vol. 16, page 319 para 615, it is stated that an executor is entitled to a receipt on payment of a legacy, and that is sufficient discharge, so that he is only in exceptional circumstances entitled to a formal Deed of Release. That statement of the law in Halsbury shows clearly that whilst a receipt is sufficient discharge to an executor, if a formal discharge is required in exceptional circumstances, the document whereby it is given is called a Deed of Release. In Conveyancing, the words "release" and "discharge" are almost inseparable associates, but the document by which claims upon a person or against any property are renounced is invariably called a "Deed of Release". The Registration Act deals primarily with the conveyance of property and interests in property, and words used in the Registration Act must therefore be given the meaning which they bear in the law of Conveyancing. Even if Mr. Zaiwalla's contention that the document merely purports to discharge the administratrix of her liability as such, but does not annihilate the rights of the heirs of the deceased in his estate be accepted, I would still hold that the Deed in question is a Deed of Release. There being no dispute that there is no consideration for the Deed in suit, I must hold that, in any view of the matter, the said Deed falls within the expression "Release other than one falling under (2) above" in Article 1 (3) of the Table of Fees prepared by the Government of Maharashtra in exercise of the powers conferred upon it by Section 78 of the Indian Registration Act, 1908. Issues Nos. 2 and 3 must be answered accordingly and the plaintiff's suit must fail.

14. I answer the issues as follows:

1. In the affirmative.
2. In the affirmative.
3. In the negative.
4. See order below.

ORDER: I dismiss the plaintiff's suit with costs.

Suit dismissed with costs.

AIR 1970 BOMBAY 115 (V 57 C 18)

(AT NAGPUR)

ABHYANKAR, J.

State of Maharashtra, Revenue and Forest Dept. through A. G. P. Bombay, Petitioner v. Dinkarrao Narayanrao Deshmukh and another, Respondents.

Special Civil Appln. No. 777 of 1967, D/- 14-2-1969.

HM/IM/D738/69/CWM/D

Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sec. 6 — Ceiling area which a family can hold under — Determination of — Number of members in the family as existing on the appointed day and not on the date of enquiry has to be taken into account — Neither births nor deaths in family subsequent to appointed day will affect the determination.

For the purpose of determining the ceiling area, which a family can hold under Section 6 of the Act, the number of members of the family as existing on appointed day, that is, 26th January 1962, alone has to be taken into account. It cannot be said that as the sub-clause (g) of Section 18 speaks of determination of the entitlement of the person after the enquiry the entitlement of land-holder or the family has to be determined with reference to the date of enquiry. The provision requiring the Collector or Enquiry Officer to determine the total land possessed by the family on the date enquiry is made has no relevance in determining the date with reference to which the entitlement, that is, the quantity of the land that the family can retain, or the limit of ceiling area upto which it can hold land is to be found. The right to land and the limit to which it can be held can be never made to depend on the exigencies of time when enquiries are held or orders are passed. Neither births nor deaths during enquiry but subsequent to the appointed date, i.e. 26th January 1962, will affect the determination of the Ceiling Area in a family. Just as land-holder cannot claim more land because there are additions to the family, the State also cannot deprive land-holder or a family of land on the basis of members existing on the date of enquiry or order, merely because there has been diminution in the members of the family after the appointed day. Special Civil Appln. No. 767 of 1968, D/- 18-4-1968 (Bom.) Followed.

(Para 7)

Cases Referred: Chronological Paras
(1968) Spl. Civil Appln. No. 767 of
1968 D/- 18-4-1968 (Bom.) 4

C. S. Dharmadhikari, Asst. Govt. Pleader, for Petitioner; C. G. Madkholkar, for Respondent (No. 1).

JUDGMENT: The petitioner is the State of Maharashtra in this petition under Article 227 of the Constitution. The State challenges an order of the second respondent, the Maharashtra Revenue Tribunal, in proceedings arising under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.

2. On 26-7-1962 the first respondent Dinkarrao furnished a return in respect of the land held by his family under Section 12 of the Ceiling Act. The return was in prescribed form I under Rule 4(1)(a) of the Rules framed under the Ceiling Act. In this return he showed himself, his wife, two daughters, Vinabai and Rewati Rama, and two sons, Prakash and Umashankar. In all

six persons comprised as members of his family. A daughter was born to the first respondent on 21-1-1964. In calculating the ceiling area available to this family out of the total area of 115 acres 16 gunthas situated at two villages Warud and Temburkheda, the Sub-Divisional Officer determined the average ceiling limit to be 92 acres 22 gunthas. He allowed that much for the family of 5 members and added to it 1/6th on account of the sixth member in the family and declared 8 acres as surplus.

3. Against this order the first respondent preferred an appeal before the Maharashtra Revenue Tribunal. A Full Bench of the Tribunal took the view that if during the enquiry, which Collector holds, a member is born in the family, a landholder is entitled to additional area on account of birth of such a member even if it takes place after appointed day. On this basis the appeal preferred by the respondent No. 1 was allowed and it was held that respondent No. 1 did not hold any surplus land. This decision is challenged in this Court on behalf of the State.

4. In support of the petition it is urged that the number of members in the family to be taken into account for the purpose of determining the ceiling area, which a family can hold under Section 6 of the Ceiling Act, the size and members of the family as existing on appointed day, that is, 26th January 1962, alone has to be taken into account. It was not permissible for the Sub-Divisional Officer to take cognizance of the fact of birth of another daughter subsequently and thus to add to the membership of the family for determining the total area which could be kept by the family. The State relies on a decision of this Court in Special Civil Appln. No. 767 of 1968, D/-18-4-1968 at Bombay. Apart from the position that I am bound by the decision, I do not think the view taken by the Tribunal is sustainable.

5. Section 3 of the Ceiling Act makes a provision for imposing a maximum limit of ceiling on the holding of Agricultural Lands in the manner thereafter provided. The section speaks of "on the commencement of this Act" the duty to impose limit of the maximum extent or ceiling upto which land may be held. This reference to the commencement of the Act, which, it is admitted, synchronises with the appointed day, namely, 26th January 1962, indicates in no uncertain terms the date with respect to which the ceiling limit or maximum limit of the land which can be held is to be found. The duty to file a return under Section 12 is cast among other persons on a person, who (a) has at any time after the 4th day of August 1959 but before the appointed day, that is, before 26th January 1962, held land causing his holding to exceed the ceiling area; and (b) any person who on or after the appointed day acquires, holds or comes into possession of any land in excess of the ceiling

area to file a return in the first case within 6 months from the appointed day and in the second case within 3 months from the date of taking possession of any land in excess of the ceiling area. Thus so far as the requirement of sub-clause (b) of sub-section (1) of Section 12 is concerned, the duty imposed to file a return will always be enforceable so long as the Act remains in force. A perusal of the form prescribed for making such a return shows that the return maker has to indicate the number of members in his family. The purpose of furnishing this information is to enable the Collector to find out what will be the extent of ceiling area available to the family if the claim is on behalf of the family. Section 8 restricts transfers in respect of persons who held land in excess of the ceiling area either on the appointed day or after the appointed day from transferring any portion of the land until determination of the land in excess of the ceiling area is determined. If Section 8 imposes this restriction it must be with respect to the persons who are to be found to hold land in excess of ceiling area on the appointed day. Thus the number of members in the family which is relevant for determining the ceiling area, will be the members in the family as on the appointed day. I fail to see how with reference to any other date the infraction of Section 8 can be brought home on a landholder unless the ceiling area is to be determined with reference to the number of members in the family on the appointed day. Similarly Section 9 prohibits a person, that is, a family, from acquiring any land if already it has land in excess of the ceiling area. The prohibition is to be operative on or after the appointed day. Here again the injunction will operate only in respect of that family or person, who, with reference to the appointed day, can be said to have land in excess of ceiling area on the basis of calculation of members in the family on the appointed day.

6. Reference was made during argument to clauses (f) and (g) of Section 18 which lay down the procedure and the findings required to be recorded by the Collector in determining the ceiling area. Under clause (f) the Collector has to find out whether any land has been acquired on or after the appointed day by testamentary disposition, devolution on death or by operation of law. This is necessary because there is a statutory prohibition in Section 9 on acquiring land by transaction inter vivos, that is, by purchase etc. But if a family has its land increased on account of any these modes of acquisition, namely, testamentary disposition, devolution on death or by operation of law, then the Collector is bound to take that fact into account. Under clause (g) the Collector is also required to find the total area of the land held at the time of enquiry and what is the area of land which the person is entitled to hold. Much reliance was placed on this sub-clause (g) in support of the contention that the entitlement of the land-

holder or the family has to be determined with reference to the date of enquiry because the sub-clauses speak of determination of the entitlement to the person after the enquiry. I do not think this interpretation is sustainable.

7. The scheme of the ceiling Act is that a person or a family is allowed to keep land upto the ceiling limit with respect to the state of affairs as on the appointed day, that is, 26th January 1962. With respect to transactions which took place voluntarily between 4-8-1959 and the appointed day, certain rules of evidence have been prescribed to determine whether those transactions or transfers are bona fide so as to affect the total area of land held by the family on the appointed day. If there are any transfers effected after the appointed day, but before determining of the ceiling limit under the Act, that is, under Section 18, those transfers are declared invalid and ineffective and in spite of the transfers the area so alienated are required to be taken into account. On the other hand, if any land is acquired by any of the involuntary process like testamentary disposition, or devolution or by operation of law, then that fact has also to be taken into account. But I do not understand how this provision requiring the Collector or Enquiry Officer to determine the total land possessed by the family on the date enquiry is made has any relevance in determining the date with reference to which the entitlement, that is, the quantity of the land that the family can retain, or the limit of ceiling area upto which it can hold land is to be found. If the interpretation urged on behalf of the respondent were to be accepted, it will lead to nothing short of chaotic condition. The right to land and the limit to which it can be held can be never made to depend on the exigencies of time when enquiries were held or orders were passed. That also is not the intention of this Legislation. It was suggested that if there is a diminution in the members of the family between the appointed day, that is, 26th January 1962, and the date on which enquiry is held and order comes to be passed, whether that would affect the right of the family to claim ceiling area or limit on the basis of the members in existence on the appointed day. In my opinion neither subsequent deaths nor subsequent births affect the determination of the ceiling area in a family, that is, births or deaths subsequent to 26th January 1962. Just as a landholder cannot claim more land because there are additions to the family, the State also cannot deprive landholder or a family of land on the basis of members existing on the date of enquiry or order, merely because there has been diminution in the members of the family after the appointed day. The ceiling limit has been fixed with reference to a fixed point of time and it is with reference to that point of time, that is, 26th January 1962, that the number of members in the family while the family was a unit of

ownership has to be determined. I, therefore, do not think that the view taken by the Tribunal correctly interprets the scheme of the provisions of the Ceiling Act and cannot be upheld.

8. The result is the petition is allowed. The order of the Tribunal is set aside and that of the Sub-Divisional Officer is restored. The petitioner will be entitled to costs from the first respondent.

Petition allowed.

AIR 1970 BOMBAY 117 (V 57 C 19)
(AT NAGPUR)

PADHYE AND VIMADALAL, JJ.

Shankar Jayaram and another, Petitioners v. State of Maharashtra and another, Respondents.

Special Civil Appln. No. 1121 of 1966, D/-14-1-1969.

States Reorganisation Act (1956), Sections 86, 2 (m) (o) and Sch. 5 — "Principal successor State" and "Successor State" — Liability of existing States — Petitioner retired in 1939 from service in the then State of M. P. — Reorganisation of States in 1956 and 1960 — Petitioner settled down in Nagpur and drawing pension from Nagpur Treasury even now — Place from where he retired still in State of new M. P. — Both Maharashtra and M. P. State Governments granted certain increases in pensions of pensioners on different occasions — State of Bombay which is successor State to existing State of M. P. would not be liable to the increase in pension granted by present State of M. P. — Further, no claim against State of M. P. can be granted even after amendment of Article 226 — (Constitution of India, Art. 226 (as amended by Constitution Fifteenth Amendment) Act (1963)).

The petitioner retired in 1939 while he was serving at Umri in the then State of M. P. as a result of reorganisation of States in 1956 and 1960 areas from the then existing State of Madhya Pradesh went to two States, viz., the State of Bombay which from the 1st May of 1960 became the State of Maharashtra and the present new State of M. P. The petitioner, after retirement, settled down in Nagpur and had been drawing his pension from Nagpur Treasury. Both Maharashtra and M. P. State Governments from time to time granted certain increases in the pensions of the pensioners on different occasions. The petitioner claimed increases in pension as granted by M. P. Government from the Maharashtra Government.

Held that the State of Bombay (now Maharashtra) which was the successor State to the then existing State of Madhya Pradesh would not be liable to give the increase in the pension which had been granted by the present State of Madhya Pradesh to its pensioners and the petitioner could not lay a

claim for such increase in the pension as had been made by the present State of Madhya Pradesh. (Para 11)

By virtue of definitions in Section 2 (m) and (o) the present State of M. P. was the "Principal Successor State" of the old or the then existing State of M. P. and the State of Bombay and now the State of Maharashtra would be the 'successor State' of the then existing State of M. P. From the scheme of the States Reorganisation Act, including the Fifth Schedule, it is clear that for the purpose of transferring the liability of the existing State to the successor States, the material point of time that had to be taken into consideration was the appointed day, namely, 1st of November 1956, on which the liability existed. There is no provision with respect to the future liabilities of the State. Thus with respect to those pensioners who had retired prior to 1-11-1956 the liability of the successor State would be on the basis of the liability existing on 1-11-1956 and subsequent to 1-11-1956, by any unilateral act of one of the successor States, the other successor State could not be bound. Section 86 of the Act deals with the liability of the existing State and any liability which is incurred after 1-11-1956 by a successor State could not be said to be a liability of the existing State and as such, one successor State will not be bound by the liability which has been created by another successor State. (Paras 6, 11)

Held, further that the High Court of Bombay could not grant any claim against the State of M. P. even after the amendment of Art. 226 by Constitution (Fifteenth Amendment) Act inasmuch as no cause of action to claim increase given by M. P. State arose in any part of State of Maharashtra.

(Para 12)

Cases Referred: Chronological Paras

- (1967) F. A. No. 101 of 1959 decided by Division Bench, D/-6-3-1967 (Bom), State v. Dr. Sarjooprasad Gumasta 9
- (1966) F. A. No. 101 of 1959, D/-14-6-1966 (FB) (Bom), State v. Dr. Sarjooprasad Gumasta 9
- (1959) AIR 1959 Bom 122 (V 46) = Misc. Petn. No. 335 of 1956, D/-23-7-1958 (FB), Dr. Sarjooprasad Gumasta v. State of Madhya Pradesh 12
- (1959) AIR 1959 Bom 363 (V 46) = ILR (1959) Bom 1267, W. W. Joshi v. State of Bombay 9

C. G. Madkholkar, and R. T. Kolhekar, for Petitioners; C. S. Dharmadhikari, Asstt. Govt. Pleader, for Respondent (No. 1); W. K. Sheorey, for Respondent (No. 2).

PADHYE J.: Original petitioners in this petition were two (1) Shankar Jayaram Ambardekar in his individual capacity and (2) Nagpur District Pensioners' Association, Nagpur, through its Honorary Secretary Mr. R. N. Gadre. After the petition was admitted the petitioners were required to give the

names of the pensioners of the petitioner No. 2 Association who had retired prior to 1-11-1956, but in spite of several opportunities being given, no names were supplied and the orders passed by this Court from time to time were not complied with. We are, therefore, not required to consider in this petition the case of those pensioners said to have been represented by the petitioner No. 2 and the decision of this case will be confined only so far as the petitioner No. 1 Shankar Jayaram Ambardekar is concerned.

2. The petitioner No. 1 in the original petition will hereinafter be described as the petitioner only. The petitioner was employed in the year 1912 as an Overseer in the Agricultural Department as a probationer in the then Central Provinces. He was then transferred as probationer to Hoshangabad and thereafter to Seoni as an Agricultural Assistant and was confirmed as an Agricultural Assistant in the year 1930. The Central Provinces and Berar was thereafter named as Madhya Pradesh and the petitioner continued in the service of the State of Madhya Pradesh, as it then was as an Agricultural Assistant. He retired on 31-10-1939 while he was serving at Umri in tahsil Bhainsdehi of Betul district in the then State of Madhya Pradesh. At the time of his retirement the last pay drawn by him was Rs. 190 per month and his pension, therefore, came to Rs. 95 per month. Out of his pension, an amount of Rs. 23-75 was commuted on 23rd of December 1942 since when he has been getting Rs. 71.25 P. per month towards his pension. The former State of Madhya Pradesh had granted an increase of Rs. 6 per month to the pensioners prior to 31-10-1956 as a temporary grant which, however, seems to be continued even now. With this increase the petitioner was getting Rs. 77.25 P. per month towards his pension after commutation on 1st of November 1956. As from 1st of November 1956, there was reorganisation of States and some portions of the former Madhya Pradesh were added to the former State of Bombay and the new State of Madhya Pradesh was formed of the remaining districts excluding those which were included in the Bombay State and adding to it the State of Madhya Bharat, Vindhya Pradesh and other portions. There was a second reorganisation in the year 1960 and from 1st of May 1960 the present State of Maharashtra has been constituted.

3. The petitioner has been residing at Nagpur and has been drawing his pension from the Nagpur District Treasury. The case of the pensioners has been under consideration of the State Governments, both Maharashtra and Madhya Pradesh and both the Governments from time to time granted certain increases in the pension of the pensioners on different occasions. So far as the Maharashtra Government is concerned by the Government Resolution No. TIP-1063/9611-X, dated 13th April 1964, the pension of the pensioners of two categories was in-

creased. The pensioners whose monthly pension did not exceed Rs. 60 were given an additional temporary increase per month of 10 per cent. of the basic pension and existing temporary increase together; whereas the pensioners whose pension exceeded Rs. 60 but did not exceed Rs. 65.50 were given an increase of Rs. 6 or such increase as will bring the total pension (including present temporary increase) upto Rs. 71.50 P. These orders were made applicable to pensioners drawing pensions granted by the former Madhya Pradesh State which were drawn from treasuries in former Bilingual Bombay State on 1st November 1956 and from treasuries in Maharashtra State on 1st May 1960 and some other categories. However, the pension of the petitioners being more than Rs. 65.50 per month, the petitioner did not get any advantage from this resolution.

4. The present Madhya Pradesh Government also, in its turn, granted relief to the Madhya Pradesh State pensioners who were in receipt of small pensions. By resolution No. 1200-F-1760-IV-R. II (60), dated 17th March 1961, the State of Madhya Pradesh granted a temporary rise in the pension and according to this order pensioners getting pension above Rs. 60 but below Rs. 100 per month would be getting an increase of Rs. 12 per month. This temporary increase took effect from 1st March 1961. This increase was followed by another increase by Memorandum letter No. 1294-R-1508-IV-R-II, dated 31st May 1965. In addition to the increase already granted in 1961, persons drawing pensions upto Rs. 100 were further granted an ad hoc increase in the pension of Rs. 5 per month. Paragraph 2 of this memorandum states that this increase will apply to all existing pensioners of the State Government and those Government servants who will retire hereafter and will take effect from the 1st of March 1965. Paragraph 4 further states that the pensioners who are already in receipt of or will be eligible for temporary increase in pension in terms of this Department Memorandum No. 1200-IV-R-II, dated 17-3-1961 will receive the benefit mentioned in Paragraph 1 above in addition. Apparently the increases granted by the Madhya Pradesh Government are more beneficial than those granted by the State of Maharashtra and it is because of this that the petitioner claims that he should be given the increase in his pension as per the memoranda issued by the Madhya Pradesh Government on these two occasions.

The petitioner contends that he has retired from the service of the then State of Madhya Pradesh in the year 1939 and the liability to pay the pension is on the State of Madhya Pradesh and whoever may be its successor after the reorganisation of States. According to the petitioner, it is immaterial where he has settled down or resides because under the Pension Rules, he is entitled to draw the pension from any treasury through-

out India and the place of drawing the pension will not determine the liability of the Government. It has not been disputed that the petitioner retired in the year 1939 while he was serving at Umri in Tahsil Bhainsdehi, District Betul which was in the State of the then Madhya Pradesh. It is still in the new State of Madhya Pradesh. It has also not been disputed that the petitioner has settled down in Nagpur and was drawing his pension from the Nagpur District Treasury upto 1st of November 1956 and has been drawing the same from the said treasury even now.

5. In the year 1956 the States in India were reorganised and the original State of Madhya Pradesh was split up and the eight districts of the old Madhya Pradesh which are now comprised in what is known as the Vidarbha Region were added to the then State of Bombay which was an existing State. The remaining districts of the existing State of Madhya Pradesh along with other areas, for example, Madhya Bharat, Vindhya Pradesh and other areas, formed a new State going by the name State of Madhya Pradesh. Thus, areas from the existing State of Madhya Pradesh have now gone to two States, namely, the State of Bombay, which from the 1st of May 1960 became the State of Maharashtra and the present State of Madhya Pradesh. In order to bring about this reorganisation, the Central Legislature passed Act No. 37 of 1956, called the States Reorganisation Act, 1956, by which 1st of November 1956 has been named as the appointed day. It will be necessary to deal with some of the provisions of this Act in order to appreciate the controversy raised in the present proceedings. Section 2 (g) defines "existing State" to mean a State specified in the First Schedule to the Constitution at the commencement of this Act. It may be stated that in the First Schedule to the Constitution, the State of Bombay and the State of Madhya Pradesh, with which we are concerned in the present case, were specified and they were thus the "existing States" within the meaning of Section 2 (g) of the Act. Section 2 (i) defines "new State" to mean a Part A State formed by the provisions of Part II. Then Section 2 (k) defines "population ratio" and "population ratio" in relation to the successor States of an existing State, means such ratio as the Central Government may by notified order specify to be the ratio in which the population of that existing State as ascertained at the last census is distributed territorially among the several successor States by virtue of the provisions of Part II. Under Section 2 (m), "Principal successor State" means (i) in relation to the existing State of Bombay, Madhya Pradesh, Madras or Rajasthan, the State with the same name. Thus, the present State of Madhya Pradesh would be the "principal successor State" of the then existing State of Madhya Pradesh. Section 2 (o) then defines the term "successor State" and "successor State" in relation to an existing State means any State to which the

whole or any part of the territories of that existing State is transferred by the provisions of Part II.

6. Part II of the Act then gives the territorial changes and formation of new States. Section 8 deals with the formation of a new Bombay State by which certain territories have been excluded from the existing State of Bombay and certain other territories which were not then part of the Bombay State have been added to the existing State of Bombay. One of the territories so added to the existing State of Bombay was the Vidarbha Region comprising of the eight districts in the existing State of Madhya Pradesh. Section 9 deals with the formation of the new State of Madhya Pradesh. By this provision the whole of the existing State of Madhya Pradesh excepting the eight districts of the Vidarbha Region was retained and to it were added certain other territories such as the existing State of Madhya Bharat, some portion of Rajasthan, existing State of Bhopal and the existing State of Vindhya Pradesh and it retained the same old name of Madhya Pradesh. This new Madhya Pradesh is thus the "principal successor State" of the old or the existing State of Madhya Pradesh and under the definition of Section 2 (o) the State of Bombay and now the State of Maharashtra would be the "successor State" of the existing State of Madhya Pradesh.

7. We are not concerned in this petition with the subsequent parts of the Act excepting Part VII which deals with apportionment of assets and liabilities of certain Part A and Part B States. Both Bombay and Madhya Pradesh States were Part A States. Section 75 of the Act makes the remaining provisions of this Part applicable in relation to the apportionment of the assets and liabilities immediately before the appointed day of every Part A or Part B State the whole or any part of whose territories is transferred to another State. Section 76 deals with the division of land and goods. Section 77 deals with the division of the treasury and bank balances. Section 78 deals with arrears of taxes, Section 79 with the right to recover loans and advances, Section 80 with credits in certain funds, S. 81 with assets and liabilities of State undertakings and S. 82 with the public debts. From these various provisions, it will be apparent that the assets of the existing State of Madhya Pradesh as on 1st November 1956 were divided between the successor Bombay State and the principal successor State of Madhya Pradesh and the lands and goods, treasury and bank balances and other assets which remained in the eight districts of Vidarbha which were transferred to the State of Bombay were transferred to the State of Bombay and the other property of similar nature which was in the districts which formed part of the new State of Madhya Pradesh were given to the new State of Madhya Pradesh.

8. Similarly, Sections 83 and 84 are with regard to liabilities of the successor States

with regard to the liabilities of the existing State. Section 85 deals with the liability of the existing State in respect of the provident fund account of a Government servant. Section 86 which deals with pensions reads thus:

"The liability of the existing States in respect of pensions shall pass to, or be apportioned between the successor States in accordance with the provisions contained in the Fifth Schedule."

From the reading of the various sections of Part VII, it is clear that the liability in respect of the pensions under Section 86 of the Act as on the appointed day, namely, 1st November 1956, either passes to a successor State if there is only one successor State, or is to be apportioned between successor States, if there are more than one successor States, in accordance with the provisions contained in the Fifth Schedule. According to the definitions which we have referred to already, the State of Bombay after 1st November 1956 would be the successor State to the existing State of Madhya Pradesh on the definition of "successor State" given in Section 2 (o), because it is the State of Bombay to which part of the territories of the existing State of Madhya Pradesh has been transferred by the provisions of Part II. So far as the new State of Madhya Pradesh is concerned, it was not an existing State. The existing State was the old Madhya Pradesh State, as it stood before 1st November 1956, and the new State of Madhya Pradesh cannot squarely fall within the definition of "successor State" as given in Section 2 (o) of the Act. The new Madhya Pradesh State, however, can be the "principal successor State" within the meaning of Section 2 (m) (i) of the Act as the name of the new State is the same as the existing State of Madhya Pradesh.

9. The question whether in relation to the existing State of Madhya Pradesh, both the State of Bombay and the new State of Madhya Pradesh are successor States or not, has not been pointedly considered in any reported decisions, but some reference is to be found in *W. W. Joshi v. State of Bombay*, AIR 1959 Bom 363, where the State of Bombay as well as the new State of Madhya Pradesh have been taken to be the successor States of the former State of Madhya Pradesh and out of the two successor States the State of Madhya Pradesh is the principal successor State of the former State of Madhya Pradesh. Similar observations are to be found in a Full Bench decision of this Court in *State v. Dr. Sarjooprasad Gumasta*, First Appeal No. 101 of 1959, decided on 14th June 1966 (Bom) (FB), and in the Division Bench decision thereafter in the same case decided on 6th of March 1967 (Bom). Nothing, however turns in the present case on the question whether both the Bombay State or the new Madhya Pradesh State are the successor States of the former State of Madhya Pradesh or only the State of Bombay, and now the State of Maharashtra, is

the successor State and the State of Madhya Pradesh is the principal successor State.

10. As said earlier the scheme of Part VII of the States Reorganisation Act shows that the assets as on 1-11-1956 were to be divided between the two new States which are successors of the old State of Madhya Pradesh on the principles laid down in the several provisions of Part VII of the Act. Similarly, the successor States were to be fastened with the liabilities of the existing State of Madhya Pradesh as on 1st of November 1956 and the liability with respect to pensions under Section 86 was the liability which was on the existing State on 1st of November 1956. It appears that just as in the case of other assets, namely, the treasury, cash balances, public debts and such other matters, the said property was to remain where it was, namely, that these cash balances etc., were not to be disturbed, but were to go to the State to which those districts have been attached, similarly, with respect to pensions, it appears that those pensioners who used to draw pensions from the treasuries of the eight districts of Vidarbha which were transferred to the State of Bombay were a liability on the new State of Bombay and those pensioners who used to draw their pensions on 1-11-1956 from the then districts which now formed part of the new Madhya Pradesh State were to be a liability of the new State of Madhya Pradesh or the principal successor State. In order to make an equitable division, an apportionment had to be made between the two States and that was to be done by the Central Government and on such apportionment being made if it was found that one State paid more to the pensioners in its area than what was due under the apportionment, then the other State was to reimburse the former State to that extent and vice versa. This is worked out by means of the Fifth Schedule to the Act. Paragraph 1 of the Fifth Schedule provides that subject to the adjustments mentioned in paragraph 3, the successor State or each of the successor States shall, in respect of pensions granted before the appointed day by an existing State, pay the pensions drawn in its treasuries. Paragraph 1, therefore, has clearly reference to a liability of the new State in respect of pensions as it existed immediately before the appointed day and it were to continue to pay the pensions to those pensioners who were being paid from the treasuries immediately before the appointed day. Paragraph 2 has no application to the present case as it applies to officers or employees who retired or proceeded on leave preparatory to retirement before the appointed day, but whose claims for pensions are outstanding immediately before that day. In paragraph 3, a method is given as to how the liability is to be apportioned between the successor States. We reproduce Para. 3 below:

"In any case where there are two or more successor States, there shall be computed, in

respect of the period commencing on the appointed day and ending on the 31st day of March 1957, and in respect of each subsequent financial year, the total payments made in all the successor States in respect of the pensions referred to in paragraphs 1 and 2. The total representing the liability of the existing State in respect of pensions shall be apportioned between the successor States in the population ratio and any successor State paying more than its due share shall be reimbursed the excess amount by the successor State or States paying less."

This will show that the payments made in the successor States have relation to the pensions referred to in paragraph 1 which would mean the pension payable in that successor State as on 1-11-1956 and it is on that basis that the apportionment has to be made in the population ratio and the consequent reimbursement by one successor State to the other. The other paragraphs of the Schedule have no reference to the present case.

11. It thus appears from the scheme of the States Reorganisation Act, including the Fifth Schedule, that for the purpose of transferring the liability of the existing States to the successor States, the material point of time that has to be taken into consideration is the appointed day, namely, 1st of November 1956, on which the liability existed. There is no provision with respect to the future liabilities of the State. It will thus appear that with respect to those pensioners who have retired prior to 1-11-1956 the liability of the successor State would be on the basis of the liability existing on 1-11-1956 with respect to such pensioners and it seems to us that subsequent to 1-11-1956, by any unilateral act of one of the successor States, the other successor State cannot be bound. Section 86 of the Act deals with the liability of the existing State and any liability which is incurred after 1-11-1956 by a successor State could not be said to be a liability of the existing State and as such, one successor State will not be bound by the liability which has been created by another successor State. This, however, proceeds on the footing that there are two successor States to the existing State. In this view, therefore, the State of Bombay which is the successor State to the existing State of Madhya Pradesh would not be liable to give the increase in the pension which has been granted by the present State of Madhya Pradesh to its pensioners and the petitioner cannot lay a claim for such increase in the pension as has been made by the present State of Madhya Pradesh. The petitioner's claim against the State of Maharashtra for the increase in pension which has been granted by the State of Madhya Pradesh must, therefore, be rejected. It is stated by the learned Assistant Government Pleader that some of the pensioners who have settled down in the Vidarbha Region have accepted the increase in the pension which has been granted by the State of Maharashtra. The

petitioner, however, has not accepted the said increase given by the State of Maharashtra because of the dispute which he has raised.

12. As regards the State of Madhya Pradesh, the learned counsel for the State Mr. W. K. Sheorey urges that the State of Madhya Pradesh is not liable for the claim of the present petitioner. We are not deciding in this case whether the State of Madhya Pradesh is liable to give the amount to the petitioner by which the pension has been increased by that Government from time to time. The Full Bench of this Court in Misc. Petn. No. 335 of 1956, D/-23-7-1958 = (AIR 1959 Bom 122), Dr. Sarjuprasad Gumasta v. State of Madhya Pradesh, has held that this Court would have no jurisdiction to issue a writ against the State of Madhya Pradesh as the jurisdiction of this Court extends only to the territorial limits of the State of Bombay and now the Maharashtra State. It is true that Article 226 of the Constitution has subsequently been amended and given jurisdiction to the High Court to issue a writ to any Government Authority or person even though the seat of the Government or authority or the residence of such person is not within those territories, provided however that the cause of action wholly or in part arises for the exercise of such power within the territorial jurisdiction of the High Court. Such is not the case here. It cannot be said that any part of the cause of action to claim the increase given by the Madhya Pradesh State, as in existence to-day, arises in any part of the State of Maharashtra. We are, therefore, not in a position to grant any relief to the petitioner so far as the Madhya Pradesh Government is concerned. The petitioner, therefore, is not entitled to any relief claimed by him, either against the State of Maharashtra or against the State of Madhya Pradesh, in the present petition.

13. The petition, therefore, fails and is accordingly dismissed, but in the circumstances, we make no order as to costs.

14. VIMADALAL J.: I have heard the judgment of the Court just delivered by my brother Padiye. I would like to add that, as a matter of plain language, as well as, as a matter of legislative intentment, the words "the liability of the existing States" in Section 36 of the States Reorganisation Act, 1956, must be read as, "the existing liability of the existing States". If an existing State chooses to create a higher or an additional liability in future, the provisions of Sec. 86 of the said Act would not be attracted, and there is no other statutory provision which would pass on such higher or additional liability, or even an apportioned part of it, to the successor State.

Petition dismissed.

AIR 1970 BOMBAY 122 (V 57 C 20)

(AT NAGPUR)

ABHYANKAR, J.

Jagpalsingh Sajjansingh, Petitioner v. Digambar Tulsiram and others, Respondents. Special Civil Appln. No. 1022 of 1966, D/-13-9-1968.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958) Ss. 114 and 111 — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Bombay Revenue Tribunal Procedure Rules, 1959, Rr. 9 and 11 — Revision filed in time returned on ground that documents were not enclosed — Application refiled with necessary enclosures — Application cannot be rejected as being filed beyond time prescribed by S. 114.

Where a revision application filed under Section 114 of the Act to the Tribunal within the time prescribed under that Section is returned on the ground that it did not accompany the documents required by R. 11 framed under the Act, and the application is refiled after due compliance thereof, it cannot be rejected on the ground that the application so refiled was beyond the time prescribed under Section 114 of the Act. AIR 1966 Bom 194, Foll. (Para 22)

The Legislature itself having fixed the limitation within which a revision application has to be filed under Section 114 of the Act, the rules made under Section 111 (2) cannot possibly be interpreted in any manner restricting that right by requiring the applicant to file some documents on the peril of his application being considered beyond time if such filing comes to be made after the period of limitation fixed by the statute. If the rules framed under Section 111 (2) do not in any way affect the period of limitation fixed and if a revision application is filed within the period of limitation fixed by the statute, then the failure of the applicant to comply with the provisions of any of the rules with the initial application presented within time will not entail rejection of the application on the ground of limitation because the compliance with the rules comes to be made at a later stage. (Paras 16, 20)

(B) Constitution of India, Article 227 — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Ss. 114 and 111 — Dismissal of revision application by Revenue Tribunal erroneously treating it to be time-barred — It amounts to failure to exercise jurisdiction vested in it — Jurisdiction of High Court is not restricted in any manner from considering validity of order of Tribunal. (Para 21)

Cases Referred: Chronological Paras
(1967) AIR 1967 Pat 153 (V 54) =
1966 ELJR 632, Imperial Tobacco
Co. of India Ltd. v. Asst. Labour
Commr., Patna

- (1966) AIR 1966 Bom 194 (V 53) =
1966 Mah LJ 289, Smt. Salubai v.
Chandu 22
- (1964) AIR 1964 SC 1336 (V 51) =
(1964) 3 SCR 495, M. L. and B.
Corporation Ltd. v. Bhut Nath 19
- (1956) AIR 1956 Bom 86 (V 43), Charity
Commr. v. Padmavati 19
- (1937) AIR 1937 Bom 64 (V 24) =
ILR (1937) Bom 421, Nemichand v.
Chaturbhuj Damji 19
- (1934) AIR 1934 Mad 306 (V 21) =
ILR 57 Mad 560 (FB), Thirumala
v. C. K. Anavemareddi 19
- (1908) ILR 32 Bom 14 = 9 Bom LR
1138, Chunilal Jethabhai v. Dahya-
bhai Amulkha 20
- (1906) ILR 30 Bom 329 = 10 Bom LR
184, Karsondas Dharamsey v. Bai
Gungabai 19
- S. V. Natu and N. S. Munshi, for Peti-
tioner; M. S. Agarwal, for Respondents
(Nos. 1 to 3.)

ORDER: The petitioner, who is the landholder, invokes the jurisdiction of this Court under Article 227 of the Constitution, challenging an order of the Maharashtra Revenue Tribunal holding that his revision application against the order of the Special Deputy Collector in appeal, which order in its turn reversed the order of the Naib Tahsildar in favour of the petitioner, was barred by limitation and therefore rejected.

2. The petitioner claims to be landholder of field survey No. 18/2, area 24 acres 30 gunthas of Koltek, tahsil Amravati. He filed an application on 27-3-1961 for possession of land having previously given a notice under Section 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. The petitioner wanted the land for personal cultivation. The respondent Tulsiram who was originally impleaded as the respondent died on 17-10-1961 and in his place the present respondents, Digambar and Ambadas sons of Tulsiram and Deokabai wife of Tulsiram, were brought on record at their instance. The respondents resisted the application on several grounds, one of the grounds being that the petitioner had claimed the right to terminate the lease of the field on the ground that the field had been allotted to him in a family partition on 26-6-1959. The Naib Tahsildar, on a consideration of the material before him, held that the petitioner was entitled to possession of one-half area of land from survey No. 18/2. The application to that extent was therefore allowed.

3. Against this order which was passed on 9-9-1963, the respondents preferred an appeal. It seems to have been argued before the appellate authority that the claim of the petitioner was hit by the provisions of Section 38 (7) of the new Tenancy Act and the application was therefore not tenable. The appellate authority, in a short order, disposed of the appeal on its view of the effect of sub-section (7) of Section 38 of the new

Tenancy Act. It was held that inasmuch as the petitioner had acquired the field as a result of the partition dated 26-6-1959, he had no right to terminate the tenancy of the respondents. The order of the Naib Tahsildar was set aside and the application of the petitioner was dismissed. This order was passed on 30-6-1964.

4. Against this order, the petitioner preferred a revision application under Sec. 111 of the new Tenancy Act. The application was presented through counsel on 22-9-1964. It is common ground that this application was accompanied by a certified copy of the order of the appellate authority but not also with a certified copy of the order of the Naib Tahsildar.

5. The Deputy Registrar of the Revenue Tribunal issued a notice to the counsel for the petitioner who had presented the revision application calling upon him to appear before him on 9-10-1964. There is a printed pro forma on record under the signature of the Deputy Registrar dated 9-10-1964 showing that the Deputy Registrar found certain defects and one of the defects was that a certified copy of the Naib Tahsildar's order was not filed along with the revision application. The order states that the revision application involves defects and the revision application was therefore to be returned. It however appears that the actual order directing the petitioner through his counsel that the revision application may be re-filed within a period of 15 days from the date of the receipt of this letter after curing the defects which have been pointed out was passed on 23-9-1964. The revision papers however seem to have been actually returned on 28-10-1964.

6. It is the case of the petitioner that he had applied for a certified copy of the order of the Naib Tahsildar as far back on 9-12-1963 through his counsel at Amravati. But the copy was not received till the revision papers were returned to his counsel at Nagpur. He waited for some more time for the receipt of the copy of the order of the Naib Tahsildar but ultimately made a fresh application on 26-3-1965 through post for a certified copy of the order of the Naib Tahsildar again. The copy was despatched on 30-10-65 and purports to be received on 1-11-1965 at Nagpur and the revision was represented along with the certified copy on 9-11-1965.

7. On 17-11-1965 the Deputy Registrar of the Tribunal has noted in the order-sheet that the revision application should be put up before the Bench for orders on admission on 9-12-1965. The counsel for the petitioner was informed of this date also. On 9-12-1965 it appears the respondents were also represented by their counsel and opposed the admission of the revision application on the ground that it was time-barred. To this objection, it was urged on behalf of the petitioner through his counsel that the delay in re-filing the revision application was due to the fact that the petitioner had twice ap-

plied for a certified copy of the order of the Naib Tahsildar and that while on his first application he was informed that the record was not traceable, a copy was supplied on his second application late. The petitioner was directed to file an application with affidavit, stating the grounds for delay within a month with necessary documents and the respondents were to file a reply, and subject to consideration of limitation, the revision application which was already admitted was fixed for hearing parties on 16-2-1966.

8. On this date, the counsel for the petitioner filed a certified copy of the application dated 9-12-1963 which his counsel Mr. Kadu had made at Amravati. The respondents filed a reply to the application for condoning the delay. The matter was ultimately heard on 29-7-1966 and the Tribunal dismissed the revision application as time-barred. It is this order which is under challenge in this petition.

9. The Tribunal has found that the revision application, when originally filed on 22-9-1964, was within limitation. But the papers were returned on 28-10-1964 and the revision application was re-filed on 9-11-1965 and the question that was posed for decision was whether this period from 28-10-1964 to 9-11-1965 should be condoned. The Tribunal has observed that the petitioner should have filed an application for a copy of the Naib Tahsildar's order about the same time when he applied for a copy of the order of the Deputy Collector for filing the revision application before the Tribunal. It is also observed that the petitioner did not file the application till long after 28-10-1964 when the papers were returned by the Deputy Registrar of the Tribunal. When the copy was received by the petitioner on 30-10-1965, the Tribunal has observed that the revision papers were not filed till 9-11-1965, and this delay of nine days has also not been explained.

10. In paragraph 6 of its order, the Tribunal has observed:

"It is thus clear that the revision application was re-filed after the inordinate delay. Part of it is not properly explained in the applicant's affidavit. An instance of this is the period from 30-10-65 to 9-11-65. Another instance is when the revision application had been returned to the applicant on 28-10-64, a copy of the Naib Tahsildar's order had not been applied for till 26-3-65."

The Tribunal has further observed that the petitioner could not claim to have been diligent throughout the period from 28-10-1964 till 9-11-1965 when the revision application was re-filed.

11. In support of this petition, it is contended that the Tribunal has acted in excess of its jurisdiction in rejecting the revision application as barred by limitation. It is contended that the period of limitation within which the revision application has to be filed

before the Tribunal under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, is fixed by statute under Section 114 of the Act, and that period is 60 days from the date of the order of the Tahsildar or the Collector as the case may be. In this case, it is the order of the Collector which is revisable by the Tribunal in exercise of its powers under S. 111 (1) of the Tenancy Act. There is no specific provision in the Act enabling the Tribunal directly to exercise its revisional powers over the orders of the Tahsildar or the Mamlatdar in the first instance. The revisional powers are so provided that they operate only on the orders of the Collector though that order may itself come to be passed in exercise of its appellate jurisdiction under Section 107 of the Tenancy Act. It is further pointed out that Section 114 does not require a copy of the order sought to be revised to be filed. In contradistinction with this, attention was invited to sub-section (2) of Section 107, which speaks of appeals against the order of the Tahsildar or the Tribunal to be filed before the Collector. That sub-section says that every petition for an appeal under sub-section (1) shall be in the prescribed form and shall be accompanied by a certified copy of the order to which objection is made unless the production of such copy is dispensed with. It is therefore contended that the statute providing for revision, not having made it incumbent on the applicant to file a certified copy, or, for the matter of that, a copy of any order, the Tribunal was not justified in making the right of revision given to the petitioner more onerous on account of the rules framed under Section 111(2) of the Tenancy Act prescribing the procedure to be followed by the Revenue Tribunal in deciding applications under Section 111. Alternatively, it is contended that even under the rules so framed, there is no provision entitling the Tribunal or any authority to dismiss an application for revision if it is otherwise filed in time to reject it on the ground that any other documents or papers which are required to accompany the revision application by virtue of these rules came to be filed at a later date, that is, beyond the period of limitation prescribed by Section 114 of the Tenancy Act.

12. The learned counsel for the respondents has generally supported the order of the Tribunal. His contention is that if the rules require an application for revision to be filed in the prescribed form containing the prescribed details and to be accompanied by prescribed documents, failure to file the application in conformity with the rules amounts to failure to file the revision application at all. It is therefore urged that the revision should be treated to be filed only when all the papers required to accompany the revision application came to be filed, and if such filing is beyond the period of limitation fixed by law, then unless the applicant satisfied the Court that there was sufficient cause for not filing the revision application

in accordance with the rules, the revision application must fail on the ground of limitation.

13. Before examining the rival contentions, it is necessary to notice what the rules made by the State Government in exercise of the powers under Section 111(2) of the new Tenancy Act actually require a litigant to do when he has to file a revision application under Section 114 of that Act. It appears that the existence of these rules framed as far back as January 1960 and published in the Bombay Government Gazette Extraordinary 19-1-1960 is not known sufficiently even to the counsel practising before the Tribunal or this Court, much less to the litigants. Arguments proceeded up to a stage on the footing that there are no such rules and that the Tribunal purported to follow the Regulations made under the Bombay Revenue Tribunals Act. The learned Standing Counsel appointed to appear before the Tribunal however assisted in finding out the relevant rules and a copy of the Gazette containing the rules was made available at the hearing at a later stage. These rules are called the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Bombay Revenue Tribunal Procedure Rules, 1959. Chapter III of these rules makes provision for presentation, registration and admission of applications. The Rules relevant for our consideration are rules 9 and 11. Under Rule 9 an application for revision may be presented in person by the applicant or by his duly appointed agent or lawyer to the Registrar or sent to him by post. There are certain requirements of sub-rule (2) of Rule 9 which are prescribed to be observed, such as writing of the application in ink in legible hand, specification of the name and address of the applicant and the opponent, specification of the provisions of law under which it is filed, the grounds of application and the relief claimed. Under clause (f) of sub-rule (2) of Rule 9, if the application is filed after the expiry of the period of limitation, then the applicant has to state how the applicant claims that it is in time. The Registrar is enjoined not to accept any application unless it complies with the requirements laid down in clauses (a) to (g) of sub-rule (2) of Rule 9. Then follows sub-rule (4) which is as follows:

"Every application presented under sub-rule (1) shall be accompanied by

(a) the decision or order (either in original or a certified copy thereof) in respect of which such application is made;

(b) If the decision or order referred to in clause (a) is itself made in appeal against any decision or order, then also such latter decision or order either in original or a certified copy thereof; and

(c) as many copies thereof legibly written in ink or typewritten as there are opponents.

14. The original Rule 11 of these Rules was substituted by a new Rule 11 by an amendment effective from 29-7-1963 and it

is this substituted rule which would govern the petitioner's application for revision in this case. It may be mentioned that these Rules have again been substituted by a fresh Rule 11 effective from 16-2-1968, but we are not concerned with this latter Rule in this petition. Rule 11 is divided into seven sub-rules. Under sub-rule (1) the Registrar receiving the application has to fix a date on which the applicant, or his agent or lawyer is required to appear. Under sub-rule (2) the Registrar has to examine the application within seven days and to satisfy himself that the persons presenting it had authority to do so and that it conformed to the provisions of the Act, the Tenancy Rules and these Rules. Thus, the Registrar has to satisfy himself, among other things, that the provisions of Rule 9(4) have been complied with. Then follows sub-rules (4), (5) and (6) which require consideration and they are in the following terms:

"(4) Where the registrar is of opinion that the application does not conform to any of the conditions specified in sub-rule (2), he shall, on the date on which the applicant is required to attend before him, return the application to the applicant or his duly authorised agent or lawyer with an endorsement specifically pointing out the defects on account of which the application could not be registered. If the defects are such as can be remedied, the endorsement shall also state the period not exceeding fifteen days within which the application may be refiled after curing the defects.

(5) If the party concerned or his duly authorised agent or lawyer refiles the application within the period prescribed under sub-rule (4) and cures all the defects pointed out, the application shall on payment of the fee provided by sub-rule (4) of Rule 47 be registered.

(6) If the party concerned or his duly authorised agent or lawyer refiles the application after the period prescribed under sub-rule (4) or fails to remedy or explain any of the defects pointed out while refiled the application, the Registrar shall, after registering the application, proceed under Rule 13".

Under sub-rule (7), if it appears to the Registrar that the application conforms to all the conditions specified in sub-rule (2) and with the provisions of the Act, but has been presented after the expiry of the limitation prescribed therefor by or under any law, the Registrar shall, after giving notice to the opponent, place it before the Tribunal for orders.

15. The contention of the learned counsel for the petitioner in the first instance is that Rule 11, or Rule 9, or for the matter of that, any of the rules framed under Section 111(2) of the new Tenancy Act, does not contain any provision that failure to observe these rules will entail dismissal of the revision application if it is otherwise tenable, that is, made within the time prescribed by Section 114 and otherwise maintainable. It

is further contended that the defect in the instant case of the petitioner was his failure to file a certified copy of the order of the Naib Tahsildar. It was not possible for the Deputy Registrar to fix a period of 15 days only for obtaining such a copy and in view of the previous experience of the petitioner, he could not have obtained a copy within 15 days. In this connection, it is pointed out that an application for a copy made to the Naib Tahsildar as far back as 9-12-1963 was not disposed of nor rejected nor a copy supplied for almost over a year till the revision application came to be filed. The petitioner also points out that even when the fresh application for a copy was made to the Naib Tahsildar on 26-3-1965, no copy was available till as late as 30-10-1965, i.e. after a period of seven months. In other words, what is complained of is the fact of inordinate delay and gross carelessness in the matter of delivering copies in the Offices of subordinate authorities — it could not be said that the petitioner could have by normal procedure obtained a copy within 15 days and been able to file it. But apart from this aspect, it is contended that sub-rule (6) of Rule 11, in terms states that if the party concerned refiles the application after the period prescribed under sub-rule (4), the Registrar shall, after Registering the application, proceed under Rule 13, Rule 13 requires that where an application has been registered, the Registrar shall, as soon thereafter as possible, place it before the Tribunal for preliminary hearing. It is urged that there is no provision either in sub-rule (6) of Rule 11 or in any other Rule that the filing of the revision application after due compliance, though beyond the period fixed by the Registrar under sub-rule (4) of Rule 11, entails any penalty such as dismissal for late filing, provided the initial application has been filed within the time prescribed by law. In my opinion, there is considerable force in this contention and it must be accepted.

16. But what is even more clear to me is that the Legislature itself having fixed the limitation within which a revision application has to be filed under Section 114 of the Act, the rules made under Section 111 (2) cannot possibly be interpreted in any manner restricting that right by requiring the applicant to file some documents on the peril of his application being considered beyond time if such filing comes to be made after the period of limitation fixed by the statute. The most important fact that stares one in the face in this petition is and there is no dispute about it — that the petitioner had filed his revision application with a certified copy of the order challenged, namely, the order of the Deputy Collector, well within time. The petitioner's contention therefore is that he had complied with the provisions of the Act by filing the revision application in time and his failure to comply with the other provisions of the rules such as filing accompaniments etc., for which

on account of the provision made in the rules, the revision application was returned to him for being re-filed along with the accompaniments, cannot entail the consequence of the rejection of his revision application as time-barred, when the original filing was well within time.

17. It is also urged, for which again there was no reply, that there is no limit of time fixed by the Rules for re-filing of an application for revision with the necessary accompaniments if the sub-rule could not have been properly called in aid. Even assuming that sub-rule (4) has been properly used, sub-rule (6) of Rule 11 does not prescribe any period of time; but on the contrary, assumes that if a party concerned re-files the application after removing the defects such application has necessarily to be registered and put up for admission.

18. In contrast with this, the provisions of sub-rule (7) of Rule 11 may be compared. Under sub-rule (7), an application filed beyond time, though with the necessary accompaniments and compliance with the other provisions of the rules, has to be placed before the Tribunal for orders on the point of limitation after hearing the opposite side. Thus, the only case in which the question of limitation can be properly raised for adjudication is where the initial filing of the revision application is itself beyond the limitation prescribed under Section 114. It does not appear that in any other case i.e. where the accompaniments are filed or other removal of defects is done late, the rules intend to penalise an applicant for revision who has filed his application for revision in time by non-suiting him on the ground that the compliance with the Rules has been made beyond a particular time.

19. The learned counsel for the respondents relied upon the following decisions on the assumption that this was a case governed by either Section 5 or Section 12 of the Limitation Act. These decisions are: *Thirumala v. C. K. Anavemareddi*, AIR 1934 Mad 306 (FB); *Nemichand v. Chaturbhuj Damji*, AIR 1937 Bom 64; *Karsondas Dharamse v. Bai Gungabai*, (1906) ILR 30 Bom. 329; *M. L. and B. Corporation Ltd. v. Bhutnath*, AIR 1964 SC 1336; *Charity Commissioner v. Padmavati*, AIR 1956 Bom. 86 and *Imperial Tobacco Co. of India Ltd. v. Asst. Labour Commr., Patna*, AIR 1967 Patna 153.

20. I do not think it is necessary to consider any of these decisions because they do not assist the respondent in view of the Full Bench decision of this Court in *Chunnial Jethabhai v. Dahyabhai Amulakh*, (1908) ILR 32 Bom 14. In that case a second appeal came to be filed within time accompanied by the judgment of the lower appellate Court but not accompanied by a copy of the order of the first Court in execution proceedings as required by Rule 25 of the rules framed in this Court. A copy of the order of the first Court was supplied much later, that is,

almost a year and two months after the appeal was filed. The Registrar treated the second appeal as presented on the later date when the copy of the order of the first Court was filed, and treating it as time-barred, directed that it should be returned. Against this order a civil application was filed which was heard by a Bench of four Judges including the acting Chief Justice. On a consideration of the relevant provisions, it has been ruled that the accompaniments directed under Rule 25 of the Bombay High Court Rules are extraneous to the memoranda of appeals; application and appeals in execution and the rule expressly does not fix any time of which the documents mentioned in clauses (2) and (3) are to accompany the memoranda etc., and therefore an appeal etc., if presented in time, is validly presented for the purposes of the Limitation Act if it is accompanied by the copies required by the Code of Civil Procedure. In my opinion, this decision fully covers the principle to be followed in interpreting the obligations of the litigant in filing a revision application under the provisions of Section 111 read with Section 114 of the Tenancy Act, vis-a-vis the rules framed under Section 111(2) of that Act. The limitation for filing a revision application having been fixed by the statute itself and further that provision not requiring the petitioner to file the documents accompanying the application for revision, the rules made under Section 111(2) regulating the procedure before the Tribunal cannot, as it were, indirectly be read as part of Section 114, so as to make the right of filing a revision more onerous in the matter of limitation. If a rule of this Court requiring certain copies to be filed with a memorandum of second appeal, which copies are not required to be filed under the Code of Civil Procedure which gives the right of appeal, cannot be treated as a necessary requirement in exercising the right of filing an appeal, on parity of reasoning, the petitioner could well claim that he has complied with the provision of Section 114 read with Section 111 of the new Tenancy Act and his revision application should not be treated as time-barred. When this decision of this Court was brought to the notice of the learned counsel for the respondents, he was fair enough to state that he was unable to distinguish it on principle. It must therefore be held that if the rules framed under Section 111(2) do not in any way affect the period of limitation fixed and if a revision application is filed within the period of limitation fixed by the statute, then the failure of the applicant to comply with the provisions of any of the rules with the initial application presented within time will not entail rejection of the application on the ground of limitation because the compliance with the rules comes to be made at a later stage.

21. It was then urged, though somewhat faintly, that this Court should not exercise its extraordinary jurisdiction under Article 227 of the Constitution, even assuming that

the order of the Tribunal was erroneous, because the Tribunal, it is urged, had the power to decide the question rightly as well as wrongly. I think that this is over-simplification of the issue involved in this case. Here the petitioner's revision application has been dismissed on the ground that it is barred by limitation, which finding is not sustainable. By so dismissing the application, the Tribunal has come to an end to the detriment of the interests of the petitioner as the application stands rejected. This is not a case where an interim order has been passed and has been challenged. As a result of the finding of the Tribunal that the revision application is barred by limitation, the petitioner's remedy successfully to challenge the order of the Deputy Collector on merits has been denied to him. Thus in this case there is a failure to exercise jurisdiction vested in it by law. If the Tribunal by erroneous decision as to limitation declines to adjudge the matter on merits, I do not think that the jurisdiction of this court is restricted in any manner from considering the validity of the order of the Tribunal under these circumstances.

22. The order under challenge before the Tribunal, namely, the appellate order of the Deputy Collector, rejects the application of the petitioner on the short ground that he claimed the property as a result of family partition in 1959. The Deputy Collector could not have rejected the application of the petitioner on this ground in view of the decision of this Court in *Smt. Salubai v. Chandu*, 1966 Mah LJ 289 = (AIR 1966 Bom 194). In view of this decision it is necessary not only to set aside the order of the Tribunal but also the order of the Deputy Collector which is *ex facie* not correct, and remand the matter to the Deputy Collector for a fresh decision of the appeal according to law. The orders of the Tribunal and the Deputy Collector are therefore set aside and the matter is remanded to the appellate authority for being considered at the appellate stage.

23. During the course of the arguments it has been observed that the exact import of the various sub-rules of Rule 11 cannot be properly appreciated. The rule-making authority may well consider whether it is advisable to make a provision of returning the original revision application itself only because the application does not comply with certain provisions of the rules. A better practice to regulate such matters would be to provide for retention of the revision application but give time to the erring party to comply with the provisions of the rules within a specified time. When a document or application is filed before the Tribunal the document and the application becomes a part of the record of the Tribunal and the Tribunal is in seisin of the matter judicially. It is not advisable in such circumstances that these papers should be allowed to be returned to the parties. A better course

would appear to be to fix a time within which compliance with the provisions of the rules may be required to be made and failure so to comply may entail dismissal of the application for want of due prosecution. Return of papers involves many difficulties, there being no reasons of finding out at a later stage what documents were not in fact filed or were filed if a dispute is raised about such matters. The Registrar may be relied of this onerous duty by a suitable modification of the rules if found necessary.

24. There is another rule which has been brought to my notice, namely, Rule 45 which permits return of documents and certified copies filed by parties with the application. In fact, Rule 45 seems to suggest that the certified or original copies of documents filed with the application shall ordinarily be returned to the party concerned. In framing this rule, it seems to have been lost sight of that more often than not, the orders of the Tribunal are brought before this Court invoking its superintending jurisdiction under Articles 226 and 227 of the Constitution. If a document comes to be filed before the Tribunal and its relevancy or admissibility or its effect is adjudicated upon, it is not proper that such a document should be returned. In fact, it is contrary to all accepted rules of procedure that such documents, even though they are certified copies, should be returned to the parties until the lis is finally decided. In fact, there is no reason why certified copies of the documents should be returned at all. I have come across many instances where even original documents are returned to the parties without taking care to retain certified copies of the documents on record. In fact, according to accepted rules of procedure in all Tribunals exercising judicial power, documents filed by parties are not to be returned until the lis is finally decided, and even after the final decision, until such time as may be prescribed by the rules. A practice seems to have grown in the Tribunal perhaps in obedience to Rule 45, and also in subordinate Courts like the Tahsildar, the Deputy Collector etc. in these proceedings where documents solemnly admitted on record on behalf of either party are just returned for the asking. Return of documents makes it almost impossible for a superior Court to find out what the document was and what was its relevance or importance in the adjudication which comes in review. The State Government may well consider whether it is necessary to have a provision like Rule 45, or at any rate in its present form. The documents filed before the Tribunal or the subordinate Courts are part of the record and must be preserved until the rights are finally decided.

25. The result is that the petition is allowed. the orders of the Tribunal and the Deputy Collector in appeal are set aside and the matter is remanded to the appellate authority for a fresh decision according to law.

As the petition was opposed, the petitioner will be entitled to his costs.

Petition allowed.

AIR 1970 BOMBAY 128 (V 57. C 21)
PATEL AND WAGLE, JJ.

Southarn Chemical Works, Appellant v. Mohamed Husein Fakruddin Maniar, Respondent.

A. F. O. D. No. 193 of 1962, D/- 24-1-1969 against decision of Civil J. Senior Division at Sangli in Spl. C. S. No. 30 of 1959.

Contract Act (1872), Ss. 23, 205 — Drugs Act (1940), S. 18 — Drugs and Cosmetics Rules, Rule 61 — Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void — Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable — (Specific Relief Act (1877), Ss. 21 (b), 21 (a), 19).

By an agreement of agency a trader was appointed as the selling agent of the medicines manufactured by a certain firm. By that agreement the trader undertook not to discontinue the agency for a period of three years and if he did so, he would have to pay damages to the firm. The trader held a licence for retail trade. But soon after he obtained wholesaler's licence under the Drugs Act but even then, by notice, he terminated the agreement on the ground that the agreement was void and illegal as he had no wholesaler's licence when the agreement was entered into.

Held, that the agreement could not be said to be a void agreement and the firm was entitled to claim damages. (Para 10)

There is nothing in the Drugs Act to show that no agreement can be entered into for agency unless and until the person who gives the agency is satisfied that the agent holds the licence. It only means that after the agreement is entered into between the parties, each party must do his best to fulfil his part. If per chance one party or the other cannot obtain such consent or licence then of course the agreement would be unenforceable but that would be not by reason of the fault or neglect of the party but because the licensing authority refused to grant the licence. It is only if the parties with a deliberate desire to evade the law enter into the contract to do something which is not legal, then the agreement must be regarded as void. (Para 6)

The underlying principle of such cases is that unless the transaction is itself of such a nature that it contravenes the law, it must be enforced by requiring the defendant to take such steps as are necessary in that direction. Much more so would be the case

where the suit is not for specific performance but for damages where, the Court cannot specifically enforce the agreement of agency since it would be impossible to supervise the carrying out of it. The plaintiff would in such a case not be barred from asking for damages where the defendant does not carry out the contract not because the law prevents it but because he refused to take any action to satisfy the conditions imposed by law upon him before fulfilment of the contract. AIR 1964 SC 978 and AIR 1965 SC 484 and (1965) 67 Bom LR 908 and (1917) 2 KB 784 and (1940) 4 All ER 335, Foll.; AIR 1960 SC 213, Ref.; AIR 1923 Mad 626 and (1888) ILR 12 Bom 422 and AIR 1963 SC 107, Disting. (Para 7)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 484 (V 52) =

ILR (1964) 1 All 355, Dy. Director of Consolidation v. Deen Bandhu 7

(1965) 67 Bom LR 908 = ILR (1966) Bom 460, Tukaram Zipre v. Baban Dhondu 7

(1964) AIR 1964 SC 978 (V 51) = (1964) 2 SCR 495, Mrs. Chandnee Widyavati v. Dr. C. L. Katial 7

(1963) AIR 1963 SC 107 (V 50) = 1963-3 SCR 687, V. Narasimha Raju v. Gurumurthy Raju 9

(1960) AIR 1960 SC 213 (V 47) = 1960-1 SCR 861, Kedar Nath v. Prahlad Rai 10

(1940) 1940-4 All ER 335 = 57 TLR 47, Taylor and Co. v. Landauer and Co. 8

(1923) AIR 1923 Mad 626 (V 10) = 18 Mad LW 564, Janu Sait v. Ramaswami Naidu 9

(1917) 1917-2 KB 784 = 87 LJKB 101, H. O. Brandt and Co. v. H. N. Morris and Co. 8

(1888) ILR 12 Bom 422, Hormasji Motabhai v. Pestanji Dhanjibhai 9

Hemendra Shah i/b. M/s. Mody Shambhu, Attorneys, for Appellant; B. R. Naik, for Respondent.

PATEL J.:— This is a plaintiff's appeal against the dismissal of his suit for damages and it arises under the following circumstances:

2. The plaintiff-firm manufactures Diamond Apicin and Diamond Jant-pudis at Miraj. The defendant is a trader at Sholapur. By an agreement dated January 2, 1959 between the plaintiff and the defendant, the defendant was appointed as the selling agent of the plaintiff's medicines for the Districts of Sholapur and Gulbarga, and for the Talukas of Humnabad, Tuljapur Latur and Indi. The agreement was to be in force for a period of three years. By this agreement the defendant undertook to purchase and sell a minimum of 80,000 pudis of Diamond Apicin and 5000 of Diamond Jant-pudis, agreeing further that the defendant would not discontinue the agency for the period of three years and if he did so, he would have to pay damages to the plaintiff. In pursu-

ance of this contract, the defendant ordered some goods but it appears that by about February 1959, the Civil Surgeon at Sholapur ordered the defendant not to sell any of these articles as a wholesaler as the defendant had no licence for wholesale trade in drugs. It appears from the correspondence between the parties that the defendant had already made an application by about February 1959 for a wholesaler's licence under the Drugs Act and the correspondence further shows that he actually got the licence on June 6, 1959. Even so, by notice dated August 17, 1959, the defendant terminated the agreement on the ground that the agreement was void and illegal as the defendant had no licence when the agreement was entered into. He also made a statement in that notice that the goods of about five months were lying with him undisposed of as he had no licence, evidently a statement which was untrue, since he had already obtained a licence about two and a quarter months prior to the issue of this notice. It may be mentioned that the defendant got another agency. The plaintiff after some correspondence filed the present suit for damages claiming a sum of Rs. 70,000 from the defendant.

3. The defendant resisted the suit contending that the agreement of agency was illegal and void as he had no wholesale licence when the agreement was entered into. He also questioned the amount of damages. The learned trial Judge held that the agreement was invalid in law and therefore unenforceable. He also gave a finding on the question of damages which he assessed at Rs. 20,527. In view of his finding on the first and the main issue, the learned Judge dismissed the suit. The plaintiff appeals.

4. The first question is whether the agreement of the nature in the case can be said to be a void agreement, so that the plaintiff should be held not entitled to claim even damages. On behalf of the respondent it is argued that the agreement is contrary to the terms of the Drugs Act read with the rules and the licence issued to the plaintiff and therefore Section 23 of the Contract Act would be attracted and the plaintiff cannot sue.

5. Section 18 of the Drugs Act, 1940, prohibits the manufacture and sale of drugs and cosmetics except as provided therein. Clause (a) relates to the quality, clause (b) prohibits the sale of any of these articles or distribution thereof if imported or manufactured in contravention of the provisions of the Act or the rules and clause (c) prohibits the manufacture for sale, or sell or stock or exhibit for sale or distribute any drug, except under, and in accordance with the conditions of a licence issued for such purpose under the Chapter. Rule 61 of the Drugs and Cosmetics Rules framed under the Drugs Act prescribes different forms for different kinds of licences to deal in drugs. As in the present case the defendant had to act as a

wholesale agent of the plaintiff, the Form applicable would be Form 20-B. The plaintiff undoubtedly and admittedly has a licence as per this Form. Now, the conditions of the licence amongst other things provide by condition 3 (ii) that no sale of any drug shall be made to a person not holding the requisite licence to sell, stock or exhibit for sale or distribute the drug. The proviso is not material to the present purposes.

6. What is prohibited is the actual sale of drugs by condition 3 (ii) of plaintiff's licence. If, therefore, in contravention of this provision a person actually sells or supplies the goods to a person who does not hold the licence for the particular purpose, then, as the sale is prohibited by law, he may not be entitled to recover the price for the goods. In the present case, however, there is an agreement of agency between the parties. An agreement of agency is capable of being carried on if each party does what is required of him to do. The plaintiff in order to fulfil his part had to have a licence for the sale of such drugs which he manufactured. Similarly the defendant in order to carry out his part of the contract was bound to have a licence which permitted him to deal in wholesale business of the drugs. It is admitted that he already held a licence for retail trade. There is nothing in the Drugs Act to show that no agreement can be entered into for agency unless and until the person who gives the agency is satisfied that the agent holds the licence. It would only mean that after the agreement is entered into between the parties, each party must do his best to fulfil his part. If per chance one party or the other cannot obtain such consent or licence then of course the agreement would be unenforceable but that would be not by reason of the fault or neglect of the party but because the licensing authority refused to grant the licence. It is only if the parties with a deliberate desire to evade the law enter into the contract to do something which is not legal, then the agreement must be regarded as void.

7. In this connection we may refer to a few cases which have come up before Courts. The case of *Mrs. Chandnee Widya Vati v. Dr. C. L. Katial*, AIR 1964 SC 978, arose out of a contract entered into by the appellant with the respondent to sell to the respondent a house which stood on a plot which was granted by the Government. The vendor-appellant could not have sold the house without the permission of the Government. As the vendor refused to complete the contract on that ground, the respondent filed a suit. The trial Court dismissed the suit. The respondent appealed to the High Court who decreed the plaintiff's suit saying that the Court had to enforce the terms of the contract enjoining upon the defendant to make the necessary application to the Chief Commissioner for the required sanction and it would then be for the Chief Commissioner to decide whether or not to grant the necessary sanction. The principle was accepted

by the Supreme Court. The second case where similar principle was laid down is the decision in *Dy. Director of Consolidation v. Deen Bandhu*, AIR 1965 SC 484, which arose under the United Provinces Consolidation of Holdings Act of 1954. In a case under the statute where sanction was refused, the Supreme Court intervened and directed that the sanction for the transfer should be made. Following these cases, this Court in *Tukaram Zipre v. Baban Dhondu*, (1965) 67 Bom LR 908, held that in a case where sanction was necessary for transfer of the property, either the Court can compel the defendant to make the application for the same or appoint a Court Commissioner to do so or permit the plaintiff to make the application. The underlying principle of these cases is that unless the transaction is itself of such a nature that it contravenes the law, it must be enforced by requiring the defendant to take such steps as are necessary in that direction. Much more so would be the case where the suit is not for specific performance but for damages such as the present, where, the Court cannot specifically enforce the agreement of agency since it would be impossible to supervise the carrying out of it. The plaintiff would in such a case not be barred from asking for damages where the defendant does not carry out the contract not because the law prevents it but because he refused to take any action to satisfy the conditions imposed by law upon him before fulfilment of the contract. In this case it is much worse because the defendant terminated the contract after he had already got a wholesaler's licence for the drugs and, according to the plaintiff, he started competing the plaintiff's sales by pushing the drugs of other manufactures. The plaintiff is right in this allegation.

8. A somewhat similar question though in a slightly different context arose in *H. O. Brandt and Co. v. H. N. Morris and Co.*, (1917) 2 KB 784. The contract in that case was for monthly deliveries of pure aniline oil. After the contract was made, the export of the oil was prohibited by an order in Council except otherwise than under licence to export. The Court held that the agreement was not void nor it became unenforceable by reason of the subsequent restrictions but that an obligation to apply for a licence lay upon the buyers who could not refuse to perform their part of the contract merely by alleging inability. Same principle has subsequently been followed in *Taylor and Co. v. Landauer and Co.*, (1940) 4 All ER 335.

9. Dr. Naik relying upon some cases urged that the agreement such as the present is void in law. He relies upon the decisions *Janu Sait v. Ramaswami Naidu*, AIR 1923 Mad 626, *Hormasji Motabhai v. Pestanji Dhanjibhai*, (1888) ILR 12 Bom 422 and *V. Narasimha Raju v. V. Gurumurthy Raju*, (1963) 3 SCR 687 = (AIR 1963 SC 107). None of these cases have any application whatsoever. The first case arose out of an actual transaction of buying and selling. The

plaintiff who had given the money and agreed to take the goods in payment thereof could not have received the goods by sale in this manner unless he had a licence. The Court held that the contract could not be enforced as the plaintiff himself had no licence though if he was not in *pari delicto* with the defendant in the making of the contract he could recover the amount which he had paid. In the second case the question arose in the relation to Abkari law where the partnership was absolutely prohibited. The Court found that both the parties were in *pari delicto* and as the partnership was absolutely prohibited the plaintiff could not succeed in his suit for account. The third case arose out of stifling of a prosecution which was filed against the promisor and as the Court came to the conclusion that it was intended to stifle the prosecution which was already launched, the promisee could not succeed on the promise. To the same effect are the other cases which are cited before us which we do not think it necessary to refer.

10. Dr. Naik has relied particularly upon the decision in *Kedar Nath v. Prahlad Rai*, AIR 1960 SC 213, where the Supreme Court after discussing several cases summarised the position in law as follows:

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

The principle stated in this decision is not irreconcilable with the principles of the cases we have referred to. The Court either in enforcing the specific performance of the contract by requiring the party to apply for the required sanction, or in giving damages for the negligence of the party in carrying out his part of the contract in not even applying for a licence, is not doing something which is contrary to the principle above stated. Having regard to the terms of the provisions we are of the view that the learned Judge was not justified in holding that the agreement between the plaintiff and the defendant was void *ab initio*.

11. It is only necessary to state that even after the defendant was informed by the

Civil Surgeon that as he had not got a wholesale drug licence he could not sell the goods, the defendant wrote to the plaintiff that the goods could not be sold not because he had not a wholesale drug licence but that he had applied for the same and further goods should be sent only after an intimation was given that such licence was received. This only shows that the agreement could be carried out after the licence was received. It was only in August 1959 when probably the defendant got some better temptation from others that he terminated the contract with the plaintiff. In our view, therefore, the plaintiff is clearly entitled to claim damages.

12. The next question is what should be the amount of damages decreed to the plaintiff. The plaintiff in its plaint had originally claimed a sum of Rs. 70,000 as damages on the basis that its monthly profit would have been Rs. 7,000. The learned trial Judge has estimated the damages at Rs. 20,527.

13. Where breach of contract has been established, the plaintiff is undoubtedly entitled to claim damages from the defendant. The plaintiff is, however, expected to take steps to mitigate his loss. The Court after considering both the actual loss and the steps taken by the plaintiff to mitigate the loss has to determine the amount of damages. In the present case the method adopted by the learned Judge to assess the damages is as below. The contract shows that every month the defendant had to sell these two drugs manufactured by the plaintiff valued at Rs. 5550 i.e. the drugs worth Rs. 66,600 per year. The plaintiff produced his assessment orders before the learned trial Judge to show that he was assessed on the basis of 66% profit in the year 1957-58 and on the basis of 47% on the sales of 30,000 in 1956-57. Exh. 167 showed that the gross profit in the trading and manufacturing account worked out at 66.2% on the sales of Rs. 51,609. Out of this amount the learned Judge deducted 15% commission payable to the agent defendant. The defendant himself did not enter the witness box to show what would be the profit in such business. The plaintiff further produced a statement, Exhibit 169, showing the sales effected by it from November 25, 1959 to May 29, 1960 for a period of six months as per the Tippians kept by him. In the statement the bill numbers and the quantity of packets sold were also mentioned. This showed that in six months he had sold medicines in the area of agency worth Rs. 23,534.37. If the defendant had continued the agency, medicines worth Rs. 33,300 for six months would have been sold. Thus the loss of sale in this area, was Rs. 9,765.63. On this basis, for 28 months the learned Judge held that the reduced sales in this area came to Rs. 45,570 and on this he held the loss would be Rs. 20,527. From this calculation it appears that the learned Judge has taken net profit at about 50% of the sales. This, however, in our view is not justified. There may be several vicis-

situdes in the market, prices might fluctuate, competition might increase with the result that some reduction in the price of the medicines sold also may be required. Having regard to all exigencies it seems to us that in this kind of business looking to the comparative higher profits, it would be reasonable to assess the loss at Rs. 25% of the sale price which would come to Rs. 11367.

14. We accordingly set aside the decree and order made by the learned trial Judge and decree to the plaintiff a sum of Rupees 11367 with costs in proportion to his success throughout. The defendant will bear his own costs.

Appeal allowed.

AIR 1970 BOMBAY 132 (V 57 C 22)

(AT NAGPUR)

ABHYANKAR, J.

Madhao Narayan, Petitioner v. Ragho Niloo and others, Respondents.

Special Civil Appln. No. 763 of 1967, D/- 8-10-1968.

Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 111 (2) — Rules under — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules (1959), R. 19 — Discretion of Tribunal to proceed to decide case in absence of both parties — Propriety — Proper order indicated — Applicants' counsel applying for adjournment after consulting Assistant Registrar — Tribunal proceeding to decide case on merits — Opposite party also absent — Propriety of order — Violation of principles of natural justice — (Civil P. C. (1908), Order 9, Rr. 3, 8; O. 17 Rules 2, 3) — (Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules (1959), R. 19).

Rule 19 does give the Tribunal a discretion either to dismiss an application if the applicant or his counsel is absent when the application is called for hearing or to decide it on merits after hearing the opposite side, if present. Where neither the applicant nor the non-applicant was present ordinarily, unless there is a compelling reason for the Tribunal to proceed with the disposal of the revision application on merits, the proper order would be an order for dismissal in the absence of parties. Passing of an order on merits without hearing the parties acts to the grave prejudice of the party in default, inasmuch as so far as the scheme of the Act is concerned, the Tribunal being the final forum where a dispute could be taken, the party suffers an adverse order without having an opportunity of being heard. It is against the principles of natural justice and the proper course in such cases would be an order of dismissal of the application for default of appearance. The Tribunal must indicate clearly and satisfactorily why its discretionary

power to decide the application on merits has been exercised rather than the dismissal of application for default. (Para 9)

Where a litigant entrusts his brief to counsel, exigencies of work do necessitate adjustment subject to orders of the Court. Where the counsel after informing the Assistant Registrar of his inability to be present on the date of hearing, and on his advice the counsel applied for adjournment, the party cannot be penalised by having his case disposed of on merits without hearing the party specially when the opposite party, though served was also absent. (Para 9)

N. S. Munshi, for Petitioner; G. G. Modak, for Respondent No. 2.

ORDER: The petitioner in this application under Article 227 of the Constitution is Madhao Narayan Sarmukkadam, who is the tenure-holder of field survey No. 15/2, area 12 acres 1 guntha, situate at village Muchi, tahsil Wani, District Yeotmal. The landholder filed an application on 15-10-1963 for possession of survey No. 15/2 on the ground that the respondent No. 1 Ragho who was a tenant of this field had sublet it to respondent No. 2 Karnu. The petitioner gave a notice on 16-8-1962 charging Ragho that he was not cultivating the field though he was his tenant and that he had sublet the field to another person. A second notice was also given on 18-4-1963 charging Ragho with the same default. This was followed by an application dated 15-3-1963 to which both Ragho and Karnu were impleaded as parties. This application is registered in the Court of the Naib Tahsildar as Revenue Case No. 2/59 (10-B) of 1963-64. In these proceedings, both Ragho and Karnu filed a joint statement and their joint defence was that that field and survey Nos. 18 and 20 belonged to one Radhabai, and they were obtained by the petitioner as a result of partition and therefore the petitioner had no right. Their further case on merits was that Ragho never cultivated survey No. 15/2 and that it has been let out to Karnu by the mother of the petitioner since 1952-53. Thus, the second respondent Karnu claimed to be a direct tenant of the field and admitted to be in cultivating possession in his own right and not under Ragho.

2. The Tenancy Naib-Tahsildar, on a consideration of all the material on record, held that Ragho was the tenant of survey No. 15/2 and that he had sublet it to Karnu. Inasmuch as subletting was proved, the Naib Tahsildar ordered that the petitioner was entitled to possession of the entire area.

3. This order was challenged in appeal both by Karnu and Ragho. The appellate authority took a contrary view, reversed the order of the Naib-Tahsildar and rejected the application of the petitioner for possession.

4. Against this order, the petitioner Madhao filed a revision application. This was registered as Application No. 1350/Ten. of 1965. It appears the revision application was posted for hearing parties on 18-6-1966

before the Tribunal. The petitioner has alleged in paragraph 10 of the petition that his counsel filed an application for adjourning the hearing of this revision application to a further date as he had to leave Nagpur unexpectedly for appearance before an inquiry at Bastar. It is alleged that the Assistant Registrar of the Tribunal was contacted and apprised of his predicament and it was at the behest of the Assistant Registrar that the counsel gave an application for adjournment. It appears that the counsel made a single application in respect of his cases fixed for that date before the Tribunal, and no separate application was filed in Revision Application No. 1350/Tenancy of 1965. But the fact that an application was made is obvious from the order-sheet of that date in the proceedings before the Tribunal. That order-sheet is as follows :

"Applicant and his counsel are absent. Non-applicants are also absent. The applicant's counsel has applied for an adjournment of the revision on the ground that he is engaged elsewhere away from Nagpur for a month and a half. If so, the applicant's counsel should have made some other arrangement for his representation in this revision application. I decline to adjourn the revision. Record perused. Order passed."

The respondents have merely denied knowledge of these averments because the respondents were also absent and possibly could have no personal knowledge of the events.

5. The learned Member of the Tribunal not only proceeded with the matter in the absence of both the parties but has decided it on merits rejecting the application of the petitioner.

6-7. It is urged in support of the petition that the procedure followed by the Tribunal has ended in the failure of justice and the Tribunal should not have proceeded to decide the application on merits and the proper order that could be passed would have been an order of dismissal of the application for want of appearance, or for want of due prosecution, if at all it was necessary to take up the case without adjourning it.

8. On behalf of the respondents, the order is supported to be well within the jurisdiction of the Revenue Tribunal relying on the provisions of Rule 19 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Bombay Revenue Tribunal Procedure, Rules 1959, framed by the State Government in exercise of the power conferred by sub-sec. (2) of Sec. 111 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. Rule 19 is as follows :

"19. Procedure in case of non-appearance of parties :

(1) If on the date fixed for hearing or any other subsequent day to which the hearing may be adjourned, the applicant does not appear either in person or through his agent or lawyer when the application is called for hearing, the Tribunal may dismiss the application or may decide it on merits after

hearing the respondent or his agent or lawyer, if present.

(2) If on the date fixed for hearing or on any other subsequent day to which the hearing may be adjourned, the opponent does not appear in person or through his agent or lawyer when the application is called for hearing, the Tribunal may decide the same on merits, after hearing the applicant or his agent or lawyer.

(3) If there be doubt as to whether a party has been served with notice issued under Rule 18, the Tribunal may decide the application without issuing a fresh notice—

(a) If the said party be the applicant, or one of the applicants, and the Tribunal is of the opinion that the application should be wholly allowed, or,

(b) if the said party be opponent, or one of the opponents, and if the Tribunal is of the opinion that the application should be wholly dismissed or rejected."

9. It is apparent that Rule 19 does give the Tribunal a discretion either to dismiss an application if the applicant or his counsel is absent when the application is called for hearing or to decide it on merits after hearing the opposite side if present. In this case, neither the applicant nor the non-applicant was present. Ordinarily therefore, unless there is a compelling reason for the Tribunal to proceed with the disposal of the revision application on merits, the proper order would be an order for dismissal in the absence of parties. Passing of an order on merits without hearing the parties acts to the grave prejudice of the party in default, inasmuch as so far as the scheme of the Act is concerned, that being the final forum where a dispute could be taken, the party suffers an adverse order without having an opportunity of being heard. It is against the principles of natural justice and the proper course in such cases would be an order of dismissal of the application for default of appearance. The Tribunal must indicate clearly and satisfactorily why its discretionary power to decide the application on merits has been exercised rather than the dismissal of application for default. There is no such indication in the present order. Ordinarily, one would have expected the request for adjournment being granted as prima facie the reason disclosed in the application was entitled to consideration. Where a litigant entrusts his brief to counsel, exigencies of work do necessitate adjustment subject to orders of the Court. It does not appear that there was any indication given to the counsel when he made an application for adjournment to the Assistant Registrar that adjournment would not be possible. If the counsel left the matter there, the party cannot be penalized by having his case disposed of on merits without hearing the party. What is even more significant in this case is that the opposite party was also absent. The notice was ordered to be issued to the opposite party on 9-8-1966 and process fee seems to have been paid for issuing of this process. It is not clear from the re-

cord whether the opponents were served at all. Under these circumstances, it is urged that the applicant has been unduly prejudiced and suffered an adverse order without the benefit of a hearing being given to him. In my opinion, this contention is well-founded. Substantial issues were involved in the case and the applicant had gone up in revision against a reversing order and the least the applicant should have been held entitled to was a hearing before the disposal of his revision application on merits.

Under the circumstances, it must be held that the order of the Tribunal cannot be sustained. It is accordingly set aside and the matter is remanded to the Tribunal for a fresh decision according to law after giving a proper opportunity to both the sides to be heard. The petition is allowed but in the circumstances there will be no order as to costs.

Application allowed.

AIR 1970 BOMBAY 134 (V 57 C 23)

VAIDYA, J.

Prabhudas Kalyanji Adhia, Appellant v. State, Respondent.

Criminal Appeal No. 1626 of 1967, D/- 9-4-1969.

Drugs and Cosmetics Act (1940), Ss. 3 (b), 18 (c) and 27 — Drugs — Definition of D.D.T. is a drug — Sale of compound containing D.D.T. without obtaining licence — Conviction under S. 18(c) read with S. 27 is proper.

The accused himself had admitted that the substance which he sold without obtaining licence as D. D. T. compound contained D. D. T.

Held having regard to the popular as well as dictionary meaning of the word 'drug', the D. D. T. compound which was sold by the accused was a drug irrespective of whether it was notified by the Government of India or whether it contained the chemical ingredients which the Public Analyst has found or not. The accused, therefore, was liable to be convicted under S. 18(c) read with S. 27. Conviction of the accused could not, however, be based on the report of the Public Analyst which did not mention protocol test. (Para 4)

N. V. Adhia, for Appellant; V. T. Gam-bhirwala, Asst. Govt. Pleader, for the State.

JUDGMENT: The only question which arises in this appeal filed by Prabhudas Kalyanji Adhia against his conviction under Section 18(c) read with Section 27 of the Drugs and Cosmetics Act, 1940, for manufacturing, stocking and selling on July 15, 1966 the substance which he described as 'D. D. T. compound' without a licence under the said Act is, whether the said D. D. T. com-

pound is a drug within the meaning of that Act.

2. The accused did not dispute that at the relevant time he was manufacturing, stocking and selling at 121, Parel Tank Road, Parel, Bombay 12, as proprietor of M/s. Hill Side Products D. D. T. compound, but he denied that the substance which he was manufacturing or selling was intended to be used for the destruction of vermin or insects which cause disease in human beings or animals as mentioned in a notification of the Government of India under Section 3(b)(ii). He relied on a label which was used on his product which he produced. On one side of the label there is a picture of a theatre and it is written:

"Theatre Brand
D. D. T. Co.
Technical DDT cum Malathion
Superior Quality
Hill-side Products, Bombay."

On another side of the label it is written:

"Not for medical use.

Theatre Brand D. D. T. is to be used with a sprayer for the control of horticultural and household pests other than those that cause disease in human beings or animals.

Caution:—Store well away from
Children, animals, food-
stuffs and animal feed.
Wash hands after use.

Do not pour or spill on open fire.
Hill-side Products

Parel Tank Road, Bombay 12."

The accused did not dispute that D. D. T. was actually used in this drug. His only contention, therefore, was that the product was not intended to be used as medicine and, therefore, it was not a drug. He also contended that the report of the Public Analyst, which was relied on by the complainant who was a Drug Inspector, did not mention the protocol test and hence the report was useless as evidence.

3. The learned Magistrate was of the view that notwithstanding the contents of the label, the substance manufactured by the accused was drug. It is argued before me that the finding of the learned Magistrate was not right firstly because the report of the Public Analyst did not mention the protocol test and secondly because the substance manufactured, stocked and sold by the accused was not for medicinal use and the learned Magistrate erred in relying on the report and in holding in spite of what was mentioned in the label that the D. D. T. compound sold by the accused was drug.

4. The Magistrate convicted the accused under Section 18 (c) read with Section 27 of the Act and sentenced him to suffer simple imprisonment for one day and to pay a fine of Rs. 200 or in default to suffer further imprisonment for 15 days. In my judgment, the conviction and sentence passed against the appellant must be confirmed although not for the reasons stated by the Magistrate. The Learned Magistrate was not right in

relying on the report of the Public Analyst which did not mention the protocol test. Nevertheless, as the accused himself has admitted that the substance which he sold contained D.D.T. and it was sold as 'D.D.T. compound,' it will be against commonsense to hold that it was not a drug. It is a well-established canon of construction that in dealing with matters relating to the general public, statutes are presumed to use words in their popular sense; *uti loquitur vulgus*. The Drugs and Cosmetics Act is dealing with matters relating to the general public. Its object is to regulate the import, manufacture, distribution and sale of drugs and cosmetics. There is no exhaustive definition which includes certain things which perhaps, according to popular usage, could not be included in the popular meaning of the word 'drug' or in respect of which there might be some doubt as to whether they would be considered as drugs according to the popular meaning of the word. Section 3 (b) reads:

3 (b): "Drug" includes —

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals;

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette."

Therefore, it is necessary for us to take into consideration not merely the clause (i) and (ii) but to find out whether the substance which the accused manufactured, stocked and sold was a substance which was popularly considered as a drug. In Halsbury's Laws of England, Volume 17, Third Edition, page 448 para 831 it is stated:

"The term 'drug' includes medicine for internal or external use. In any case of doubt, it will be a question of fact for the determination of the court whether an article is a drug or not, and the answer will depend upon whether or not the substance was sold for use as medicine. An article is not necessarily a drug because it is included in the British Pharmacopoeia and may be used in the preparation of medicines, nor is an article a drug merely because it is sold under a designation which implies that it contains a drug in its composition, when in fact it does not."

In the present case, the accused himself has admitted that the substance which he sold as D. D. T. compound contained D. D. T. which is a well-known drug in the 20th century. The Oxford English Dictionary has described drug as 'an original, simple medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament'. Having regard to

the popular as well as dictionary meaning of the word 'drug', I have no doubt that the D. D. T. compound which was sold by the accused was a drug irrespective of whether it was notified by the Government of India or whether it contained the chemical ingredients which the Public Analyst has found or not.

5. In the result, the conviction and sentence passed against the appellant are confirmed and the appeal is dismissed.

Appeal dismissed.

AIR 1970 BOMBAY 135 (V 57 C 24)

CHANDURKAR, J.

R. J. Gujar, Appellant v. Jamnadas Gopalji and another, Respondents.

Criminal Appeal No. 65 of 1968, D/- 13-3-1969.

Prevention of Food Adulteration Act (1954), Ss. 16(1)(b), 19(2), 11 and 10 — Accused a dealer in "Anik Ghee" supplied by manufacturers in sealed tin — Accused refusing to sell to Food Inspector 450 Grams out of packing of 2 Kg. and insisting to purchase the sealed tin — Inspector refusing to purchase sealed tin as offered — Dealer, held not guilty under Section 16(1)(b) — Provisions of Ss. 10, 11 and 19 to be read harmoniously — S. 10 cannot be so construed as to deprive seller of his defence under S. 19(2) — Neither S. 11 of the Act nor Rr. 22 and 22A of the Rules, prohibits Food Inspector to purchase more than 450 grams of sample — (Prevention of Food Adulteration Rules (1955), Rr. 22 and 22A).

Where the accused who was a Kirana merchant and was also dealing in "Anik Ghee" supplied to him by the manufacturers in sealed tins under a warranty, refused to sell the Food Inspector a sample of 450 Grams after breaking open the sealed tin as required by the Food Inspector and insisted him to purchase the sealed tin of 2 Kg. but the Inspector refused to purchase the quantity more than 450 Grams under the impression that he had no power to purchase a quantity larger than 450 Grams.

Held that it could not be said that the accused had committed an offence of preventing the Food Inspector from taking a sample as contemplated by Section 16 (1) (b) of the Prevention of Food Adulteration Act. The failure to obtain the sample by the Food Inspector was essentially the result of a misapprehension of the legal position under which the Food Inspector himself was labouring, namely, that he was prohibited from purchasing more than 450 grams of the Food Article. Having regard to his right to take the benefit of the statutory defence under Section 19 of the Act the seller was entitled to insist that it should be purchased in the form which he received it from manufacturer. (Para 9)

KM/LM/F103/69/LGC/M

There is nothing in Section 11 (1) of the Act or in Rr. 22 and 22A of the Prevention of Food Adulteration Rules which casts any positive obligation on the Food Inspector to purchase 450 grams alone and not a gram more, nor is there anything which can be read as a prohibition to purchase a larger quantity if he thought it necessary.

(Para 7)

The very fact that the quantity of sample of Ghee to be supplied for analysis under R. 22 is specified to be an approximate quantity indicates that this rule is of directory nature and there is nothing in this rule which prevents the Food Inspector in a given case from sending a larger quantity.

(Para 7)

The provisions of Sections 10, 11 and 19 of the Act have to be read harmoniously and the provisions of Section 10 dealing with the powers of the Food Inspector cannot be so construed as to deprive the seller of the statutory defence under Section 19(2) of the Act. If Section 10 is construed as giving a power to the Food Inspector to insist on a sale of an article in sealed container received by the seller with a warranty from the manufacturer after breaking open the seal then such a construction will deprive the seller of the defence under Section 19(2) of the Act.

(Para 8)

A. M. Bapat, for Appellant; V. G. Palshikar (for No. 1) and M. M. Qazi, Asst. Govt. Pleader (for No. 2), for Respondents.

JUDGMENT: This is an appeal filed by the Food Inspector of the Akot Municipal Council challenging the judgment of acquittal of the respondent No. 1, who was acquitted of the offence under Section 16(1)(b) of the Prevention of Food Adulteration Act, 1954, hereinafter referred to as the Act.

2. The facts in this case are not disputed. The respondent No. 1 is a Kirana merchant, who deals, among other articles, in a product called "Anik Ghee", which is product of Hindustan Lever Limited. The complainant went to the shop of the respondent No. 1 at about 11.20 A. M. on 19-8-1966 and asked him to sell him a sample of the quantity of 450 grams out of a sealed container weighing 2 kg. which was kept for sale in the shop by the accused. The complainant served a notice on the respondent No. 1 that the sample of the food article "guaranteed pure Anik Ghee" which was stocked in his grocery shop for sale in the packing of 2 kg. was to be sent for analysis, and therefore, 450 grams of "Anik Ghee" should be given to the Food Inspector. The respondent No. 1 received this notice and endorsed thereon that he sold packed tins of "Anik Ghee" of Hindustan Lever Limited, Bombay, and that he did not sell in small quantity from the packed tin. He further stated "if you require, you can purchase a packed tin."

2A. The Food Inspector, however, carried the impression that he had no power to purchase a quantity larger than 450 grams of sample of food-stuff, and therefore, he did

not purchase the whole container. He prepared a memo reciting all these facts in the presence of the two Panchas whom he had taken with him. According to the Food Inspector, this failure of the respondent No. 1 to sell 450 grams of Anik Ghee after breaking open the sealed container amounted to preventing him from taking a sample and he had thus committed an offence under Section 16(1)(b) of the Act. He, therefore, filed a complaint in the Court of the Judicial Magistrate, First Class, Akot, reciting all these facts. It is not necessary to reproduce all the contents of the complaint except the one relating to the explanation of the complainant why he did not purchase a larger quantity than 450 grams. In the complaint it is stated as follows:—

"Under rules made under the Act, the quantity of sample of the said Article of Food-ghee to be supplied to the Public Analyst for analysis is specified to be 150 grams. The quantity of sample is to be separated into three parts before sending one of the parts for analysis to the Public Analyst, and therefore the complainant had no authority to collect the quantity of the sample in any amount except than 450 grams."

(Underlining (here in ' ') is mine.)

3. The complainant examined himself and admitted in the witness-box that the accused was willing to sell the whole tin if the complainant so wanted. He sticks to the explanation why he did not purchase the whole tin by stating that as per law he could not take more than 450 grams of sample. The defence of the accused was that he was not permitted to sell retail quantity of Anik Ghee and this defence was put to the complainant in cross-examination, and in cross-examination the complainant admitted that the accused had not sold any loose Ghee from the tin in question. The warranty which was issued to the dealer by the Hindustan Lever Limited in respect of this article was put to the complainant in cross-examination.

4. The trying Magistrate on these admitted facts found that there was no provision of law which prevented the Food Inspector from purchasing a larger quantity than 450 grams of sample. He thus took the view that because the complainant did not purchase the whole tin or was unable to purchase the same it did not mean that the accused prevented him from taking the sample. He, therefore, acquitted the accused. Against this acquittal this appeal has been filed.

5. The learned counsel for the appellant contends that having regard to the provisions of Rules 22 and 22-A of the Prevention of Food Adulteration Rules, 1955, the complainant could insist on a sale of 450 grams of Ghee in the sealed container and that since the respondent No. 1 had failed to sell this quantity he should have been held guilty of the offence under Section 16 (1) (b) of the Act. He

relied also on the provisions of Section 10 (1) (a) (i) for the proposition that the power which is given to the Food Inspector by this Section to take a sample of any article of food from any person selling such article could not be construed in such a way that he would be prevented from taking the necessary sample. This argument was supported by the learned Assistant Government Pleader appearing for the State also.

6. The learned counsel for the respondent No. 1, however, contended that there was no provision either in the Act or the Rules which prevented the Food Inspector from purchasing a sample of a quantity larger than 450 grams and as he was willing to sell the sealed container he had not committed any offence.

7. In order to appreciate the rival contentions it will be necessary to refer to certain provisions of the Act and the Rules. It is not disputed that the provisions of Section 10 (1) (a) (i) give power to the Food Inspector to take sample of any article of food from any person selling such article. Admittedly it was this power which the Food Inspector was seeking to exercise. But the real question is whether the failure of the Food Inspector to obtain the necessary sample from the respondent No. 1 was a result of any act on the part of the respondent No. 1 or whether it was a result of misapprehension of the legal position with regard to his powers under which the Food Inspector was, namely, that there was prohibition for him to purchase a quantity more than 450 grams by way of a sample. It is also an admitted position that Rule 22 prescribes the quantities of samples to be sent to the Public Analyst in respect of several articles specified therein. So far as Ghee is concerned, the quantity specified under Rule 22 is 150 grams. It is worth noting that these different quantities in respect of different articles which are specified under this Rule are only approximate quantities, because the column specifying the quantity of the article under this rule is itself headed as "approximate quantity to be supplied". The very fact that the quantity is specified to be an approximate quantity indicates that this Rule is of directory nature and there is nothing in this Rule which prevents the Food Inspector in a given case from sending a larger quantity. Section 11 of the Act prescribes the procedure to be followed by the Food Inspectors where a sample of food is taken for analysis and it requires that the sample taken is to be divided into 3 parts then and there and these parts are to be marked and sealed in such manner as its nature permits. Cl. (c) of sub-s. (1) of S. 11 of the Act requires one of the parts to be delivered to the person from whom the sample is taken, another part is to be sent for analysis to the Public Analyst and the third part is to be retained for production if necessary, in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under sub-section

(2) of Section 13 of the Act. It is on the basis of this provision with regard to the division of the sample into 3 parts that it is contended that not more than 450 grams could be taken by the Food Inspector. Section 11 (1) nowhere specifies the quantity to be taken by way of a sample. It is difficult to read the figure '450' into this Section, but probably the argument is that since 3 parts are to be made and one part which is to be sent to the Public Analyst is to consist of 150 grams it is intended that the total quantity must be of 450 grams. In a given case that may be so, but there is nothing in Section 11 (1) of the Act which casts any positive obligation on the Food Inspector to purchase 450 grams alone and not a gram more nor is there anything which can be read as a prohibition to purchase a larger quantity if he thought it necessary. Reliance is then placed on Rule 22-A of the Rules which is as follows:—

"22-A—Contents of one or more similar sealed containers having identical labels to constitute the quantity of food sample. Where food is sold or stocked for sale or for distribution in sealed containers having identical label declaration, the contents of one or more of such containers as may be required to satisfy the quantity prescribed in Rule 22 shall be treated to be a part of the sample."

On the basis of this rule it is contended that the Food Inspector was justified in asking the respondent No. 1 to break open the sealed container and sell 450 grams out of its contents to him. I am unable to spell out this power of the Food Inspector from the words of this rule. The obvious purpose of this rule appears to be that in a given case the contents of one of the containers may be such that it may not be sufficient to fulfil the requirement of Rule 22 and also the requirement of Section 11 where out of the 3 parts made, one is to be kept with the dealer and the other is to be retained by the Food Inspector. In a given case if the contents of a container are less than or even equal to 150 grams, it will be impossible to divide contents of that container into 3 parts so as to make available to the Public Analyst a quantity sufficient for analysis and also a sufficient quantity to be retained, if necessary, to be sent to the Director of the Central Food Laboratory under sub-section (2) of Section 13, and it may, therefore, be necessary to draw on the contents of another container in order to provide sufficient quantity of this food article. In the absence of this rule the accused might raise a defence that the different parts are not out of the same sample and it is obvious that it is to meet such a contention that this rule appears to have been made. But it is impossible to spell out from this rule a restriction on the power of the Food Inspector to purchase anything more than 450 grams or to insist upon the dealer to break open a sealed container and sell him a lesser quantity. Such a power does not appear to have been given

by any of the provisions of either the Act or the Rules, either expressly or impliedly.

8. In this connection a reference to Section 19 also becomes necessary. Section 19 (2) enumerates the defences which are open to a person who is prosecuted in respect of an offence under the Act and one of the defences is that the seller has purchased an article of food with a written warranty in the prescribed form and that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it. If we contemplate a case in which a dealer who sells articles received by him in sealed containers under a warranty from the manufacturer and that article, if it is sold in the same state, namely, the sealed condition in which he had received from the manufacturer, and that article is found to be adulterated, then there is a good defence to him that the goods were purchased under a warranty and they were sold in the same state in which he had received them. The accused is entitled to raise such a statutory defence especially in a case where the dealer deals in an article like the present case. The accused has produced a warranty from the Hindustan Lever Limited as contemplated by Section 19 (2) and if he had sold this article in a state other than the one in which he had received, namely, by retail sale after breaking open the seal of the manufacturer, he would have been deprived of the statutory defence under Section 19 (2) of the Act. The provisions of Sections 10, 11 and 19 of the Act will have to be read harmoniously and the provisions of Section 10 dealing with the powers of the Food Inspector cannot be so construed as to deprive the seller of the statutory defence under Section 19 (2) of the Act. If Section 10 is construed as giving a power to the Food Inspector to insist on a sale of an article in sealed container received by the seller with a warranty from the manufacturer after breaking open the seal then such a construction will deprive the seller of the defence under Section 19 (2) of the Act.

9. It will, therefore, be seen that the failure to obtain the sample by the Food Inspector was essentially the result of a misapprehension of the legal position under which the Food Inspector himself was labouring, namely, that he was prohibited from purchasing more than 450 grams of the food article. Secondly this is not a case in which the respondent No. 1 refused to sell an article of food. All that he insisted was that it should be purchased in the form in which he had received it from the manufacturer and in my view he was entitled to so insist, having regard to his right to take the benefit of the statutory defence under Section 19 of the Act. Under such circumstances, it cannot be said that the accused had committed an offence of preventing the Food Inspector from taking a sample as contemplated by Section 16 (1) (b) of the Act. The trying Magistrate was, therefore, right in acquitting the accused.

10. The result is that the appeal fails and is dismissed.

Appeal dismissed.

AIR 1970 BOMBAY 138 (V 57 C 25)

CHANDURKAR, J.

Radheshaym Mohanlal Kaitan, Petitioner v. The Maharashtra Revenue Tribunal Nagpur and others, Respondents.

Special Civil Appln. No. 587 of 1966, D/- 1-4-1969.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 36 (1) — Application under — Period of limitation — Starting point — Tenant dispossessed of fields — Limitation runs from date of dispossession.

The starting point of limitation under Section 36 (1) is the date on which the right to obtain possession of land accrues. So where a tenant is dispossessed of fields by the landlord, then limitation will start running from date when tenant is dispossessed. By the mere fact that, in proceedings under S. 145, Cr. P. C. in respect of those fields a receiver appointed by the Magistrate was placed in possession of the fields in dispute, it cannot be said that the tenant had really no cause of action on the basis of which a claim for possession could be validly made under S. 36 (1) and that the cause of action for application under S. 36 (1) really arose when the possession of fields was handed over to the landlord by the Magistrate after the proceedings terminated in favour of the landlord. It is not possible to substitute in Section 36 (1) any other cause of action in place of one which is referred to therein for the purpose of deciding whether an application under Section 36 (1) is made within the prescribed period of three years. If the tenant is dispossessed, then it is that dispossession which gives him the right to obtain restoration of possession and the period of three years must be reckoned from that date alone and not from any other date. (Para 7)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958) Section 36 (1) — Application for restoration of possession — Prescription of period of limitation under Act — It is different from period prescribed by 1st Schedule of Limitation Act — Section 14 of Limitation Act applies to proceedings under Sec. 36 (1).

Section 14 of the Limitation Act is applicable to a proceeding under Section 36 (1) of Tenancy Act. The two conditions which are required to be satisfied under Section 29 (2) of Limitation Act if the provisions enumerated in clause (a) thereof including Section 14 are to apply to a proceeding under the special law are that (1) the Special law prescribes a period of limitation different from

the period prescribed by the First Schedule and (2) the application of those sections is not expressly excluded by the Special law. It cannot be said that as the First Schedule does not prescribe any period of limitation for an application under Sec. 36 (1), the first condition is not satisfied and as such the provisions of Section 14 are not applicable to such proceedings. The prescription of period of limitation by the Tenancy Act for application under Section 36 (1) for which no period is prescribed by First Schedule, must be taken to be prescription of a period of limitation different from the period prescribed by the First Schedule, for the purpose of Sec. 29 (2) of the Limitation Act. AIR 1961 Bom 154, Rel. on. (Para 10)

There is also no express provision in the Tenancy Act which excludes the applicability of the section enumerated in clause (a) of Sec. 29 (2) of Limitation Act. Hence Section 14 of Limitation Act is applicable to an application under Section 36 (1) of Tenancy Act. (Para 10)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), S. 36 (1) — Limitation prescribed under — Computation of—Proceedings instituted under S. 145 Criminal P. C. cannot be taken into account for that purpose, by applying Section 14, Limitation Act.

Before a party can claim the benefit of Section 14 (2) of the Limitation Act he must show that he was prosecuting another civil proceeding in good faith with due diligence in a Court which from defect of jurisdiction or other cause of like nature was unable to entertain it. He has also to show that he was prosecuting the proceeding for the same relief which he claims in the subsequent proceeding. (Para 11)

So, where a tenant is dispossessed of the fields by the landlord, then the pendency of proceedings, instituted by the tenant under Section 145 Criminal P. C. in respect of those fields, cannot be taken into account for computation of limitation period prescribed under Section 36 (1) of Tenancy Act, by applying Section 14 of Limitation Act. The proceeding under Section 145, Criminal Procedure Code, by its very nature being a quasi-criminal proceeding, cannot be classified as civil proceeding as contemplated by Section 14 (2) of the Limitation Act. So, even if the proceedings under Section 145, Criminal Procedure Code, were pursued to their conclusion and there was no question of any want of jurisdiction in the Magistrate who passed the final order in those proceedings, and even assuming that the proceedings in the Magistrate's Court were for the same relief and were prosecuted with the due diligence, the most important conditions necessary for the applicability of Sec. 14 (2) of the Limitation Act, cannot be said to have been satisfied. (Para 11)

(D) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region

and Kutch Area) Act (99 of 1958), Ss. 36 (1), 129 — Application under Sec. 36 (1) — Not prohibited by Sec. 129 in case of lands enumerated therein.

An application under Section 36 (1) is not prohibited by Section 129 in the case of lands enumerated therein. It is true that the section provides that "none of the foregoing provisions of the Act shall apply" but to this an exception is made by enumerating certain provisions which means that the provisions which are stated by way of an exception have been made applicable to the lands specified in the section. These provisions which are stated by way of exception to the general provision of inapplicability of anything that is provided in Sections 1 to 128-A are: Section 2, the provisions of Chapter II excepting Sections 21, 22, 23, 24 and 37 from that Chapter and Section 91 and the provisions of Chapters X and XII. Section 36 which is in Chapter II is not one of the provisions which are omitted from the Chapter II as being inapplicable because from Chapter II some of the provisions are made inapplicable and they are Sections 21, 22, 23, 24 and 37. (Para 12)

Cases Referred: Chronological Paras

(1961) AIR 1961 Bom 154 (V 48) =

1961 Nag LJ 1 = 1961 (1) Cri LJ

637 (FB), Anjanabai v. Yashwant-

rao

10

(1956) AIR 1956 Bom 447 (V 43) =

58 Bom LR 295, State v. C. N.

Raman

10

(1953) AIR 1953 Bom 35 (V 40) =

54 Bom LR 661, Canara Bank Ltd.

v. Warden Insurance Co. Ltd.

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N. S. Munshi and V. G. Senad, for Petitioner; P. B. Gadkari, for Respondent No. 4.

ORDER : The petitioner is the landlord of four fields with an area of 38.18 acres situated at village Randala, Tahsil and District Nagpur. The contesting respondent No. 4 who claimed to be a tenant cultivating these fields, filed an application on 26-2-1964 alleging that he was dispossessed of these fields otherwise than in accordance with law and that he was, therefore, entitled to be restored to possession. The application, however, does not state the exact date of dispossession but it is not now disputed that he was dispossessed on 10-6-1959. In respect of these fields proceedings under Section 145, Criminal Procedure Code, were taken by the Sub-Divisional Magistrate, Nagpur, in which according to the tenant, the Tahsildar, Kamptee, was appointed a receiver and he was placed in possession of these fields on 28-11-1959. These proceedings under Section 145, Criminal Procedure Code, terminated in favour of the petitioner landlord and in accordance with the decision of the Civil Court under Section 146, Criminal Procedure Code, the petitioner was put in possession of these fields on 23-5-1963 by the S. D. M. The tenant was conscious of the fact that his application filed on 26-2-1964 was delayed and he tried to explain this delay by

stating in the application that the fields were in possession of the receiver and that "with a bona fide object of getting back the possession of the fields as early as possible, the applicant sued out proceedings under Section 145 of the Criminal Procedure Code and also as advised by his lawyer." He, therefore, stated that if there was any delay in making the application, then that should be excused taking into consideration those circumstances. This is the only ground on which the delay in making the application for possession under Section 36 (1) of the Bombay Tenancy and Agricultural Lands Act, 1958 (hereinafter referred to as the Act) was explained. The landlord contested the application made by the tenant. According to him, the tenant had executed a surrender deed on 4-4-1959 in his favour and that it was submitted for verification and he was, therefore, entitled to be in possession. One of the main grounds on which the maintainability of the application filed by the tenant was contested was that the application was made beyond the period of three years from the date of dispossession and that the tenant was not entitled to exclude the time during which proceedings under Section 145, Criminal Procedure Code, were pending.

2. It appears that on 29-11-1959, the tenant had also filed an application in the Court of the Collector, Nagpur District, Nagpur, under Section 120 of the Tenancy Act and in that application, the tenant prayed that the landlord should be evicted from the fields in question as he had no right to disturb the possession of the tenant. It was alleged in this application under Section 120 of the Act that the dispossession had taken place on 4-11-1959. This application came to be registered as revenue case No. 128-A/52-59-60 in the Court of the Sub-Divisional Magistrate, Nagpur. The Sub-Divisional Magistrate on this application passed an order on 23-1-1959 forwarding it to the Naib-Tahsildar for enquiry and report. This application was then tagged on to the application filed by the landlord for verification of the surrender-deed. The case regarding verification of the surrender-deed was registered as revenue case No. 25/59-4-59-60 in the Court of the Naib Tahsildar, Nagpur.

3. The tenant's application under Sec. 36 of the Act was dealt with by the Additional Tahsildar, Nagpur. He framed a preliminary issue on the question of limitation. That issue was as follows:

"Whether the application of Shri Govind-rao son of Ramji Thakre, dated 24-2-1964, asking for possession of the suit land, is within limitation and whether it is tenable?" The Tahsildar took the view that the application was made beyond three years from the date on which the right to obtain possession had accrued to the tenant. He further held that the tenant was not entitled to the benefit of Section 14 of the Limitation Act, 1908 and that the pendency of proceedings under Section 145, Criminal Procedure Code

was not a bar to making an application under Section 36 (1) of the Act. He also gave a finding that the tenant had chosen a wrong forum and could not claim benefit of pendency of those proceedings and he had not acted with due diligence to safeguard his own interest. The application was thus rejected as barred by limitation.

4. Against this order, the tenant appealed. The Deputy Collector took the view that the time during which proceedings under Section 145, Criminal Procedure Code were pending, was liable to be excluded for the purpose of ascertaining whether the application under Section 36 (1) of the Act was filed by the tenant within the prescribed period of limitation. The Deputy Collector also held that "Sec. 129 (d) of the Bombay Tenancy Act excluded operation of Section 36 on lands under Criminal Court's management" and therefore the period from 28-1-1961 i.e. the date when Act No. V of 1961 came into force, till 23-5-1963, when the fields were released, from the management of the Criminal Court, will have to be included. It appears that before that Deputy Collector an argument was advanced that the time involved in proceedings under Section 120 of the Tenancy Act should also be excluded under Section 14 of the Limitation Act, 1908. The contention was advanced before him on the basis of an application made to amend the memo of appeal before him in which it was stated that the case under Section 120 of the Act was still pending and that an additional ground of appeal should be allowed to be urged that the tenant was pursuing his remedy for possession in the Court of the Sub-Divisional Officer, Nagpur and that therefore the application under Section 36 was within time. Even this contention was accepted and the learned Deputy Collector held that the principle underlying Section 14 of the Limitation Act, should be applied in the case of an application under Section 36. He, therefore, set aside the order of the Tahsildar and sent back the case to the Tahsildar for disposal according to law.

5. This order of the Deputy Collector was challenged by the landlord petitioner by a revision application filed before the Maharashtra Revenue Tribunal, Nagpur. The Revenue Tribunal made no reference to the case of the tenant that the time taken in the proceedings under Section 145, Criminal Procedure Code, should be excluded but the learned member of the Tribunal took the view that the tenant had chosen a wrong forum through ignorance or wrong advice by making an application to the Sub-Divisional Officer and that condonation of delay was justified. The revision application was, therefore, rejected. The landlord has now challenged the orders of the Revenue Tribunal and the Deputy Collector by this petition.

6. The learned counsel for the petitioner contends that the tenant was not entitled to the exclusion of the period between 23-9-1959 i.e., the date of the preliminary order

to 23-5-1963 on which date the proceedings under Section 145, Criminal Procedure Code ended in favour of the petitioner. According to him, the tenant should have made an application for restoration of possession within three years from 10-6-1959 which was the date of dispossession and the application was patently barred by time and was rightly rejected by the Tahsildar. The learned counsel for the respondent tenant, however, contends that the landlord was not in possession of the fields from 28-11-1959, when the receiver appointed by the Sub-Divisional Magistrate was placed in possession of the fields in dispute and that really the tenant had no cause of action on the basis of which a claim for possession could be validly made under Section 36 (1). According to him, cause of action for the application under Section 36 (1) of the Act really arose on 23-5-1963 when the possession of the fields was handed over to the landlord by the Sub-Divisional Magistrate. He, therefore, contends that the application is well within limitation from that date. His alternative submission is that the tenant is entitled to have the period of pendency of the proceedings under Section 145, Criminal Procedure Code, excluded while computing the period of limitation by virtue of the provisions of Section 14 read with Section 29 (2) of the Limitation Act.

7. Having heard counsel for parties at some length I am inclined to hold that the tenant's application was rightly rejected by the Tahsildar. Section 36 (1) of the Tenancy Act prescribes a limitation of three years for an application by a tenant where he claims that he is entitled to possession as a result of eviction in contravention of sub-section (2) and this period of three years is to be reckoned from the date on which the right to obtain possession of the land had accrued to the tenant. The starting point of limitation, therefore, under Section 36 (1) is the date on which the right to obtain possession of land accrued. This right to obtain possession so far as present respondent-tenant is concerned, obviously accrued to him on the date on which he was dispossessed viz., on 10-6-1959. It is not possible to substitute in Section 36 (1) any other cause of action in place of the one which is referred to therein for the purposes of deciding whether an application under Section 36 (1) was made within the prescribed period of three years. Accepting the contention of the tenant that the cause of action in his favour really arose on 23-5-1963, under Section 36 (1) would be reading something in the section which the legislature never intended. If the tenant was dispossessed, then it is that dispossession which gives him a right to obtain restoration of possession and the period of three years must be reckoned from that date alone and not from any other date. Therefore, the application filed by the tenant on 24-2-1964 was barred by limitation.

8. The next question that requires to be decided is whether the pendency of the proceedings under Section 145, Criminal Pro-

cedure Code, should be taken into account for deciding whether the application by the tenant is within limitation or not. It was argued that Section 14 of the Limitation Act, 1908 became applicable to these proceedings by virtue of Section 29 (2) of that Act. The learned counsel for the landlord, however, contended that the Limitation Act does not provide for a period of limitation for an application made under Section 36 (1) of the Tenancy Act and in the absence of such prescription the condition required to be satisfied for the applicability of sub-sec. (2) of Section 29 is not satisfied and, therefore, the provisions enumerated therein viz. Section 4, Sections 9 to 18, and Section 22 of the Limitation Act cannot be said to be applicable to the proceedings under Section 36 (1) of the Tenancy Act in respect of which the limitation is provided by the Special law viz., the Tenancy Act.

9. Section 29 (2) of the Limitation Act, 1908 is as follows:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefor, in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall apply."

10. It is clear from the words of Section 29 (2) that there are the two conditions which are required to be satisfied if the provisions enumerated in Cl. (a) thereof including Section 14 are to apply to a proceeding under the special law. These conditions are that (1) the Special law prescribes a period of limitation different from the period prescribed by the First Schedule and (2) the application of those sections is not expressly excluded by the Special law. Learned counsel for the petitioner contends that the first condition is not satisfied in the instant case because the First Schedule does not prescribe any period of limitation for an application under Section 36 (1) of the Tenancy Act and therefore the provisions of Section 14 of the Limitation Act, 1908 are not applicable to a proceeding under Sec. 36 of the Tenancy Act. The argument must, however, be rejected having regard to the construction placed by this Court on the opening words in Section 29 (2) of the Limitation Act in Full Bench decision of this Court in Anjanabai v. Yeshwantrao, 1961 Nag LJ 1 = (AIR 1961 Bom 154 FB). The question in that case was whether the provisions of Section 5 of the Limitation Act are applicable in the case of

an application made under Section 417 (3) of the Criminal Procedure Code for the grant of leave to appeal against an order of acquittal. Section 29 (2) fell for consideration in that case and it was contended that sub-section (2) of Section 29 can apply only where the special law prescribes a period of limitation different from the period prescribed therefor by the First Schedule and that since the First Schedule to the Limitation Act does not prescribe any period of limitation for an application for leave to appeal against an order of acquittal, the period prescribed under Section 417 (3) of the Criminal Procedure Code cannot be said to be different from that laid down in First Schedule to the Limitation Act. This contention was negated by the Full Bench relying on an earlier decision of Division Bench in *Canara Bank Ltd. v. Warden Insurance Co. Ltd.*, 54 Bom LR 661 = (AIR 1953 Bom 35) which was later followed in *State v. C. N. Raman*, 58 Bom LR 295 = (AIR 1956 Bom 447). In *Anjanabai's* case the following observations of the Division Bench in the decision in the *Canara Bank* case were quoted with approval:

"The contention of Mr. Adarkar is that sub-section (2) only applies when you find a period of limitation laid down in the first schedule and a special law alters or modifies that period, and inasmuch as the Limitation Act does not provide for a period of limitation in respect of an appeal from a special officer to the High Court, S. 29 (2) has no application to this particular special law. In our opinion that is not the correct interpretation to put upon the language used by the Legislature, viz., a period of limitation different from the period prescribed therefor by the first schedule. The period of limitation may be different under two different circumstances. It may be different if it modifies or alters a period of limitation fixed by the first schedule to the Limitation Act. It may also be different in the sense that it departs from the period of limitation fixed for various appeals under the Limitation Act. If the first schedule to the Limitation Act omits laying down any period of limitation for a particular appeal and the special law provides a period of limitation, then to that extent the special law is different from the Limitation Act. We are conscious of the fact that the language used by the Legislature is perhaps not very happy, but we must put upon it a construction which will reconcile the various difficulties caused by the other sections of the Limitation Act and which will give effect to the object which obviously the Legislature had in mind, because if we were to give to Section 29 (2) the meaning which Mr. Adarkar contends for, then the result would be that even Section 3 of the Limitation Act would not apply to this special law. The result would be that although an appeal may be barred by limitation, it would not be liable to be dismissed under Section 3. Therefore, in our opinion, it is clear that we have before us a special law which does

prescribe a period of limitation different from the period prescribed therefor by the first schedule to the Limitation Act."

The Full Bench observed that the view taken by the Court in the two earlier cases was correct. Thus, prescription of period of limitation of three years by the special law viz. Tenancy Act for an application under Section 36 (1) of the Tenancy Act, for which no period of limitation is prescribed by the First Schedule, must be taken to be prescription of a period of limitation different from the period prescribed by the First Schedule, for the purpose of Section 29 (2) of the Limitation Act, 1908. The first condition laid down in sub-section (2) of Section 29 having been satisfied, the provisions contained in Section 4, Sections 9 to 18 and Section 22 must be held to apply to an application under Section 36 (1) of the Tenancy Act, 1958 in so far as and to the extent to which they are not expressly excluded by such special or local law viz., the Tenancy Act. There is no express provision in the Tenancy Act which excludes the applicability of the sections enumerated in clause (a) of Section 29 (2) of the Limitation Act, 1908 in the case of an application under Section 36 (1) of the Tenancy Act. It must, therefore, be held that the provisions of Section 14 of the Limitation Act, 1908 are applicable to a proceeding under Section 36 (1) of the Tenancy Act. It will however depend on the facts of each case whether the party claiming the benefit of that provision satisfies the requirements thereof. In view of the fact that the provisions of the several sections enumerated in clause (A) of Section 29 (2) of the Limitation Act, 1908 has now been held to apply to a proceeding under Section 36 (1) of the Tenancy Act, Section 9 of the Limitation Act, 1908 will also become applicable to these proceedings. Section 9 of the Limitation Act, 1908 provides—

"Where once time has begun to run no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover continues."

In this case the proviso is not material. The effect of Section 9 of the Limitation Act, however, is that if the limitation for an application under Section 36 (1) had begun to run from the date of dispossession viz., 10-6-1959, that limitation is not arrested. Thus for the purposes of Section 36 (1) of the Tenancy Act, the limitation must be held to have commenced from 10-6-1959.

11. The next question then is whether under Section 14 of the Limitation Act the time taken during the pendency of the proceedings under Section 145, Criminal Procedure Code was liable to be excluded. The proceeding under Section 36 (1) is initiated by an application and the manner of computation of the period of limitation prescribed for an application is dealt with by Sec-

tion 14 (2) of the Limitation Act. Section 14 (2) is as follows:

"It computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Before a party can claim the benefit of Section 14 (2) of the Limitation Act he must show that he was prosecuting another civil proceeding in good faith with due diligence in a Court which from defect of jurisdiction or other cause of like nature was unable to entertain it. He has also to show that he was prosecuting the proceeding for the same relief which he claims in the subsequent proceeding. In my view a proceeding under Section 145, Criminal Procedure Code, by its very nature is a quasi-criminal proceeding and cannot be classified as civil proceeding as contemplated by Section 14 (2) of the Limitation Act. The proceedings under Section 145, Criminal Procedure Code, were pursued to their conclusion and there was no question of any want of jurisdiction in the Magistrate who passed the final order in those proceedings. Thus even assuming that the proceedings in the Magistrate's Court were for the same relief and were prosecuted with the due diligence, the most important conditions necessary for the applicability of Section 14 (2) of the Limitation Act, 1908 are not satisfied in the instant case. The pendency of these proceedings cannot, therefore, be taken into account for computation of the period of limitation of three years prescribed by Section 36 (1) of the Tenancy Act. In my view the pendency of those proceedings did not also prevent the tenant from making an application under Section 36 (1) of the Tenancy Act. The application made by the tenant on 24-2-1964 must therefore be held to have been made beyond the period prescribed by Section 36 (1) of the Tenancy Act. It was, therefore, rightly rejected by the Tahsildar.

12. The learned counsel for the tenant then contended that his client was prevented from making the application under Sec. 36 of the Act because the management of the field was taken over by the receiver appointed by the Criminal Court. He was obviously referring to the fact that a receiver appointed by the Sub-Divisional Magistrate was in possession of the field and this amounted to taking over management by the Criminal Court within the meaning of Section 129 (d) of the Bombay Tenancy Act. For the proposition that the applicability of Section 36 of the Tenancy Act was excluded in the case of such property, the management of which was taken over by the Criminal Court, the learned counsel for the tenant relied on

the opening words of Section 129 of the Bombay Tenancy Act. This section is as follows:—

"129. Nothing in the foregoing provisions except Section 2, the provisions of Chapter II (excluding Sections 21, 22, 23, 24 and 37) and Section 91 and the provisions of Chapters X and XII in so far as the provisions of the said Chapters are applicable to any of the matters referred to in sections mentioned above, shall apply—

- (a) X X X X
- (b) X X X X
- (c) X X X X X

(d) to any land taken under management by a Civil, Revenue or Criminal Court;"

The learned counsel contends that the opening words of Section 129 must be so construed as to mean that the provisions of Chapter II are made inapplicable in the case of lands under the management of civil, revenue and criminal Court. Section 129 of the Act deals with the applicability and the inapplicability of certain provisions to the different kinds of lands enumerated therein. It is true that the section provides that "none of the foregoing provisions of the Act shall apply" but to this an exception is made by enumerating certain provisions which means that the provisions which are stated by way of an exception have been made applicable to the lands specified in the section. These provisions which are stated by way of exception to the general provision of inapplicability of anything that is provided in Sections 1 to 128-A are: Section 2, the provisions of Chapter II excepting Sections 21, 22, 23, 24 and 37 from that Chapter and Section 91 and the provisions of Chapters X and XII. Section 36 is in Chapter II. Section 36 is not one of the provisions which are omitted from the Chapter II as being inapplicable because from Chapter II some of the provisions are made inapplicable and they are Sections 21, 22, 23, 24 and 37. Thus, Section 129 cannot be construed as to mean that an application under Section 36 is prohibited in the case of lands which are enumerated therein. If the tenant was entitled to take recourse to Section 36, even in the case of a land, the management of which was taken by the criminal Court, it is not possible to accept the submission that the tenant in the instant case could not have made an application for restoration of possession before the date on which the petitioner was placed in possession by the Magistrate because Sec. 36 of the Act was made inapplicable to the case of lands which were taken over by the receiver in the proceedings under Section 145, Criminal Procedure Code. It may also be stated that this ground was not even stated in the application made before the Tahsildar.

13. It is finally contended by the learned counsel for the tenant that the pendency of proceedings under Section 120 before the Sub-Divisional Officer, Nagpur, must be taken into consideration and that the learned member of the Revenue Tribunal and the

Deputy Collector were justified in condoning the delay having regard to the pendency of those proceedings. I am unable to accept this contention also. There is no other provision other than Section 14 (2) of the Limitation Act under which such an indulgence could be claimed by the tenant. It is not necessary to decide for the purpose of this case whether the proceedings pending under Section 120 before the S. D. O. Nagpur, were in the nature of civil proceedings within the meaning of Sec. 14 (2) of the Limitation Act. But the record of those proceedings is before me and the record speaks eloquently of want of diligence on the part of the tenant. Whether a particular proceeding was being prosecuted with due diligence or not is a question of fact which must be decided on the facts of each case. I have already stated that before the Tahsildar the benefit of Section 14 (2) of the Limitation Act on the ground of pendency of proceedings before the Sub-Divisional Officer was never claimed by the tenant. If such a question was raised, the Tahsildar would have inquired into the question whether the tenant was prosecuting the proceedings with due diligence or not. Apart from that, patently the Sub-Divisional Officer does not have jurisdiction in respect of a matter which is covered by Section 36 (1) of the Act and the tenant has chosen a forum which had no jurisdiction to deal with his application at all. The learned member of the Tribunal has observed that the tenant must have done so on account of some mistake or wrong advice. That again would be a question of fact and there is no evidence in this case on the basis of which the reason why the tenant was prompted to approach an authority without jurisdiction could be ascertained. The record shows that after the proceeding under Section 120 of the Tenancy Act was instituted on 23-11-1959, it got tagged on to the proceedings started by the landlord for the purpose of the verification of the surrender deed which the tenant is alleged to have executed. It is surprising to see that for almost 3½ years these proceedings have remained unattended to. The order sheet dated 3-7-1961 in this case states that—

"Both (Radhesham and Govindrao) present. Radhesham filed an application for extension of period for allowing him to produce stay order, along with one affidavit that his application for stay will be heard in the first week of July by S. D. O. Await. Case for 18-7-1961."

and the next order-sheet after this is of 21-1-1965. This order-sheet mentions that—

"This case is put up to me by my Reader Shri Kamble on asking when in an application made by Shri Kamble pleader in case No. 15/59-32 of 63-64 of M. Ranara, he made a reference to this case pending decision. Reader orally tells me he found this case lying unattended to in the box containing papers received from the Court of N. T. Nagpur, Shri Gokhale. It appears the re-

cords of the case must have been received back by the former Court with revisional orders passed on 31-1-1963 by the Court of Spl. Dy. Collector, L. R. Nagpur; the order is on record of this case.

2. My reader will please report as to how and when he detected this case." It is not disputed before me by the parties that the proceedings in this case were never stayed and when the proceedings were never stayed, the tenant obviously did not appear to be interested in getting his application under Section 120 of the Tenancy Act decided early. The conduct of the tenant in not taking any steps to see that these proceedings are disposed of can hardly be said to be diligent. Apart from the fact that these proceedings have not even been disposed of and there is no finding that the Court had no jurisdiction to entertain this application, the manner in which the tenant has prosecuted this proceeding under Section 120 is a clear proof of want of diligence on his part. I am, therefore, of the view that the learned member of the Tribunal and the Special Deputy Collector were not justified in accepting the vague allegation made at the appellate stage and condoning the delay in making the application by the tenant under Section 36(1) of the Tenancy Act.

14. These were the only contentions advanced before me. Since I have held that the application under Section 36(1) of the Tenancy Act was patently barred by time and that the tenant was not entitled to have the time taken in the two proceedings referred to above excluded, I must hold that the Tahsildar was justified in rejecting the application of the tenant as barred by limitation. The petition is therefore allowed. The orders of the Revenue Tribunal in Revenue Revision Application No. 1305 of 1965 decided on 7-8-1965 and the order of the Special Deputy Collector, Land Reforms, Nagpur, in Revenue Appeal No. 10/59-10(A)/64-65 decided on 30-4-1965 are, therefore, quashed. The petitioner shall be entitled to costs from the tenant-respondent No. 4.

Petition allowed.

AIR 1970 BOMBAY 144 (V 57 C 26)
(NAGPUR BENCH)

ABHYANKAR AND PADHYE, JJ.

Dadarao Son of Kashiram and another,
Petitioners v. State of Maharashtra and
others, Respondents.

Special Civil Appls. Nos. 1026 of 1966
and 170 of 1968, D/- 24-7-1969.

(A) Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Ss. 12 to 21 (Chap. IV) — Scheme of Act — Ceiling area and surplus land — Determination of — Holder of land dying after 26-1-1962 but before declaration under S. 21 — His heirs by succession or under

KM/LM/F108/69/KSB/M

will have to file separate returns with respect to land held by them if it is in excess of ceiling area — Determination of surplus land has to be with respect to such returns and not with respect to land held by deceased holder on 26-1-1962.

Where a holder of property dies after the appointed day viz. 26-1-1962 and before any declaration is made by the Collector under Section 21 of the Ceiling Act, the heirs or the legatees are under an obligation to file a return in respect of the property which they may already hold as on 20-1-1962 and which they may get on the death of the deceased either by succession or under a will if these together are in excess of the ceiling area and it is only with respect to such property that the surplus has to be found. In such cases, the surplus cannot be found with respect to the property which the deceased holder held on 26-1-1962 and would have held on the date of the declaration had he been alive on that date. (Para 19)

The heirs or the legatees are the persons in respect of whom the ceiling area is to be determined and the surplus land declared. The returns which can be called from the heirs and legatees will be their individual returns and not joint returns. (Para 21)

The scheme of the Ceiling Act shows that a ceiling is to be determined with respect to "a person which also includes a family and it creates a bar to a person holding land in excess of the ceiling area. (Para 13)

The Ceiling Act nowhere makes a provision that the ceiling is to be determined as on the state of affairs existing on 26-1-1962 even if the holder who was alive on 26-1-1962 dies after that date. In the absence of any such provision, it must be taken that the Ceiling Act contemplates "a person" who is alive not only on the date 26-1-1962, the appointed day, but at the time of the filing of the return and till the date of the declaration made by the Collector under Section 21 of the Ceiling Act. (Para 14)

(B) Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) Pre. — Object of Act.

The main purpose of the Ceiling Act, seems to be to distribute agricultural land amongst the landless and other persons to subserve the common good and for the purpose, to limit the extent of land to be held by a person and to take away the land in excess of the land which is allowed to be retained by the holder which is called a ceiling and the land in excess of the ceiling area is then to be distributed by the State to certain categories of persons according to priorities. The taking over of the surplus land is thus related to its distribution among the landless and other persons and among such landless persons could be also the heirs or legatees of the deceased holder, who held land on the appointed day and died during the enquiry proceedings. (Para 6)

(C) Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) S. 4(2) — Deeming provision in S. 4(2) introduces a legal fiction and can be applied only for purpose intended and cannot be stretched further — It cannot be construed to mean that determination of surplus land is to be made as on 26-1-1962 irrespective of whether holder was alive or dead after 26-1-1962.

The deeming provision of sub-section (2) of Sec. 4 in which it is said that all land held by a person in excess of the ceiling area shall be deemed to be surplus land has only a limited application and cannot be stretched further. It cannot be contended that under this provision the date 26-1-1962 is to be taken as the date with reference to which the surplus land is to be determined, whether the holder of land who was alive on 26-1-1962 was thereafter living or dead. In the first place, sub-section (2) of Section 4 has no reference to the appointed day and also it does not make any provision to say that in spite of the death of the holder the determination of the surplus land will have reference to the appointed day. The deeming provision introduces a legal fiction that a position which otherwise would not obtain is deemed to obtain under those circumstances. (Para 16)

The introduction of this legal fiction is, therefore, only to this extent and it cannot be applied to mean that it applies with reference to property held on 26-1-1962 by a holder who dies subsequently but before the declaration is made. In the absence of any specific provision and looking to the purpose and intent of the Ceiling Act from the other provisions it does not appear that the surplus land was intended to be determined and declared as on the basis that the holder was alive on 26-1-1962 and continued to live on the date of the declaration. (Para 16)

Cases Referred:	Chronological	Paras
(1963) AIR 1963 SC 1448 (V 50) =		
(1963) Supp 1 SCR 699, Commr. of Income-tax v. Amarchand		18
(1962) AIR 1962 SC 663 (V 49) =		
1962 Supp (1) SCR 143, Additional Income-tax Officer v. E. Alfred		16
(1958) AIR 1958 SC 687 (V 45) =		
1959 SCR 583, Kamaraja Nadar v. Kunju Thevar		16
(1955) AIR 1955 SC 661 (V 42) =		
(1955) 2 SCR 603, Bengal Immunity Co. Ltd. v. The State of Bihar		18
(1931) AIR 1931 Bom 333 (V 18) =		
5 ITC 100, Commr. of Income-tax v. Elis C. Reid		18

In Special Civil Appln. No. 1026 of 1966 V. R. Manohar and S. V. Natu, for Petitioners; P. G. Palshikar, Asst. Government Pleader, for Respondents Nos. 1 and 3.

In Special Civil Appln. No. 170 of 1968 S. V. Natu, for Petitioners, M. M. Qazi Asst. Government Pleader, for Respondents Nos. 1 to 3.

PADHYE, J.: The facts in the two cases slightly differ, but that does not make any difference in the legal position to be considered in these two cases and hence both these special civil applications are disposed of by this common judgment.

2. In Special Civil Appln. No. 1026 of 1966 one Parwatabai, wife of Pundlikrao Gawande, owned 114 acres and 38 acres of land at various village in taluq Akot, District Akola. The ceiling area for dry crops land in this area is 78 acres. That was the land held by Parwatabai as on 4-8-1959 and she continued to hold the same till 26-1-1962. Parwatabai submitted the return as required by Section 12 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (hereinafter called the Ceiling Act) on 26-7-1962. On this return enquiry was started by the Deputy Collector, Akot and during the pendency of this enquiry, the holder Parwatabai died on 3-9-1963. Before her death, however, she executed a will on 1-9-1963 under which the present petitioners Dadarao, sons of Kashiram and Janabai wife of Rambhau were made the legatees of this area. On the death of Parwatabai Janabai and Dadarao both contended that each of them held an area less than the ceiling area and no land which was originally held by Parwatabai was liable to be declared as surplus land. As regards Parwatabai the surplus land which could be delimited came to 38 acres and 4 gunthas in accordance with Section 21 of the Ceiling Act. The Deputy Collector rejected the contention of the petitioners and took the view that the devolution of the property on the petitioners by the will dated 1-9-1963 could not be taken into consideration and the surplus area will have to be determined on the basis that the original holder Parwatabai was still alive. On this view, the Deputy Collector delimited 38 acres 4 gunthas of land as detailed by him in his order dated 18th October 1965 in the last paragraph as surplus.

3. The petitioners challenged this order by way of appeal before the Maharashtra Revenue Tribunal. The Revenue Tribunal by its order dated 16th September 1966 took the view that the ceiling area had to be determined for the persons who held the surplus land as on 26-1-1962 and the surplus land had to be determined in respect of that person. It was held that the will dated 1-9-1963 executed by Parwatabai will operate only with respect to the ceiling area held by her and subject to the delimitation of the surplus area under Section 21 of the Act. It was further observed that

"If Parwatabai had been alive today the will dated 1-9-1963 executed by her would not have enabled her to escape the provisions of the Ceiling Act relating to loss of the surplus land to her and she would not have had any defence whatsoever to the delimitation of 38 acres and 4 gunthas of her land as surplus."

It was also observed that her death during the pendency of the proceedings under the Ceiling Act does not enable her legatees to claim the lands which Parwatabai herself would have lost as surplus land under Section 21 of the Act. Before the Revenue Tribunal, the petitioners had also urged that by reason of the death of Parwatabai during the enquiry proceedings, the proceedings for delimitation of the land abated and the proceedings which were started on the return of Parwatabai would not continue. The contention, it appears, was that after the death of Parwatabai only the legatees were obliged to file the returns in respect of their own property including the property they received under the will if such property held by them was in excess of the ceiling area. This contention was also negated by the Revenue Tribunal and the appeal was dismissed. These orders are challenged by the petitioners in this special civil application.

4. In Special Civil Application No. 170 of 1968, one Vasantarao Dajipant Kahate was the holder of about 460 acres and 20 gunthas of land on 4-8-1959 and continued to hold the same on 26-1-1962, the appointed day. He filed a return as required by Section 12 of the Ceiling Act on 20-7-1962, which was far in excess of the ceiling area. During the enquiry proceedings on this return, the original holder Vasantrao Kahate died intestate on 31-10-1966 leaving his widow and two married daughters as his heirs. Besides, there were other members in the family with whom we are not concerned at present. On the death of Vasantrao his heirs or legal representatives, namely, the present petitioners, were required to file the returns and they filed separate return of the property which each of them held including the property which they inherited from Vasantrao. The Assistant Collector and sub-Divisional Officer, it appears, under instructions of the Commissioner wanted to treat three returns as one joint return on behalf of the three petitioners jointly to which the petitioners did not submit. The petitioners submitted their contentions before the Assistant Collector contending that they could not be treated jointly as they had inherited separate shares from the deceased Vasantrao and the land which each of them got had to be treated separately for the purposes of the Ceiling Act. This contention was not accepted by the Assistant Collector. Taking into consideration the other members of the family, the Assistant Collector held that the land which could be retained would amount to 160 acres and the joint holders were ordered to file their retention statement under Section 16 of the Ceiling Act and it was further ordered that the remaining land should be declared as surplus. It may be mentioned that the petitioners had filed separate returns in pursuance of the order of the Assistant Collector dated 15-12-1966 which is in the following terms:

"The landholder Shri Vasantrao Kahate is dead. As instructions contained in Revenue and Forest Department letter No. ICH-2566-20787-N (Spl) dated 10-8-1966, now that the landholder is dead there can be no question of holding an enquiry under the Act for deciding the extent of surplus land. However, the lands held by him devolve on the successors and it has thus become a joint holding held by them. The joint holders will be liable to submit a return under Section 12. On receipt of such return fresh enquiry will be started. This case be filed."

Since the Assistant Collector was acting in pursuance of the instructions received from the Commissioner, that is, from the Government, the petitioners have directly come to this Court challenging the said order making the Commissioner and the State Government as parties to this petition.

5. It would thus be seen that the points arising in the two cases are the same and the fact that in one case the petitioners claim as legatees under a will from the deceased holder and in the other claims as heirs of the deceased holder, really makes no difference in the legal position.

6. The Ceiling Act has provided for fixing the ceiling acres for different areas or regions in the State and any person holding land in excess of the ceiling area fixed for any particular area is deemed to be a surplus holder and under the provisions of the Ceiling Act the land in excess of the ceiling area is delimited as surplus land and it is taken over by the State in which the title vests on possession of such surplus land being taken. If a person held land in excess of the ceiling area on 4-8-1959 and continued to hold the same on 26-1-1962, the appointed day, and further the enquiry was held and concluded during his lifetime and the possession of this surplus land was taken over by the Government, as envisaged by the Ceiling Act, no difficulty arises. It is only a matter of finding out the actual land which was held by the holder and after deducting the land upto the ceiling area from the land which the holder would retain with himself under the different provisions of Ceiling Act, the excess is to be declared as surplus area of which possession is to be taken by the Government. These two cases, however, are not cases of that type and the death of the holder during the enquiry proceedings changes the whole complexion. In order to appreciate the legal position, it would be necessary to take into consideration the object of the Ceiling Act and the various provisions thereof in order to find out whether the Ceiling Act seeks to deprive the legatees or the heirs of their land even if they do not hold land in excess of the ceiling area though the original holder hold surplus land. The object of the Ceiling Act is given in the preamble to the Act which reads as under:

"Whereas, for securing the distribution of agricultural land as best to subserve the common good, it is expedient in the public interest to impose a maximum limit (or ceiling) on the holding of agricultural land in the State of Maharashtra; to provide for the acquisition of land held in excess of the ceiling, and for the distribution thereof to landless and other persons; and for matters connected with the purposes aforesaid."

It is for this purpose that the Ceiling Act has been enacted which came into force on the 26th day of January 1962 which is also 'the appointed day' referred to in the Ceiling Act. The main purpose of the Ceiling Act, therefore, seems to be to distribute agricultural land amongst the landless and other persons to subserve the common good and for the purpose, to limit the extent of land to be held by a person and to take away the land in excess of the land which is allowed to be retained by the holder which is called a ceiling and the land in excess of the ceiling area is then to be distributed by the State to certain categories of persons according to priorities. The taking over of the surplus land is thus related to its distribution among the landless and other persons and among such landless persons could be also the heirs or legatees of the deceased holder, who held land on the appointed day and died during the enquiry proceedings.

7. It is contended by Mr. Natu who argued for the petitioners in both the special civil applications that the scheme of the Ceiling Act shows that the provisions regarding the determination of the surplus land as on 26-1-1962 referred only to a holder who was alive on 26-1-1962 and who filed a return under Section 12 or Section 13 of the Ceiling Act and was living on the day the enquiry concluded and the surplus land was declared by an order of the Collector in the enquiry proceedings, but the provisions of the Ceiling Act do not affect the persons who got the property either by inheritance or as legatees under a will from the holder who was alive on the appointed day, but died during the enquiry proceedings and before the declaration of surplus land was made. In order to understand the scheme of the Ceiling Act, it would be well to refer to a few provisions thereof and to see what the Ceiling Act intends and how the object of the Ceiling Act can be achieved or defeated. It will then have to be seen whether the contention raised on behalf of the petitioners in any way defeats the object of the Ceiling Act or in a way achieves it and whether the contention on behalf of the petitioners is well founded on the reading of the various provisions of the Ceiling Act.

8. Section 3 of the Ceiling Act reiterates the preamble of the Act given at the beginning. Section 4, sub-section (1) prohibits a person from holding land in excess of the ceiling area as determined in the manner

provided by the Ceiling Act. Sub-section (2) of Section 4 provides that subject to the provisions of this Act, all land held by a person in excess of the ceiling area, shall be deemed to be surplus land, and shall be dealt with in the manner provided in the Ceiling Act for surplus land. How the surplus land is to be dealt with is given in Chapter VI of the Ceiling Act. By an explanation to Section 4 (1) it is provided that a person may hold exempted land to any extent. This, however, must be to the exclusion of any other land which is not exempted. This will be clear from the provisions of Section 7 which apply to a case where a person holds both exempted and other land. If a person holds both exempted and other land, then in determining the surplus land the exempted land is also taken into consideration along with the other land and the surplus is then determined.

8a. Coming then to Chapter III which deals with restriction on alienations and acquisitions of land and consequences of contraventions, reference will be made to Section 8 which provides :

"8. No person who, on or after the appointed day, holds land in excess of the ceiling area, shall on or after that day transfer or partition any land until the land in excess of the ceiling is determined under the Act.

Explanation : In this section "transfer" means transfer by act of parties (whether by sale, gift, mortgage with possession, exchange, lease or any other disposition) made inter vivos; and "partition" means any division of land by act of parties made inter vivos."

This provision puts a check on a surplus holder preventing him from defeating the object of the Ceiling Act by prohibiting him from transferring or effecting a partition of any land held by him on or after the appointed day until the land in excess of the ceiling is determined under the Ceiling Act. If such a provision had not been made, then a surplus holder would have divested himself of the excess property by transferring the same to various persons, with the sole object of defeating the provisions of the Ceiling Act so that no land of his could be taken as surplus land. If such a restriction had not been placed, then the object of the Ceiling Act could be defeated even by making nominal or bogus transfers and just with a view to avoid such result that this provision has been specifically made in the Ceiling Act. It has, however, to be noted that Section 8 deals only with the transfers inter vivos including a partition and has no reference whatsoever to any devolution of property on the death of a person either by inheritance or by a will. Section 9 then puts another restriction on the acquisition of land in excess of the ceiling area. It reads as under :

"9. No person shall, at any time on or after the appointed day, acquire by transfer or

partition any land if he already has land in excess of the ceiling area, or land which together with any other land already held by him will exceed in the total the ceiling area." The words "transfer" and "partition" have been given the same meaning as in Section 8. The idea underlying is that after the appointed day no person shall hold any land in excess of the ceiling area under any circumstances and if a person comes to hold or comes into possession of any land in excess of the ceiling area after 26-1-62, that excess land will be taken over as surplus land leaving with the person only the ceiling area. This provision is thus meant to permit a holder to hold maximum land which is permissible to him under the ceiling Act and the rest of the land will be utilised for distribution among the needy persons.

8b. Section 10 provides for the consequences of certain transfers and acquisitions of land. It provides for contingency such as the holders owning land in excess of the ceiling area having come to know of the contemplated Act should not dispose of the excess land with a view to avoid or defeat the objects of the Ceiling Act. It refers to transfers made after the 4th day of August 1959 but before the appointed day. It provides that if any person transfers or partitions after the 4th day of August 1959 but before the appointed day any land in anticipation of, or in order to avoid or defeat, the objects of this Act, then, in calculating the ceiling area which that person is entitled to hold, the area so transferred or partitioned shall be taken into consideration, and land exceeding the ceiling area so calculated shall be deemed to be in excess of the ceiling area for that holding, notwithstanding that the land remaining with him may not in fact be in excess of the ceiling area. It also applies to lands transferred or partitioned in contravention of the provisions of Section 8. In cases of transfers made between these two dates, the burden is placed on the landholder to show that the transfers are not made in anticipation of, or in order to avoid or defeat, the objects of the Ceiling Act. Sub-sec. (2) of Section 10 then provides :

"If any land is possessed on or after the appointed day in excess of the ceiling area or if as a result of the acquisition (by testamentary disposition, or devolution on death or by operation of law including by, or in execution of a decree or order of a Court, tribunal or authority) of any land on or after that day, the total area of land held by any person exceeds the ceiling area, the land so in excess shall be surplus land."

Sub-section (3) of Section 10 is a penal provision which provides :

"Where any land is acquired in wilful contravention of the provisions of Section 9, or is obtained by collusive proceedings in any Court, then as a penalty therefor, the right, title and interest of that person in the land shall, subject to the provisions of Chapter IV, be forfeited, and shall be deemed to be

transferred to, and shall vest without further assurance in the State Government."

This provision of Section 10, however, does not make the transfers or partitions invalid or void, but they are not recognised for the purpose of determining the ceiling area or the surplus land. Thus, what is restricted or prohibited in Chapter III is only the transfers including partition by act of parties made inter vivos and it has no reference whatsoever to any devolution of property either by way of inheritance or under a will.

9. Coming to Chapter IV which deals with surplus land, Section 12 thereof requires the surplus holders to submit their returns in the prescribed forms. It provides for four categories of persons who have to submit their returns and different periods are provided for these different categories of persons within which they have to submit their returns. Clause (a) of sub-section (1) of Section 12 categorises one class of persons who held land in excess of the ceiling area between the 4th August 1959 and 26th January 1962, the appointed day, that is, a person who held land in excess of the ceiling area after the 4th of August 1959, has to submit a return within six months from the appointed day. Clause (b) of sub-section (1) of Section 12 requires a person who on or after the appointed day acquires, holds or comes into possession of any land (including any exempted land) in excess of the ceiling area, has to submit a return within three months from the date of taking possession of any land in excess of the ceiling area. It is on the basis of these returns that a further enquiry is made in order to find out the surplus land with the holder in respect of which a declaration is to be made. We are not very much concerned in these cases with sub-section (2) of Sec. 12. If however a person falling in the categories mentioned in Section 12 fails to file a return under Section 12, though he was liable to file a return, then the Collector can call upon him to show cause why the penalty should not be imposed upon him and if the Collector finds that the person has without reasonable cause failed to submit the return within time or has submitted a return which he knew or had reason to believe to be false, then he may impose the penalty provided in Section 13 (1) and may require such person to submit a true and correct return complete in all particulars within a period of one month from the date of the order. If, even after such requisition the person fails to comply with the order within the time granted, then as a penalty for failure to furnish a return or a true and correct return complete in all particulars, the right, title and interest in the land held by him in excess of the ceiling area is to be forfeited to the State Government on which it will vest in the Government.

10. Thereafter an enquiry is to be held by the Collector in accordance with the pro-

visions contained in Sections 14 to 20. The Collector has to make a declaration under Section 21 regarding the surplus land and take steps to take over possession of the surplus land. From the date on which the surplus land is taken possession of on the declaration being made, the said land shall be deemed to be acquired by the State Government for the purpose of the Ceiling Act and shall accordingly vest without further assurance and free from all encumbrances in the State Government. Such surplus land taken over by the State Government is then distributed as per provisions of Chapter VI of the Ceiling Act and further in respect of such surplus land compensation as provided in Chapter V of the Ceiling Act to be paid to the surplus holder is to be worked out.

11. Section 46 of the Ceiling Act empowers the State Government to make rules for carrying into effect the purposes of the Ceiling Act and sub-section (3) thereof provides that all rules made under this section shall be laid before each House of the State Legislature as soon as may be after they are made and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid or the session immediately following and publish in the Official Gazette, so that if the requirements of sub-section (3) of Section 46 are complied with, the rules made by the State Government have the force of law and are to be treated as if they are part of the Ceiling Act itself. Under this rule-making power the State Government has framed rules, the validity of which has not been challenged, and under the rules several forms have also been prescribed which include the forms in which returns had to be filed and also the notice to be issued to the holders under sub-section (2) of Section 17, of the Ceiling Act. On the basis of the provisions of the Ceiling Act referred to above and the forms prescribed for filing of the returns, it is urged on behalf of the petitioners that throughout, the declaration of surplus land can be made with respect to a person who held land on the appointed day and continued to hold the land till the date of declaration under Sec. 21 of the Ceiling Act. Mr. Natu has also invited our attention to the different contemporary Acts by way of comparison to show that the Ceiling Act takes into consideration only the surplus land of a person who is alive on the date of the declaration and the heirs or legatees are not affected in any way unless the land obtained by them on succession along with their other land, if any, makes their land in excess of the ceiling area.

12. We shall now consider the effect of the various provisions of the Ceiling Act referred to above to ascertain therefrom the object or intention of the Legislature and to see how far the Ceiling Act affects the persons like the petitioners.

13. Reading the aforementioned provisions of the Ceiling Act, it appears to be the scheme of the Ceiling Act that a ceiling is

to be determined with respect to "a person" which also includes a family and it creates a bar to a person holding land in excess of the ceiling area. With respect to a family the unit is taken as five members permitting it to hold land equal to one ceiling area. However, if the members of the family exceed five, then for each additional member an additional land of one-sixth of the ceiling area is permitted, so however that the total land held by a family however big will not exceed two ceiling areas. This ceiling area is, however, to be determined by a competent authority in accordance with the provisions of the law, whether such determination is for a person or a family and it is only after such determination that the surplus land is found out having regard to the ceiling fixed for a particular area and also having regard to the different kinds of lands which a person may hold. The surplus area is thus to be determined with respect to a person who is in existence at the date of determination. The provisions of Section 21 of the Ceiling Act will show that the Collector has to consider the matters which are given in Section 18 of the Ceiling Act and has also to take into consideration the matters given in Section 20 and it is only then that a declaration under Section 21 has to be made by the Collector. In making such a declaration the Collector has to find out the area of land which the person is entitled to hold as a ceiling area, the total area of land which is in excess of the ceiling area, the name of the person to whom possession of land is to be restored under Section 19, the area and particulars of such land, the area which is to be delimited as surplus land and the area which is to be forfeited to the State Government and it is only after such a declaration is made under sub-section (1) of Section 21 that a notification has to be made as to the land which is delimited as surplus land and also of the land to be forfeited to the State Government. After this is done, the Collector has to take possession of the land which is delimited as surplus land under sub-section (4) of Section 21 and it is only from the date on which the surplus land has been taken possession of, the surplus land is deemed to be acquired by the State Government for the purposes of the Ceiling Act and vest in the State Government. Till such vesting takes place, the holder of the land continues to be the owner of all the land he owned and possessed and is entitled to enjoy the same without any let or hindrance except that there are certain restrictions or prohibitions with respect to the transfer of any land by act of parties inter vivos. For example, a holder is precluded from transferring any land subsequent to 26-1-1962 and any such transfer will be at his peril while determining the surplus land. Similarly, from and after the date of the notification in pursuance of the declaration made under sub-section (1) of Section 21, no transfer such as sale, gift, mortgage, exchange, lease etc., can be made

of the land which is delimited as surplus land and if any transfer is made in respect of the land which is delimited as a surplus land after the notification, then such transfer or disposition will be invalid and of no effect. It should also be noticed that the vesting is further postponed till the final decision of the appeal, if any is filed against the declaration or any part thereof, or the final decision of the State Government if it calls for the record or proceedings of the declaration under sub-section (2) of Section 45.

14. It will thus be seen that the holder of the land is not divested of the surplus land on 26-1-1962 but continues to be the owner of land till the final declaration is made by the Collector, or by the Revenue Tribunal, or the State Government, as the case may be and continues to be the owner and in possession and enjoyment of all his land till the date of vesting of the surplus land in the State Government. The said declaration has to be made on the basis of the return filed by "a person" which includes a family and that return has to be filed with respect to the land which he held on and after 4-8-1959 and continues to hold till 26-1-1962. With respect to such a return of "a person" the land to be retained by him and the land to be declared as surplus land is determined. If that person dies or ceases to be in existence after the return is filed, then the determination of the ceiling area to be retained by the holder cannot be with respect to that person because a dead person cannot hold or retain any property. There is no provision in the Ceiling Act for substitution of the legal representatives of the deceased holder who files a return or dies after 26-1-1962 so that the legal representatives would step into the shoes of the deceased holder. The vesting of the property cannot remain in abeyance and as such, as the holder dies before the vesting in the State Government takes place, the property which he held must pass to his heirs or if there is a "will" to his legatees and after such passing of the property the heirs or the legatees take the property in their own rights either as heirs or legatees and do not simply step into the shoes of the deceased holder. The Ceiling Act nowhere makes a provision that the ceiling is to be determined as on the state of affairs existing on 26-1-1962 even if the holder who was alive on 26-1-1962 dies after that date. In the absence of any such provision, it must be taken that the Ceiling Act contemplates "a person" who is alive not only on the date 26-1-1962, the appointed day, but at the time of the filing of the return and till the date of the declaration made by the Collector under Section 21 of the Ceiling Act. Contemplate a case, where a holder of property in excess of the ceiling area as on 26-1-1962 dies after that date but before the filing of the return. The property will naturally pass on such an event to his heirs or legatees. In such a case, the person who was alive on 26-1-1962 can-

not naturally file a return and the return will have to be filed by the heirs or legatees who take the property. That return must necessarily be of the person who holds the property on that date and it is with respect to that person who files the return that the ceiling area and the surplus land have to be determined. There appears to be no obligation under any of the provisions of the Ceiling Act on the heirs or the legatees to file a return in respect of a person from whom they inherit. If there is no such obligation, then evidently there can be no return in respect of the property held by a deceased holder on 26-1-1962 and the only return that may be filed will be by a living person who can be called upon to file a return only in respect of the property which he holds which may include the property which he already owned on 26-1-1962 and which he inherited after 26-1-1962, but before the filing of the return and it is with respect only to such return and on this basis that a declaration can be made under Section 21. It is true that if a person liable to file a return does not file a return within the time prescribed and if the Collector considers that such a person is liable to file a return being in possession of land in excess of the ceiling area, the Collector can levy a penalty on such person and can call upon that person to file the return within the prescribed time and if he fails to file such a return, then he determines the ceiling area and the surplus land in the absence of the holder and the holder is further penalised by forfeiting the surplus land to the State Government, thus depriving the holder of the compensation which he would have normally got for the surplus land. But here again, Section 13 under which this action is taken postulates a living person because the person who was liable to file a return and does not file it as required by Section 12, because of his death in the meanwhile, cannot be proceeded against under Section 13 and the heirs or legatees of the deceased holder could not be penalised under Section 13 for non-filing of the return, nor can be called upon to show cause why penalty should not be imposed for the non-filing of the return by the deceased holder, nor can the penalty of forfeiture be levied against the heirs or the legatees for their failure to file the return since there is no duty or obligation on the heirs or the legatees to file any return in respect of the property held by the deceased holder.

15. The Legislature has made specific provisions which will be found in Sections 8 and 10 of the Ceiling Act inhibiting any person from transferring or partitioning only land on or after the appointed day until the land in excess of the ceiling is determined under the Ceiling Act. Even with respect to transfers between 4-8-1959 and the appointed day, 26-1-1962, a provision has been made throwing the burden on the holder to show that such transfers were not made in

anticipation of, or in order to avoid or defeat, the objects of the Ceiling Act. However, these transfers relate only to transfers inter vivos made by act of parties. That means the Legislature did not want the holders of excess land to divest themselves of the excess land after the Ceiling Act came into force or in anticipation of the Ceiling Act coming into force in order to defeat the objects of the law, by voluntarily transferring their excess lands either by transfer or partition as that would prompt the holders to defeat the objects of the Ceiling Act by entering into nominal or fraudulent transactions or to benefit their relations or friends, who would not otherwise be entitled to the property and defeat the very purpose of the Ceiling Act namely distribution of the surplus land to the landless persons. If the Legislature wanted to extend this inhibition even to heirs or the legatees, it would have been very easy for the Legislature to include those contingencies also and it was open to the Legislature to specifically provide that the surplus land will be determined in relation to the property held by a person who was alive on 26-1-1962 and died subsequently before the declaration is made. In the absence of any such provision, it will be stretching the language of the Ceiling Act too far to include even such cases where the persons taking the property on the death of the holder have no hand in getting such property which comes to them because of the accident of their being the heirs or the legatees and in the latter case on account of the voluntary act of the testator to which the legatee is not a party.

16. It was contended on behalf of the State that the determination of the surplus land has to be made as on the appointed day on which the holder was living and the heirs or legatees will succeed only to the extent of the land which the holder would have been entitled to retain had he been alive on the date of determination and the surplus land must in any case vest in the State. Reliance is placed on the deeming provision of sub-section (2) of Sec. 4 in which it is said that all land held by a person in excess of the ceiling area shall be deemed to be surplus land and it is contended that under this provision the date 26-1-62 is to be taken as a date with reference to which the surplus land is to be determined, whether the holder of land on 26-1-1962 was thereafter living or dead. In the first place, sub-section (2) of Section 4 has no reference to the appointed day and also it does not make any provision to say that in spite of the death of the holder the determination of the surplus land will have reference to the appointed day. The deeming provision introduces a legal fiction that a position which otherwise would not obtain is deemed to obtain under those circumstances; see *Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687 and *Additional Income-tax Officer v. E. Alfred*, AIR 1962 SC 663, where the effect of such a legal fiction is stated thus :

"When a thing is to be deemed to be something else it is to be treated as if it is that thing, though in fact it is not."

However, the legal fiction has to be applied only for the purpose for which it is intended and cannot be carried further than that; construing this deeming provision in subsection (2) of Section 4, it has only a limited application. The deeming provision refers only to land which is under the Ceiling Act deemed to be surplus land. But for the Ceiling Act, there was no bar to a person holding any amount of land and no land with him could be said to be surplus land. By the Ceiling Act a bar is put on a person holding land in excess of the ceiling area in any particular area and the remaining land, though it is not in fact surplus with the holder, is deemed and declared to be surplus land in the hands of the holder for the purposes of the Ceiling Act so that that surplus land can be taken away by the Government and distributed to the landless persons. The introduction of this legal fiction is, therefore, only to this extent and it cannot be applied to mean that it applies with reference to property held on 26-1-1962 by a holder who dies subsequently but before the declaration is made. Section 4 (2) refers to a person who must be living at the date of the determination of the surplus land because the surplus land can only be determined after the enquiry contemplated by Sections 18 to 20 after which a declaration is to be made under Section 21. If the intention of the Ceiling Act was to treat the land in excess of the ceiling area as surplus as on 26-1-1962 irrespective of the existence or non-existence of the person after 26-1-1962, then suitable provisions could have been made requiring the heirs or the legatees to file the return in respect of the property held by the deceased holder as on 26-1-1962 and provision could also have been made for determining the surplus land on the basis of such return, deeming that person to be alive even at the date of the declaration though he is dead. In the absence of any such provision and looking to the purpose and intent of the Ceiling Act from the other provisions to which we have already referred, it does not appear to us that the surplus land was intended to be determined and declared as on the basis that the holder was alive on 26-1-1962 and continued to live on the date of the declaration.

17. The provisions of the Ceiling Act may be contrasted with the provisions of other Acts by which there has been expropriation of land. We may refer in this connection to the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951) by which the lands and other things which were previously held by the erstwhile proprietors were expropriated and vested in the State. It may be seen that in this Act there is no reference to "a person" but it deals only with properties and certain kinds of properties which the proprietors held which were

deemed to vest in the State from a particular date and the proprietors were to cease to hold those properties from the specified date. Reference may be made to Section 3 of that Act which provides :

"3 (1). Save as otherwise provided in this Act, on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate, mahal, alienated village or alienated land, as the case may be, in the area specified in the notification, vesting in a proprietor of such an estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor, shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances." By notifications, dates from which the property was to vest in the State were notified and Section 4 of the said Act gives the consequences of such vesting. Thus, by this Act a clear provision has been made that all the properties which are of the categories mentioned in Section 4 (1) and the proprietary rights vest in the State from the specified date and all rights, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor shall cease from that date. It has no reference to the person at all and nothing is to be determined for the purpose of vesting the property in the State. Vesting takes place with immediate effect from the specified date unlike the vesting under the Ceiling Act which can only take place after the declaration is made, the notification is issued and the possession of the property is taken by the State. The vesting under the Ceiling Act takes effect only after certain stages have been gone into and after making an enquiry into the several matters upon which only the ceiling area and the surplus land can be determined. If no restrictions were placed as in Sections 8 and 10 of the Ceiling Act, then the property which would vest even in respect of a person living on 26-1-1962 would be that which would be left as surplus at the date of the declaration and would have no reference to the date 26-1-1962. It is only because of the restrictions put by Sections 8 and 10 of the Ceiling Act that the property of the holder who continues to live till the date of declaration has to be taken for the purposes of determination of the ceiling area and the surplus land as on 26-1-1962. It will thus be seen that 26-1-1962 cannot be taken to be the date for determining the surplus area which vests in the heirs or the legatees after 26-1-1962, but before any declaration could be made.

18. Reference may be made to some provisions of the Estate Duty Act, 1953. Section 5 of the said Act is the charging section which provides for the levy of estate duty on the death of a person leaving property. The property as on the death of that person is the subject matter of the charge and the provision has been made specifically in Section 53 of the Act for the liability of

the legal representatives and other persons to whom such property passes. But for this provision, the legal representatives would not perhaps have been liable for payment of the estate duty on the property left by the deceased. A similar provision has been made in the Income-Tax Act, 1922 after the decision of this Court in *Commr. of Income-Tax v. Ellis C. Reid*, AIR 1931 Bom 333. The facts of this case were that a notice was issued to an assessee to make a return for income-tax. After the receipt of notice the assessee had 30 days' time in which to comply with the notice. After the expiration of the period of 30 days but before any return could be filed, the assessee died. Question was whether the assessment could be continued with respect to the estate in the hands of his legal representatives and whether the income-tax payable by the deceased assessee could be determined after his death and the income-tax could be recovered from the estate of the deceased in the hands of the legal representatives? In construing the provisions of the Income-tax Act, the Division Bench observed that having regard to the definition of "assessee" as being a person who is liable to pay income-tax, the word is not appropriate to a dead man, so that if an assessment is to be made on a dead man, as was done here, under Section 23 (4), some violence must be done to the language of the section. We may refer to the following pertinent observations made by Beaumont C. J. in the judgment, at p. 335, column 2:

"these are, I think, the only material provisions of the Act. It is to be noticed that there is throughout the Act no reference to the decease of a person on whom the tax has been originally charged, and it is very difficult to suppose the omission to have been unintentional. It must have been present to the mind of the legislature that whatever privileges the payment of income-tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and in practically every case, before the last instalment has been collected, and the legislature has not chosen to make any provisions expressly dealing with assessment of, or recovering payment from, the estate of a deceased person. In order that the Government may succeed and assessment made in this case may be held legal I think, one must do a certain amount of violence to the language of Section 23 (4); I should say a considerable amount of violence to the language of Section 27, or else hold that the privilege conferred on a living person assessed under Section 23 (4) of getting the assessment set aside if not to be enjoyed by the estate of a deceased person distinction for which I can see no logical reason."

Later it was further observed:

"In my judgment, in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged

on the deceased in his life-time, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the statute. We are not concerned with the case which may arise on the death of a person after assessment but before payment."

It is after this judgment that a specific provision came to be made in the Income-tax Act by adding Section 24B by which assessment of the year in which an assessee died could be made even after the death of the assessee and the property of the deceased in the hands of the legal representatives could be made liable for the assessment. This was because by Section 24B legal personality of a deceased assessee is extended for the duration of the entire previous year in the course of which he died and therefore the income received by him before his death and that received by his heirs and legal representatives after his death but in that previous year becomes assessable to income-tax is the relevant assessment year. While dealing with these provisions, the Supreme Court in *Commr. of Income-tax v. Amarchand*, AIR 1963 SC 1448, observed:

"The section was enacted by the Legislature to bring to tax, after his death, income received during his lifetime, and fill up the lacuna which was pointed out by the High Court in 5 ITC 100 = AIR 1931 Bom 333." It was further observed in paragraph 7 of the judgment:

"By Section 24B the legal representatives have, by fiction of law, become assessee as provided in that section but that fiction cannot be extended beyond the object for which it was enacted. As was observed by this Court in *Bengal Immunity Co. Ltd. v. The State of Bihar*, 1955-2 SCR 603 at p. 646 = AIR 1955 SC 661 at p. 680, legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. In the present case the fiction is limited to the cases provided in the three sub-sections of Section 24B and cannot be extended further than the liability for the income received in the previous year."

19. It will thus be found that neither there is any specific provision for a contingency, such as it occurs in the present case namely, on the death of a holder subsequent to 26-1-1962 but before making of a declaration, nor is there any legal fiction created by which the property of the holder as on 26-1-1962 has to be taken into consideration for determining the surplus area even though that person dies after 26-1-1962 but before either filing the return or before making of the declaration, and the legal fiction, as we have said above, extends only to declare certain land as surplus which otherwise could not be said to be surplus with the holder. The position, therefore, that emerges is that where a holder of property

dies after 26-1-1962 and before any declaration is made by the Collector under Sec. 21 of the Ceiling Act, the heirs of the legatees are under an obligation to file a return in respect of the property which they may already hold as on 26-1-1962 and which they may get on the death of the deceased either by succession or under a will if these together are in excess of the ceiling area and it is only with respect to such property that the surplus has to be found. In such cases, the surplus cannot be found with respect to the property which the deceased holder held on 26-1-1962 and would have held on the date of the declaration had he been alive on that date.

20. We are thus unable to agree with the contentions raised by the learned counsel for the State and the view taken by the Revenue Authorities.

21. The orders of the Deputy Collector and the Maharashtra Revenue Tribunal (in Special Civil Application No. 1026/66) and of the Assistant Collector (in Special Civil Application No. 170/68) are quashed and set aside. The respective cases are sent to the Deputy Collector and the Assistant Collector who will deal with these cases in accordance with law and proceed on the basis that the heirs or the legatees are the persons in respect of whom the ceiling area is to be determined and the surplus land declared. The returns which can be called from the heirs and legatees will be their individual returns and not joint returns.

22. In the result, both the petitions succeed and are allowed with costs.

Petitions allowed.

AIR 1970 BOMBAY 154 (V 57 C 27)
(NAGPUR BENCH)

PADHYE AND CHANDURKAR, JJ.

Ramchand Maroti Mandwale, Petitioner v. Malkapur Municipal Council, Malkapur and another, Respondents.

Special Civil Appln. No. 55 of 1967, D/- 19-2-1969.

(A) Constitution of India, Arts. 246, 265, Sch. 7 List 2, Entries 11, 49 — Maharashtra Education (Cess) Act (27 of 1962), Pre — Word "education" — Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49, even assuming tax is not covered by Entry 11 — (Words and Phrases — "Education").

For levying and collecting any tax a law has to be made and in view of Art. 265 of Constitution that law must be made by a Legislature which has competence to make that law. The State Legislature has made Maharashtra Education (Cess) Act (27 of 1962)

for the purpose of levying and collecting the education cess and the authority to make such a law is to be found in List II or List III of the Seventh Schedule to the Constitution. Entry No. 11 in the List II relates to education and the purpose of levying the education cess under the Maharashtra Act is for promoting the education in the State of Maharashtra and it is for this purpose that the impugned Act has been made. Giving a wide amplitude to the word "education" levying and collecting of the cess for the purpose of promoting the education would also be covered by the term "education". If the State is to impart education, it must have funds for the purpose without which it would not be possible for the State to carry on that obligation. Hence whatever is necessary for the purpose of carrying out the main object, that is, of education, would be within the competence of the State Legislature and raising of funds being essential for the purpose of imparting education, the entry No. 11 in the List II would also take in the said subject namely, levying and collecting of a cess or tax for the purpose of augmenting the funds. (Para 6)

Assuming that the subject of this tax is not covered by entry No. 11, it can still be brought under Entry No. 49. (Para 6)

It may be that some persons might be deriving income by letting their houses, but the levy is not only on such persons, but also on persons, who occupy their own houses and do not derive any rent from them. This is really not a tax on the income which a person derives as rent, but for the occupation of the lands or buildings, and the incident of taxation falls on all persons, whether the person is an owner or a tenant occupying the land or a building. This tax would, therefore, wholly fall within Entry No. 49 of List II of the Seventh Schedule. (Para 7)

(B) Constitution of India, Art. 45 — Maharashtra Education (Cess) Act (27 of 1962), Pre — State can impose tax on citizens for meeting expenses of education—Art. 45 is no bar.

Article 45 only directs the imparting of free education to the children, but does not prohibit collection of taxes for that purpose to meet the expenses of such education from other sources and further a tax on lands and buildings or a tax on professions, trades, callings and employments would be other sources for meeting the expenses of free education. If the State is enjoined to provide for free education for all children, then it must necessarily have funds for carrying out that purpose and it is no answer to say that without levying any further tax, the education must be provided out of the revenues from the consolidated fund. Thus the State can impose tax on citizens for meeting expenses of education. Article 45 is no bar. (Para 8)

(C) Maharashtra Education (Cess) Act (27 of 1962), Pre, Ss. 3, 4 — Imposition under Act is tax on lands and buildings — Tax is

authorised by Entry No. 49 of List 2 of Sch. 7 of Constitution — Fact that tax has no relation to services rendered is immaterial. (Constitution of India, Arts. 246, 265, Sch. 7 List 2, Entry 49).

The imposition described as "education cess" under Mah. Act 27 of 1962 is a tax on lands and buildings under the Municipalities Act. The property tax has also no relation to the services rendered, but is a tax on the property itself, which is authorised by entry No. 49 in List II and the impugned Act is not ultra vires on that account. (Para 9)

It is true that the education tax is levied on a percentage basis on the annual letting value of the lands and buildings, but that is a mode of determining the quantum of tax imposed on the person who owns lands and buildings. None-the-less, it is a tax on lands and buildings and not on the income.

(Para 10)

The obligation to give free education is cast on the State by the directive principles and therefore, it is the State which has to meet the expenses for providing free education. The State has got the power to impose tax on lands and buildings and that power cannot be taken away because part out of it has been given to the local bodies. The State is not divested of its power to impose tax on lands and buildings because the State has also authorised the Municipalities to levy some taxes on lands and buildings. That power is for all the time, preserved to the State and the State is empowered to make this law.

(Para 10)

The Maharashtra Education (Cess) Act provides for levy of certain percentage on the annual letting value of the lands and buildings which annual letting value is already determined by the municipalities in respect of each land and house for the purpose of levying and collecting the municipal taxes, such as conservancy, water rate, the property tax etc. It was not, therefore, necessary to evolve an independent method for the purpose of determining the quantum of the assessment to be imposed on lands and buildings afresh for the purpose of the education cess. Under the Municipalities Act, the machinery is provided for dealing with the objections which might be raised by the tax-payers to the valuation of the lands and buildings and for the determination of the annual letting value of the lands and buildings. That opportunity having been provided, it is not necessary to provide further opportunity by this Act for raising objections to the annual letting value.

(Para 11)

(D) Constitution of India, Art. 276(2), Sch. 7 List 2, Entry 49 — Maharashtra Education (Cess) Act (27 of 1962), Ss. 3, 4 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned—Hence, education tax cannot be limited to Rs. 250 — Art. 276(2) has no application.

(Paras 13, 14)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1512 (V 54) =
(1967) 1 SCR 548, Shinde Brothers v. Deputy Commr., Raichur 5
(1967) AIR 1967 SC 1916 (V 54) =
(1967) 3 SCR 595, Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. State of Gujarat 5, 12
(1962) AIR 1962 SC 1563 (V 49) =
(1963) 1 SCR 220, Jagannath Baksh Singh v. State of Uttar Pradesh 5

B. R. Mandlekar, for Petitioner; C. S. Dhar-madhikari, Asst. Govt. Pleader for Respondent No. 2 and Advocate General.

PADHYE J.: By this petition under Articles 226 and 227 of the Constitution, the petitioner seeks to challenge the demand notice dated 21st January 1967 as being illegal and prays for a writ of prohibition to the respondents from making the recovery of the education tax on the basis of the said demand notice dated 21st January 1967. The petitioner also seeks a direction that the respondent No. 2, the State of Maharashtra, be ordered to restore and repay the amount of Rs. 775.50 to the petitioner which has been collected by the respondent No. 1 for respondent No. 2 towards the education tax for the period from 1962-63 to 1964-65. The petitioner further wants a prohibition against the respondents prohibiting them from further recovering any amount under the Maharashtra Education (Cess) Act, 1962 and the Rules thereunder. A relief is also claimed for a declaration that the Maharashtra Education (Cess) Act 1962 be declared as ultra vires of the Constitution.

2. The petitioner is a resident of Malkapur, taluq Malkapur, District Buldana and owns several lands and buildings in the town of Malkapur. Most of these buildings are let out to tenants and the petitioner gets rent for those buildings. Besides, the petitioner is also a cultivator and carries on business of moneylending. The petitioner has set out in paragraph 1 of his petition the several houses in different wards of the town of Malkapur. Education cess is being demanded by the Malkapur Municipal Council from the petitioner since October 1962 at the rate of two per cent of the annual letting value of lands and buildings owned by the petitioner within the limits of the Malkapur Municipal Council. By a notice dated 16-2-1965 an amount of Rs. 775.00 was demanded by the Municipal Council towards the education cess for the period 1962-63 to 1964-65 along with other municipal taxes. The petitioner protested against the said demand contending that it was illegal and ultra vires and requested the Municipal Council to withdraw the demand of education tax. The petitioner, however, was further served with other demand bills dated 2-12-1966 for Rs. 190 and Rs. 174 for the years 1965-66 and 1966-67 respectively on account of the education tax and the petitioner was further pressed to

pay the education tax for the period 1962-63 to 1964-65. In order to avoid any coercive process, the petitioner is alleged to have paid under protest on 3-12-1966 an amount of Rs. 775.50 towards the education cess for the years 1962-63 to 1964-65. The petitioner again received another demand bill on 19th December 1966 for Rs. 82 towards the education tax for the period 1965-66 and 1966-67. The representation by the petitioner to the Chief Officer of the Municipal Council was rejected on or about 5th January 1967. The petitioner again received another demand bill dated 21st of January 1967 for Rs. 364.50 towards the education tax with a threat that in case of failure to pay the amount, the amount would be recovered by issuing a warrant under the provisions of the Maharashtra Municipalities Act, 1965. The petitioner has given a schedule in paragraph 7 of his petition showing the amount of education cess or tax paid by him or demanded of him during each of the years 1962-63 to 1966-67. The education cess demanded for 1962-63 for the second half was Rs. 153.50, for 1963-64 was Rs. 307, for 1964-65 Rs. 295, for 1965-66 Rs. 223 and for 1966-67 it was Rs. 223. In view of the demand made by the Municipal Council for the unpaid education cess, coupled with the threat by the Municipal Council to recover the amount by coercive process, the petitioner is led to file this writ petition for the reliefs claimed by him as stated above.

3. The petitioner's contentions are: (1) The Maharashtra Education (Cess) Act, 1962, Act No. XXVII of 1962, is ultra vires the powers of the State Legislature of Maharashtra because the State List prescribed under the Seventh Schedule of the Constitution of India does not empower the State to impose education tax; (2) The imposition of education tax by the State of Maharashtra offends the directive principles laid down under Article 45 of the Constitution of India. It was urged that the Constitution directs that education should be free and this implies that no direct impost could be levied by the State and the expenditure has necessarily to be met from the general revenue raised by the State. As a part of the same contention, it has been urged that it is the duty of the respondent No. 1 under the Constitution to impart education and that the direct taxes could not be imposed for carrying out the said duty when the general revenue was provided for meeting the same. (3) The imposition of education tax exempting lands and buildings having annual letting value less than Rs. 75 and without any maximum per annum and in direct proportion to the annual letting value of the lands and buildings irrespective of any services rendered or not to the assessee is ultra vires of the Constitution of India. It was stated that the impost was strictly in the nature of tax and not fee. (4) The education tax is a tax on houses and lands in direct relation to the annual letting value of the same and such levy being exclusively reserved for the pub-

lic authorities or local bodies for their purposes, the State had no jurisdiction for the same. These are, in substance, the contentions which are advanced on behalf of the petitioner. It is also urged that the Act does not provide for giving any opportunity at any stage to the assessee to raise objections to the assessment or to dispose of any such objection, if raised, and therefore, the Act offends against the accepted principles of natural justice and the assessment lists prepared have no legal force so far as the education cess is concerned, as there are no guiding principles prescribed under the Act for the levy of the assessment of these taxes.

4. The Maharashtra Education (Cess) Act, 1962, Act No. 27 of 1962, has been enacted by the State Legislature and was published on or about the 13th August 1962. This Act has been made, as will appear from the preamble, for providing for the creation of a fund for the promotion of education in the State of Maharashtra, and for matters connected with the purposes aforesaid. Section 3 of the Act provides that for the purpose of providing for the cost of promoting education in the State of Maharashtra there shall be levied and collected in the manner hereinafter provided, the taxes in the next succeeding section described as the "Education Cess". The levy and collection was to be made with effect from the 1st of October 1962 and the levy was made on the basis of two per cent of the annual letting value of lands and buildings. Section 4 mentions this levy to be a tax on lands and buildings. Section 5 (1) provides that where more than one land or building in a municipal area is owned by the same person, the tax on lands and buildings shall be assessed on the annual letting value of all such lands and buildings. Section 6 provides that the proceeds of the Education Cess and penalties (not being a fine) recovered under this Act, shall first be credited to the Consolidated Fund of the State; and after deducting the expenses of collection and recovery shall, under appropriation duly made by law in this behalf, entered in, and transferred to, a separate fund called the State Education Cess Fund and the amount transferred to the State Education Cess Fund shall be charged on the Consolidated Fund of the State and further, the amount in the Fund shall be expended, in such a manner and under such conditions as may be prescribed, for the purposes mentioned in Section 3, that is, for promoting the education in the State of Maharashtra. Section 9 (1) (b) authorises the municipality to collect the tax, and sub-section (2) (b) provides the machinery for collecting the tax in the same manner in which the property tax is collected in that area under the relevant municipal law, or where no property tax is levied by the municipality, the tax is to be collected in such manner as may be prescribed. Sub-section (3) of Section 9 further authorises the appropriate municipal autho-

rity appointed to collect the property tax on behalf of such municipality to collect the education tax and the penalty. After making the collection, the municipality is to be given such rebate as may be prescribed to compensate the cost of the collection of the tax. From this latter provision, it would appear that the tax is levied by the State Government for augmenting its funds for the purpose of education and the municipality is only a Collecting Agent for the State and after Collection the account has to be credited to the State fund.

5. The main contention of the learned counsel for the petitioner is that the impugned Act is ultra vires of the State legislature as no entry in the State List empowers the State Legislature to make such a law. It is contended that the subject with respect to the levy of the education cess or tax does not fall under any of the entries in the List II or List III of the Seventh Schedule and as such, the State Legislature has no competence to make such a law. It is further contended that the cess contemplated is in fact a tax and as such, it is only the Union that can make such a law and not the State. It is also argued that this cess is in fact a tax on income which is also within the competence of the Union Legislature and the State Legislature has no power to make such a law. It is true that in the impugned Act itself, the Legislature has described this levy as a tax as will appear from the various provisions in the said Act. The cess is in fact a tax and that is so held by the Supreme Court in *Shinde Brothers v. Deputy Commr., Raichur*, AIR 1967 SC 1512 and *Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. State of Gujarat*, AIR 1967 SC 1916. Under List II of the Seventh Schedule to the Constitution, the State Legislature is empowered to make laws for the levy of taxes under several entries, such as Entries Nos. 46, 49, 50, 52 to 58 and 60 to 62. Entry No. 11 in List II deals with the subject of education including Universities subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III. Entry No. 49 provides for taxes on lands and buildings and Entry No. 60 relates to taxes on professions, trades, callings and employments. As has been observed by the Supreme Court in *Jagannath Baksh Singh v. State of Uttar Pradesh*, AIR 1962 SC 1563:

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution. A general word used in the entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it."

6. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. Therefore, for levying and collecting any tax a law has to be made and that law must be made by a Legislature which has competence to make that law. The State Legislature has made this law for the purpose of levying and collecting the education cess and the authority to make such a law is to be found in List II or List III of the Seventh Schedule to the Constitution. Entry No. 11 in the List II relates to education and the purpose of levying the education cess under the Maharashtra Act is for promoting the education in the State of Maharashtra and it is for this purpose that the impugned Act has been made. Giving a wide amplitude to the word "education" as has been observed by the Supreme Court in the case cited supra, levying and collecting of the cess for the purpose of promoting the education would also be covered by the term "education". If the State is to impart education, it must have funds for the purpose without which it would not be possible for the State to carry on that obligation. Hence whatever is necessary for the purpose of carrying out the main object, that is, of education, would be within the competence of the State Legislature and raising of funds being essential for the purpose of imparting education, the Entry No. 11 in the List II would also take in the said subject, namely, levying and collecting of a cess or tax for the purpose of augmenting the funds. It may be stated, and has been so said, on behalf of the petitioner that the matter of tax would not be covered in Entry No. 11 because in the same List wherever power has been given to impose taxes, it has been so specifically stated in the different entries, for example, Entry No. 46 and onwards in List II, and hence Entry No. 11 could not empower the State Legislature to impose any cess or tax though for the purpose of education. Assuming, however, that the subject of this tax is not covered by Entry No. 11, it can still be brought under Entry No. 49. Entry No. 49 relates to taxes on lands and buildings. The impugned Act in effect levies this tax as a tax on lands and buildings, as would be seen from Section 4 of the Act. This would be found repeated in several provisions of the said Act. This is, therefore, a tax on the lands and buildings just as the municipalities have been authorised to levy and collect conservancy tax, water rate, lighting tax, property tax and other taxes. Though the purpose of this levy is for the promotion of education, the incidence of this tax falls on lands and buildings and is thus a tax on lands and buildings which the State Legislature is competent to impose under Entry No. 49. It is an addition to an existing tax levied by the municipalities under the Maharashtra Municipalities Act or the earlier Municipal Acts prevalent within the different regions of the State. Being a tax on lands and buildings, the State Legislature is competent to make

a law in that respect and it cannot be said that the impugned Act is beyond the competence of the State Legislature.

7. It was urged that in cases where a person derives a rental income from his house property, the incident of this tax would fall on that rental income which is an income of the owner and this tax on such income would amount to an Income-tax which is wholly within the competence of the Union Legislature. It may be that some persons might be deriving income by letting their houses, but the levy is not only on such persons, but also on persons, who occupy their own houses and do not derive any rent from them. Besides, the Act provides that in respect of the education cess which the owner might be required to pay in respect of the house in occupation of the tenants the owner is entitled to charge the said increase on the tenants and thus, it would appear that this is really not a tax on the income which a person derives as rent, but for the occupation of the lands or buildings and the incident of taxation falls on all persons, whether the person is an owner or a tenant occupying the land or a building. This tax would, therefore, wholly fall within Entry No. 49 of List II of the Seventh Schedule.

8. The next contention that was raised was that Article 45 of the Constitution of India, which is in Chapter of Directive Principles of State Policy in Part IV of the Constitution, places a duty on the State to endeavour to provide for free and compulsory education for all children until they complete the age of fourteen years. It is urged that it being the duty of the State to impart free education to all children, it cannot impose any taxes on the citizens for meeting the expenses of such education. Mr. Mandlekar contended that the cost of education to the children must be met by the State out of the consolidated fund which it collects from the various sources and no tax under the head "Education" could be levied and collected by the State. It is true that the directive principle embodied in Article 45 provides for free education of children, and that is the endeavour that is being made by the State in that direction. The State has provided for free education of children upto the age of 14 years and no fees are recovered from such students. Article 45 only directs the imparting of free education to the children, but does not prohibit collection of taxes for that purpose to meet the expenses of such education from other sources and further a tax on lands and buildings or a tax on professions, trades, callings and employments would be other sources for meeting the expenses of free education. If the State is enjoined to provide for free education for all children, then it must necessarily have funds for carrying out that purpose and it is no answer to say that without levying any further tax, the education must be provided out of the revenues from the consolidated fund. It has to be seen that this is

not the only obligation on the State, but the consolidated fund is required for other obligations which the State has to discharge. The contention of the learned counsel for the petitioner, therefore, on this point cannot be accepted.

9. As regards the third contention that the imposition is in direct proportion to the annual letting value of the lands and buildings irrespective of any services rendered or not to the assessee and hence the imposition is ultra vires, the same reasoning will apply as on the first point. The new imposition is a tax on lands and buildings just as a property tax is imposed on lands and buildings under the Municipalities Act. The property tax has also no relation to the services rendered, but is a tax on the property itself, which is authorised by Entry No. 49 in List II and the impugned Act cannot be held ultra vires on that account, as contended on behalf of the petitioner.

10. The next contention is also similar to the one already dealt with. It is true that the education tax is levied on a percentage basis on the annual letting value of the lands and buildings, but that is a mode of determining the quantum of tax imposed on the person who owns lands and buildings. None-the-less, it is a tax on lands and buildings and not on the income, as contended by the petitioner or exclusively reserved for local bodies. For the purposes of carrying out the municipal administration, the State Legislature has passed the Maharashtra Municipalities Act and in order to meet the needs of the administration has made provision authorising the Municipal Councils or Municipal Committees to raise the revenue and conservancy, water rate, property tax etc., are some of the taxes which the Municipalities are authorised to levy for their purposes. The obligation to give free education is cast on the State by the directive principles and therefore, it is the State which has to meet the expenses for providing free education. The State has got the power to impose tax on lands and buildings and that power cannot be taken away because part out of it has been given to the local bodies. The State is not divested of its power to impose tax on lands and buildings because the State has also authorised the municipalities to levy some taxes on lands and buildings. That power is, for all the time, preserved to the State and the State is empowered to make this law which is impugned in this case.

11. The next ground that is urged was that there is no machinery provided for the manner of levying or imposing the taxes. There is no opportunity afforded to the taxpayers to raise any objections, nor any machinery provided to hear and decide those objections to the levy of the tax. It was also contended that there is no machinery for the determination of the tax by providing any method in the Act itself. It has to be noticed that this Act provides for levy of

certain percentage on the annual letting value of the lands and buildings which annual letting value is already determined by the municipalities in respect of each land and house for the purposes of levying and collecting the municipal taxes such as conservancy, water rate, the property tax etc. It was not, therefore, necessary to evolve an independent method for the purpose of determining the quantum of the assessment to be imposed on lands and buildings afresh for the purpose of the education cess. Under the Municipalities Act, the machinery is provided for dealing with the objections which might be raised by the tax-payers to the valuation of the lands and buildings and for the determination of the annual letting value of the lands and buildings. That opportunity having been provided, it is not necessary to provide further opportunity by this Act for raising objections to the annual letting value.

12. A similar objection was raised in a case arising in the State of Gujarat in AIR 1967 SC 1916 which was also a case under the Gujarat Education Cess Act and has finally been decided by the Supreme Court. It was urged there that the Education Cess Act was bad because it was not self-contained in the matter of assessment. It did not provide its own procedure of assessment and did not give the tax-payers an opportunity for putting forward their objections by way of representation, appeal or otherwise before the tax was finally fixed and hence offended the principles of natural justice. While dealing with the contention, the Supreme Court held:

"The cess is nothing more than an addition to existing taxes. As it is a percentage of another tax, the determination of the cess is not by an independent assessment. It is an arithmetical calculation based on the result of assessment under other Act or Acts. Those Acts allow the raising of objections and provide for appeals. It is only the result of assessment after scrutiny, objection and appeals which forms the basis for the application of a percentage. There is no need for further scrutiny, objection or appeals. Nor is the Cess Act bad because it is not self-contained in the matter of assessment. In all cases of imposition of cesses for special administrative purposes (such as health cess, road cess, education cess, etc.) this method is followed. Being an addition to another tax this is the only method possible. The legislation on the subject of the imposition, levy and collection of a cess is made complete by incorporation of and reference to another piece of legislation.

"This practice is neither ineffective nor unconstitutional and cannot be said to be bad."

It will thus be seen that this contention of the petitioner also had no force.

13. Lastly, it was urged that the education tax in excess of Rs. 250 could not be recovered from the petitioner in any one year as it would offend the provisions of

Article 276 of the Constitution. Article 276 (2) provides that the total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum. The contention of the petitioner is that the letting of houses by the petitioner and deriving income from them is a profession or a calling of the petitioner and hence even if each house which he owns were to be assessed to tax separately, the total amount of tax could not exceed Rs. 250 in one year. This would be so if the said Act would fall wholly under Entry 60 of List II of the Seventh Schedule and would not be covered by any other entry. We have already held that this subject is wholly covered by Entry No. 49 relating to tax on lands and buildings and the Supreme Court has also held in the Gujarat case referred to above that it is an addition to the existing tax on lands and buildings and hence it would fall under Entry No. 49. There is no limit fixed so far as taxes falling under Entry No. 49 are concerned and the tax payable by the petitioner could not be limited to Rs. 250, as contended by him and Article 276 (2) of the Constitution would have no application to the present case.

14. On the basis of sub-section (1) of Section 5 of the impugned Act it was contended that if a person owns more than one land and building in a municipal area, the tax on the lands and buildings has to be assessed on the annual letting value of all such lands and buildings and hence, it is contended that the sum total of the annual letting value of all the lands and buildings has to be taken for imposing a total tax on the owner and that tax should not exceed Rs. 250 as provided by Article 276 (2) of the Constitution. It appears that this provision has been made for facilitating the demand to be made on the owner owning more than one land or building and for the facility of recovering the said tax, which has nothing to do with the limit of tax provided in Article 276 (2) of the Constitution. We do not see any force in this contention also. None of the contentions raised on behalf of the petitioner can, therefore, be accepted and in our opinion, the petitioner is not entitled to any of the reliefs claimed by him.

15. The petition thus fails and is dismissed with costs.

Petition dismissed.

AIR 1970 BOMBAY 160 (V 57 C 28)

(NAGPUR BENCH)

ABHYANKAR, J.

Gitabai w/o Srinivas, Petitioner v. Dayaram Shankar and others, Respondents.

Special Civil Appln. No. 930 of 1966, D/-4-9-1968.

(A) Civil P. C. (1908), O. 13, Rule 9 — Courts are not empowered to allow a party to take back documents filed by him normally without notice to other side and without placing on record a certified copy of that document — Document must be available throughout the lis till matter is finally decided.

The Courts are enjoined that no presiding officer is empowered to allow a party to take back the documents filed by him normally without notice to the other side and without placing on record a certified copy of that document. Allowing documents to be taken away introduces a grave lacuna in the procedure and creates unnecessary handicaps in the appreciation of the material and the conclusions drawn therefrom, by the superior Courts.

(Para 5)

The Courts are exercising judicial power and the material on the documents on which their decisions are based must be available throughout the lis till the matter is finally decided. As tribunals of limited jurisdiction exercising exclusive powers under special Acts, there is a special responsibility cast on the presiding officers of the tribunals faithfully to observe these rules of procedure which are also rules of caution. If a party is allowed to file documents which influences the tribunal in arriving at its conclusion, it is not only fair but it is necessary that that document must continue to form part of the record throughout the proceedings.

(Para 5)

(B) Evidence Act (1872), S. 18 — Document — Admission of execution — Admission of signature of a person on document is not tantamount to admission of execution document by that person—It is one thing to admit signature of a person on a document and quite another thing which has different legal implications to admit that that person whose signature is identified by the deponent has executed the document.

(Para 6)

(C) Evidence Act (1872), Ss. 91, 92 — Partition deed — Document containing admission of both parties that they were joint till 1954 — Oral admission of partition in 1951 — Court should not persuade itself to hold that there was an oral partition between parties in face of admissions in written partition deed.

(Para 7)

(D) Tenancy laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Sections 6, 7 — Tenancy, proof — Mere production of batai patra alleged to contain signature of a person cannot lead to an inference of his cultivation — Affirmative

evidence of actual cultivation should be produced before Court.

(Para 12)

(E) Tenancy Laws—Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 111 — Civil P. C. (1908), S. 115 — Relationship of landlord and tenant — Mixed question of law and fact — Revisional authority can interfere.

It is true that in reaching a conclusion about the jural relationship like that of landlord and tenant in this case, certain facts are required to be established, and so far as the facts to be established lead to an inference of fact, that may be a finding which is binding on the superior authorities. But if the inference reached itself is without evidence, then it is open to the revisional authority to find what the evidence is in order to come to a proper conclusion as to the jural relationship. Moreover the question of status of a person who claimed to be a tenant on land and a protected lessee is not a pure question of fact, nor is it dependent on an inference from fact. It is a question of law and/or at any rate, a mixed question of law and fact. The question as to whether a certain legal position is created as between the parties as the result of a certain transaction is a matter of law, and hence the question whether the relationship of landlord and tenant existed between the defendants and the plaintiff is one of law and not of fact. Case law discussed.

(Para 13)

Therefore, where on facts which could be said to be established, an inference as to the jural relationship between the parties viz., that of landlord and tenant, is required to be drawn, the jurisdiction of the revisional authority cannot be denied on the ground that it is interfering with the finding of fact. The inference being a legal inference to be drawn from proved circumstances, it was open to the Tribunal to record a finding.

(Para 15)

Cases Referred: Chronological Paras

(1960) AIR 1960 All 395 (V 47), Ram

Prakash v. Shambhu Dayal 13

(1954) AIR 1954 Bom 100 (V 41) =

ILR (1953) Bom 969, Dhondi v.

Dadoo 14

(1953) AIR 1953 SC 153 (V 40) =

1953 SCR 930, Bejoy Gopal v.

Pratul Chandra 13

(1935) AIR 1935 Mad 268 (V 22) =

40 Mad LW 810, Narasayya v.

Veerayya 13

(1927) AIR 1927 PC 102 (V 14) =

54 Ind App 178, Dhannamal v.

Moti Sagar 13

(1919) AIR 1919 PC 60 (V 6) =

46 Ind App 197, Satgur Prasad v.

Raj Kishore Lal 13

J. N. Chandurkar, for Petitioner; V. R. Manohar, for Respondent No. 1.

ORDER: This is a landlord's petition under Article 227 of the Constitution. Dayaram, respondent No. 1, filed an application on 21-5-1963 before the Agricultural Lands Tribunal requesting that he should be

Authority under Section 6(1)(b) of the Bengal Municipal Act, 1932.

6. In my view, however, the contention raised by the learned Advocate for the petitioners appears to be sound and must prevail. Both the Bengal Municipal Act and the Howrah Municipal Act are enactments of the same legislature, which undoubtedly is competent to legislate on the subjects included in the two enactments. The provision in one statute cannot be ignored in order to give effect to the provision in the other. Section 6 of the Bengal Municipal Act requires the State Government to issue a notification if it wants to do any of the various things set out in sub-section (1) of the said section. The matter, however, does not stand there. Section 7 gives to any inhabitant of the town or local area, or any rate payer of the Municipality or Municipalities in respect of which a notification has been published under Section 6, a right to file an objection within three months from the date of publication of the notification, and the State Government is required to take such objection into consideration. The provisions requiring the State Government to take the objection into consideration are mandatory in nature. If any inhabitant of the town or local area or any rate payer of the Municipality has been given a statutory right to file objection and the mandate of the legislature is that the State Government should consider such objection, it cannot, in my view, be said that this mandate of the legislature can be ignored or over-looked because the Howrah Municipal Act has included the areas which were previously within the Bally Municipality and the Howrah Municipality into one area and incorporated this area into Howrah Municipal Corporation. It is true that under the Howrah Municipal Act no provision has been made with regard to the notification required to be published under Section 6 of the Bengal Municipal Act, but that omission in the latter statute does not make a provision in Sections 6 and 7 of the earlier statute, namely, the Bengal Municipal Act, ineffective and inoperative. The provisions in Sections 6 and 7 of the Bengal Municipal Act have created rights and imposed obligations which are mandatory in nature and it cannot be said that these provisions can be ignored, overlooked or not complied with because in the latter Act, the legislature has chosen to incorporate two different areas of the Municipalities into one Municipal Corporation.

7. The doctrine of implied repeal in the rule of construction of statutory provisions which are repugnant to each other cannot be invoked in construing the provisions of the Bengal Municipal Act and the Howrah Municipal Act, as there is no

repugnancy in the provisions of the two statutes. Section 6(1)(b) of the Bengal Municipal Act requires the State Government to publish a notification declaring its intention to withdraw a Municipality from the operation of the Bengal Municipal Act. Section 7 of the same Act confers upon various classes of persons a right to file objections and imposes an obligation upon the State Government to consider such objections. These provisions are not inconsistent with any of the provisions in the Howrah Municipality Act. But even the doctrine of implied repeal does not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it, (see Maxwell 9th Ed. p. 163). It is only where the coexistence of two sets of provisions in two statutes would be destructive of the object for which the latter was passed that the earlier would stand repealed by the latter, (see Maxwell 9th Ed. p. 171). But in this case the provisions in the Bengal Municipal Act regarding publication of the notification under Section 6(1) and the filing of objections under Section 7 is not destructive of the purpose of the latter Act namely the Howrah Municipal Act, which is the creation of a Municipal Corporation of Howrah, including therein the areas previously included in what were known as the Municipality of Howrah and the Municipality of Bally. I set out below the statement of the law on the doctrine of implied repeal in Craies on Statute Law 5th Ed. p. 338:

"Before coming to the conclusion that there is a repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later, imply the repeal of an express prior enactment i. e. the repeal must, if not express, flow from necessary implication."

8. In this case, in my view, there is no inconsistency or repugnancy at all. All that has happened is a failure or omission on the part of the State Government to issue the notification prescribed by Section 6(1) of the Bengal Municipal Act, in consequence whereof the inhabitants and rate payers of the Bally Municipality have been deprived of the statutory right to file their objections. It is therefore clear to me that there is no repugnancy or inconsistency between the provisions of the two statutes.

9. Regarding the contentions raised on behalf of the respondents that by reason of the operation of Section 8 of the Howrah Municipal Act all laws, applicable to what was previously known as 'the Howrah Municipality and the Bally Municipality' stand repealed, I must at

once point out that what was repealed was "all laws relating to matters provided for in this Act". That being so, if there were any laws which were in force in the two Municipalities of Howrah and Bally covering subjects which were covered by the Howrah Municipal Act, then such laws as were in force in the Municipalities of Howrah and Bally should stand repealed. It is to be noted that in the Howrah Municipal Act there is no provision similar to matters dealt with in Section 6 of the Bengal Municipal Act. Section 6 of that Act is in Part II Chapter II which is headed "The creation of Municipalities". There is no corresponding subject dealt with in the Howrah Municipal Act, and therefore, Section 8 of the Howrah Municipal Act cannot have the effect of repealing Section 6 of the Bengal Municipal Act.

10. It was next contended on behalf of the respondents that under Section 6 (1)(b) of the Bengal Municipal Act "the State Government may, by notification and by such other means as it may determine" declare its intention to do any of the Acts specified thereunder. With regard to this provision, it was argued in the first place that it was in the discretion of the State Government to publish a notification and it was not mandatory that such notification should be published by the State Government. The word "may" it was submitted, made it plain that the State Government was not bound to issue a notification. I cannot accept this contention. The scheme of the sections in Chapter II and Part II of the Bengal Municipal Act make it abundantly clear that the word "may" is not only directory but mandatory in nature and if the State Government wants to do any of the things set out in Section 6 (1)(b) of the Act a notification as mentioned above must be published.

11. It was next argued that the declaration of intention of State Government may be either by notification or by such other "means" as it may determine. It was submitted that the enactment of the Howrah Municipal Act by the State legislature was a "means" of declaration of intention of the State Government, and therefore, publication of notification was not necessary. This contention also must be rejected because S. 6(1) requires that the State Government may by a notification "and" by such other means as it may determine, do any of the acts specified thereunder. A notification therefore must be published as prescribed by the section, and in addition to the notification the State Government may adopt other means for declaring its intention.

12. In my view it was not competent for the State Government to withdraw

the areas from what was previously known as the Bally Municipality without first publishing the necessary notification under Section 6(1)(b) of the Act, and to include such areas into areas previously known as the Howrah Municipality even though the latter Act, namely the Howrah Municipal Act, has authorised the inclusion of areas in what was previously known as the Bally Municipality within the Howrah Municipal Corporation. This position becomes clear on a reference to "The Chundernagore Municipal Act, 1955." In schedule I to the said Act are set out the modifications of the Bengal Municipal Act, and by clause (4) of the schedule Sections 6 to 14 of the Bengal Municipal Act have been directed to be omitted.

13. Again in Section 594 of the Calcutta Municipal Act, 1951, it is provided that the State Government may by notification in the official Gazette declare that the area comprised within the Municipality of Tollygunge shall be included within Calcutta and shall be administered under the Calcutta Municipal Act. In clause (a) of Section 595 of the said Act it is provided that the Bengal Municipal Act 1932 shall be deemed to be repealed, in the areas comprised within the Municipality of Tollygunge upon publication of the notification under Section 594. These provisions in the Chundernagore Municipal Act and the Calcutta Municipal Act make it clear that the requirements of notification under Section 6(1)(b) of the Bengal Municipal Act are to be complied with before any area included within the Municipality is withdrawn and incorporated in another Municipality or in a Municipal Corporation.

14. The learned Advocate General appearing for the State of West Bengal submitted further that since the legislature which is competent to enact the Howrah Municipal Act has provided for inclusion of the Bally Municipality into the area now included in the Howrah Municipal Corporation, such inclusion cannot be challenged merely because of non-compliance with the requirements of Section 6(1)(b) of the Bengal Municipal Act. In my view, however, in the absence of any provisions in the Howrah Municipal Act to that effect, before the Bally Municipality can be withdrawn from the operation of the Bengal Municipal Act a notification under Section 6(1)(b) declaring the State Government's intention to withdraw the Municipality from the operation of the Act has to be published. There is nothing in the Howrah Municipal Act which dispenses with the compliance with the provisions of Bengal Municipal Act and unless there is clear statutory provision dispensing with the fulfilment of the

compliance with the requirements of the Statute, it is not open to a party to contend that the State Government is at liberty to dispense with the compliance with the provisions of the Statute.

15. For the reasons mentioned above, this Rule is made absolute. There will be no order for costs.

16. As prayed for by the learned Advocate-General let there be stay of the operation of the order passed to-day for six weeks from date.

Order accordingly.

AIR 1970 CALCUTTA 131 (V 57 C 20)

D. BASU, J.

Kshetra Mohan Nath, Petitioner v. District Controller of Stores, E. Rly. Halishahar and others, Respondents.

C. R. No. 1174 (W) of 1965, D/- 17-7-1969.

(A) Constitution of India, Art. 245 — Delegation by delegatee — Power to call for statement of assets from railway employee — General Manager is competent to further delegate his power as he is a "Government" in respect of non-gazetted staff within the meaning of R. 2 (i) of Railway Service (Conduct) Rules.

In view of the fact that the word 'Government' has been defined in R. 2 (i) of the Railway Services (Conduct) Rules 1956 as meaning the 'General Manager' in respect of non-Gazetted staff, the General Manager, as 'the Government' can authorise the Controller to exercise his power. It cannot be contended that under R. 15 (4) the Government having empowered the General Manager to call for the statement of assets of the employee, the latter cannot further delegate his delegated power, according to the maxim delegatus non potest delegare. (Paras 7, 8)

(B) Constitution of India, Arts. 311 and 226 — Departmental proceedings — Natural justice — Applicability.

It is an elementary principle of natural justice that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. As a general rule, therefore, the delinquent should not be interrogated before some witness or witnesses are examined in support of the charge. The reason is that, in order to be consonant with natural justice, a disciplinary inquiry should not be in the nature of an inquisition. AIR 1968 SC 266 & AIR 1963 SC 1719 & (1964) 3 SCR 652, Rel. on. (Para 12)

To the above general rule, an exception has been engrafted, namely, where an interrogation of the delinquent at the beginning of the inquiry may be to his ad-

vantage, by way of explaining an admission made by him or when the accusation is based on matters of record. The exception is based on the principle that the rules of natural justice do not prevent the delinquent being interrogated where the evidence in support of the charge is already known to him or where such interrogation would be beneficial to him; it is only inquisition which is prohibited. AIR 1968 SC 236, Rel. on.

(Para. 13)

Railway Establishment Code does not lay down anything contrary to the foregoing principle. It only lays down the sequence of the stages at an inquiry and does not lay down that witnesses must be examined in support of the charge even where no such evidence was necessary.

(Para 14)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 236 (V 55)=

1968-1 SCR 307, Firestone Tyre & Rubber Co. v. Workmen 13

(1968) AIR 1968 SC 266 (V 55)=1968-1

SCR 251, Central Bank of India v. Karunamoy 13

(1964) 1964-3 SCR 652=1963-7 Fac

LR 269, Associated Cement Co. v. Workmen 13

(1963) AIR 1963 SC 1719 (V 50)=

1964-1 SCR 293, Meenglass Tea Estate v. The Workmen 13

Noni Coomar Chakrabarty, S. K. Sen Gupta and Mrs. K. Banerjee, for Petitioner; Ajoy Kr. Basu for B. N. Bose, for Respondents.

ORDER:— The petitioner, who entered into the service as Khalasi under the Eastern Railway, was, at the material time, working as Clerk, Grade III. By the letter at Ann. B., dated the 31st May, 1962, the Controller of Stores (Respondent no. 3) asked the petitioner to submit a complete statement of his assets, movable and immovable by the 15th June, 1962. Another letter was issued by respondent no. 3 to the same effect on the 28th June, 1962 (Ann. C), but on the 26th December, 1962, the charge-sheet at Ann. G was issued against the petitioner to show cause why he should not be punished for 'disobedience of order' for having failed to submit his statement of assets by the 15th June, 1962, even though he was reminded of his obligation by a second letter.

2. In his answer to the charge-sheet (Ann. H), the petitioner stated, inter alia that in course of a proceeding started by the Special Police Establishment, the statement of assets had been called for by them from the petitioner and the petitioner had submitted to them such statement. The petitioner had, by his letter of 4th July, 1962 (Ann. D) requested the Controller to refer to the statement which the petitioner had filed before the Police.

Notwithstanding all this, the Controller appointed the Assistant Controller as the Inquiry Officer, on the 21st May, 1963. The Inquiry Officer submitted his report on the 28th October, 1964, finding the petitioner guilty (Ann. T.), and, agreeing with that finding, the District Controller (respondent no. 1) issued the second show cause notice at Ann. U, proposing removal from service as the tentative punishment. In pursuance thereof, the petitioner was removed from service by the order of the 8th December, 1964 at Ann. W, made by the District Controller (respondent 1). The petitioner's appeal to the Controller (respondent 3) filed on the 23rd December, 1964, not having been disposed of in a year, the petitioner moved this Court on the 21st December, 1965 and obtained this Rule, challenging the validity of the charge-sheet, show cause notice and the removal order.

3. The petition is opposed by a joint affidavit on behalf of respondents 1-3, by the Assistant Controller, respondent 2.

4. I. Before going into the points raised by the petitioner, it is to be noted at the outset that the appeal referred to in the petition has since been rejected on the 27th December, 1965, by the Deputy Controller, who is stated in the appellate order as the proper authority. Since this is subsequent to the Rule, the petitioner has not amended the petition to challenge its validity, but has nevertheless urged that his appeal has not been disposed of by the proper authority. The District Controller is, admittedly, the punishing authority of the petitioner. In para 23 of the counter affidavit, it was categorically stated that the appellate authority from orders of the District Controller is the Deputy Controller and not the Controller. Nothing has been said in reply or at the hearing to show that this is not correct. Hence, it cannot be said that appellate order was without jurisdiction. But since the disposal of the appeal took place after the issue of the Rule, the petitioner is entitled to challenge the validity of the disciplinary proceedings culminating in the removal, regardless of the order at Ann. III of the counter-affidavit.

5. II. Since the charge was one of violation of orders of a competent authority to submit a statement of assets, at the hearing the petitioner first seeks to cut at the root by urging that it was the General Manager and not the Controller who was competent to ask for such a statement and that accordingly, the order on the basis of which the disciplinary proceeding was founded was without jurisdiction.

6. Mr. Chakravarty, appearing on behalf of the petitioner, relies on R. 15 (4) of the Railway Service (Conduct) Rules, 1956, which says —

"(4) The Government or any authority empowered by it in this behalf may, at any time, by general or special order, require a railway servant to submit, within a period specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or by any member of his family as may be specified in the order."

7. The case of the respondent is that the Government has, in exercise of the above rule, empowered the General Manager to call for the statement and that the latter, in his turn, has delegated his power to the Controller, by a circular of 4th June, 1957, which has been produced before me. The petitioner questions the validity of the second delegation, made by the General Manager on the ground that it is only the Government or any other person authorised by the Government, which can make an order calling for such statement; the authority empowered by the Government cannot further delegate his delegated power, according to the maxim '*delegatus non potest delegare*.'

8. This contention cannot, however, succeed in view of the fact that the word 'Government' itself has been defined in R. 2(i) of these rules as meaning the 'General Manager', in respect of non-Gazetted staff; if so, there has been nothing wrong in the General Manager, as 'the Government', to authorise the Controller to exercise his power by the Circular produced by the respondents. This plea is accordingly rejected.

9. III. The next point taken on behalf of the petitioner is that, in contravention of R. 1712 of the Railway Establishment Code, Vol. I, the petitioner was interrogated by the Inquiry Officer, at the outset, without taking any evidence in support of the charge. The averments in this behalf in para 19 of the petition are corroborated by the copy of the first day's proceeding at Ann. M, namely, that after the Inquiry Officer read over the charge to the petitioner, he put questions to the latter as to why he did not submit the statement of assets asked for from him. The petitioner said that he had nothing to add to what he had stated in his written explanation.

10. The language of R. 1712(1), indeed suggests that the normal procedure at the inquiry is that after reading over the charge, the evidence in support thereof, in so far as the charge is not admitted, shall be recorded before the delinquent may be called upon to adduce evidence in his defence.

11. The plea in para 15 of the counter-affidavit is that from the papers on the record, including the petitioner's correspondence, it was evident that statement was called for by the Controller but the petitioner did not comply with his demand

and that accordingly, no further evidence was necessary to establish the charge of disobedience to that order and that the only point for the Inquiry Officer was to ascertain from the petitioner if he had any valid excuse for not obeying the order; it was for this reason that the Inquiry Officer interrogated the Petitioner to that effect at the beginning.

12. Though there are no reported Supreme Court decisions relating to disciplinary proceedings against Government servants on this point, the matter has been dealt with in several cases relating to disciplinary proceedings against industrial employees, where the question of natural justice arose.

13. The general principles laid down in these cases, relating to natural justice, will not be out of place in understanding the import of R. 1712 (1) of the Code. These are :—

(i) It is an elementary principle of natural justice that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. As a general rule, therefore, the delinquent should not be interrogated before some witness or witnesses are examined in support of the charge (*Meenglass Tea Estate v. The Workmen*, AIR 1963 SC 1719 (1720); *Associated Cement Co. v. Workmen*, (1964) 3 SCR 652 (661)). The reason is that, in order to be consonant with natural justice, a disciplinary inquiry should not be in the nature of an inquisition, *Central Bank of India v. Karunamoy*, AIR 1968 SC 266 (271).

(ii) To the above general rule, an exception has been engrafted, namely, where an interrogation of the delinquent at the beginning of the inquiry may be to his advantage, by way of explaining an admission made by him or the accusation is based on matters of record (AIR 1968 SC 266, *ibid*; *Firestone Tyre Rubber Co. v. Workmen*, AIR 1968 SC 236). The exception is based on the principle that the rules of natural justice do not prevent the delinquent being interrogated where the evidence in support of the charge is already known to him or where such interrogation would be beneficial to him; it is only 'inquisition' which is prohibited.

14. In the nature of the charge against the delinquent in this case, therefore, there was nothing wrong in asking the petitioner why he did not comply with the order of the Controller, when the materials on the record showed that there was an order and that the petitioner did not comply with it. His plea was that the order was without jurisdiction and that he was not bound to comply with it. R. 1712(1) of the Code does not lay down anything contrary to the foregoing

principle. It only lays down the sequence of the stages at an inquiry and does not lay down that witnesses must be examined in support of the charge even where no such evidence was necessary. In the circumstances of the case, therefore, I hold that the rule relied upon by the petitioner has not been violated and also that there has been no contravention of the requirements of natural justice.

15. IV. In para 20 of the petition, the complaint is made that at the second sitting of the inquiry on the 10th April, 1964, the defence helper of the petitioner, Sri Monoj Bose, could not attend because he was not spared by the Railway Administration and the Inquiry Officer also did not grant the petitioner's prayer for adjournment on that ground. In para 16 of the counter-affidavit, it is contended, with reference to Annexure II thereto that the said defence helper was indeed spared by the respondents but that he did not turn up on the date in question for private reasons, namely, that he had to attend trade union or like meetings.

16. Under Rule 1712(2) it has been held by this Court that the defence helper being a Railway servant, the respondents must take all reasonable steps for enabling him to appear so that the provision in Rule 1712(2) may not be rendered nugatory. The obligation of the Railway, however, ends as soon as the officer in question is spared from his duties for the purpose. They cannot be held responsible if the defence helper does not attend for any reason of his own. The petitioner has not been able to establish, in the instant case, that the respondents did not spare the defence-helper. Hence, the petitioner cannot complain of any violation of the Rule referred to.

17. As to the petitioner's request for adjournment, the respondents contend that adjournments had been sought for and granted to the petitioner on two previous occasions (Annexure I) and on one of those occasions (I) the ground stated by the petitioner was that the said defence helper had to attend a meeting of the Railwaymen's Federation. If, in these circumstances, the Inquiry Officer refused to allow adjournment on the third occasion, though the defence-helper had been spared, it cannot be held that such refusal was arbitrary.

18. This point must also be rejected, accordingly.

19. V. The next point urged on behalf of the petitioner is that the report of the Special Police Establishment (if any) which was called for by the petitioner's letter dated the 9th January, 1964 (Annexure L) was not shown to him. The plea in para 19 of the counter-affidavit is that there was no such report and, secondly, that the instant charge was indepen-

dent of any other proceeding held against the petitioner. This plea of the respondents must be upheld. The present charge was one of disobedience to the order to submit statement of assets. That offence had nothing to do with any adverse report of the Special Police against the petitioner, even if any such report had been received. For the same reason, the non-examination of the officer in charge of such proceeding by the Police by the prosecution caused no irregularity or prejudice in the present disciplinary proceeding against the petitioner. One of the pleas raised by the petitioner for non-submission of the return as asked for by the Controller was that he had already submitted such return to the Police (para 10 of the Petition). This is, however, no excuse for non-submission of return as asked for under the Railway Establishment Code.

20. The present plea must also fail.

21. VI. One of the points raised by the petitioner is that he had previously submitted a return of his assets at the verbal order of Mr. Sambully, the District Controller and that if the latter had been examined, as requested by the petitioner he would have proved this fact. It is to be noted that the District Controller had no jurisdiction, under the Rule, read with the Circular, to ask for such a statement. The petitioner's story on this point seems to have been an afterthought and, in the circumstances, it cannot be said that the petitioner has been prejudiced in any way by the non-examination of Mr. Sambully. As I have said in another case, if a Criminal Court has the power to withhold examination of a witness who does not appear to the Court to be relevant to the charge, an Inquiry Officer at a disciplinary proceeding cannot lack that power and Rule 1712 does not lay down anything to the contrary.

22. VII. The most important point raised on behalf of the petitioner was that the Inquiry Officer was a witness against the petitioner in a Civil suit instituted by the petitioner against the respondents in the matter of stoppage of his increment which was pending at the Baraset Court at the time of the instant proceedings. This objection was, however, rejected by the Inquiry Officer on the ground that the Civil suit at the Baraset Court related to an issue different from that involved in the instant charge (Annexure N). It has been rightly argued by Mr. Basu on behalf of the Railway that the petitioner has not shown that the Inquiry Officer had any personal grudge against the petitioner; if he had deposed against the petitioner in an official capacity regarding another matter, it cannot be said that the Inquiry Officer had any bias against the petitioner at the present

inquiry for non-compliance with the order for submitting return of assets, which was to be established by documentary evidence. The deposition of the Inquiry Officer at that suit has also not been produced before me. Nor is any actual malice shown by the Inquiry Report where the Inquiry Officer did not go out of his way in suggesting any particular punishment.

23. It cannot, therefore, be held that the petitioner was in any way prejudiced by any bias on the part of the Inquiry Officer.

24. All points having failed, this Rule must be discharged. But I make no order as to costs.

Rule discharged.

AIR 1970 CALCUTTA 134 (V 57 C 21)

B. C. MITRA, J.

Sheikh Mohammed Sayeed, Petitioner v. Assistant Collector of Customs for Preventive (I) and others, Respondents.

Matters Nos. 332 and 359 of 1966, D/-5-6-1969.

(A) Customs Act (1962), Ss. 124, 110 (2) Proviso — Order of extension of period under proviso to S. 110(2) — Notice and an opportunity of being heard to party whose goods have been seized not required — Sufficiency of cause is merely subjective satisfaction of Collector — Unless Order is in violation of provision in statute there can be no judicial review of such order — (Constitution of India, Art. 226).

There is nothing in the Customs Act which requires the Collector of Customs while making an order of extension under S. 110 (2) to act judicially or quasi-judicially and have a judicial approach so that he must give notice to the party whose goods have been seized and give an opportunity of being heard to such a party. The order of extension contemplated by the proviso to S. 110(2) is to be made where a notice under S. 124 could not be served within the initial period of six months. The cause that can be shown for an order of extension is that inquiries from particular persons or at particular places could not be completed within the specified period for one reason or another. To give notice to the party against whom the investigation is to be made, that inquiries have yet to be made from particular persons at particular places, will not only be contrary to the scheme of the Act but will be against public interest. The phrase 'on sufficient cause being shown' in the proviso to S. 110(2) merely postulates a subjective satisfaction of the Collector of Customs

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and it is satisfaction of the Collector of Customs that provides the ground and justification for an order extending the time to complete the inquiry. Objections that notice to show cause or opportunity of being heard was not given, cannot provide any grounds for challenging the legality or validity of an order of the Collector extending the time under S. 110 (2). The satisfaction of the Collector on the question of sufficiency of cause is not justifiable and there can be no judicial review of an order of extension duly made, unless such an order is made in violation of the provisions in the statute after expiry of six months fixed by the statute or expiry of the period of extension. Case law discussed. (Paras 18, 19, 20, 42, 43)

(B) Customs Act (1962), Ss. 2(25), 110 (1), 111 (d), 130 — Goods, meant for home consumption, cleared upon payment of Customs Duty on basis of forged licence — Goods so imported cannot be treated to be lawfully imported goods within S. 2 (25) — Liable to be seized under S. 110(1) — S. 130 not applicable.

The import of goods on a licence, in the case of goods the import of which is prohibited, must be confined to imports made on a licence lawfully obtained. If import licence, on the basis of which goods meant for home consumption are cleared upon payment of Customs Duty, is forged it is no licence at all and any import cannot be valid import under the Act. Goods so imported cannot therefore, be treated to be lawfully 'imported goods' within the definition of that term in S. 2(25). The goods must be held to have been brought contrary to a prohibition imposed by law as contemplated by S. 111(d) and such goods though cleared upon payment of duty are liable to confiscation and power to seize under S. 110(1) can be invoked by Customs authorities. In such case it cannot be said that the goods were released by Customs authorities and that their decision to release being conclusive such decision can be revised only by the Central Board of Revenue under Section 130. AIR 1960 SC 415, Relied on.

(Paras 32, 36)

(C) Customs Act (1962), S. 110 (2), Proviso and S. 124 — Goods seized from business premises and residence of a person — Period to issue show cause notice under S. 124 extended by order of Collector of Customs in exercise of power under proviso to S. 110(2) — Person, challenging the validity of that order, obtaining from Court Rule nisi and order of injunction restraining the customs authorities from taking any steps — After expiry of extended period, by consent of parties interim order modified so as to enable the Customs authorities to serve

show cause notice — Show cause notices under S. 124 subsequently served — Validity of show cause notice challenged on ground that it was issued beyond the extended period and not within period prescribed by Statute — Held, show cause notices issued under S. 124 were valid — Time for issue of show cause notice lapsed because of the order of injunction and this injunction was obtained by petitioner and it was not open to him to plead lapse of time as the ground of invalidity of show cause notices. (Paras 37, 39)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 707 (V 56) = 1969-1 SCC 325, Rohtas Industries Ltd. v. S. D. Agarwal 26
- (1969) 1969-1 SCC 308 (SC), Purtabpore Co. Ltd. v. Cane Commissioner of Bihar 27
- (1969) 73 Cal WN 340, Bibhuti Bhusan Bagh v. I. J. Rao 13, 14, 33
- (1968) AIR 1968 SC 240 (V 55) = 1968-1 SCR 355, M. Gopal Krishna Naidu v. State of Madhya Pradesh 24
- (1968) AIR 1968 Cal 28 (V 55) = 1968 Cri LJ 33, Charan Das Malhotra v. Asst. Collector of Customs and Supdt. Preventive Service 12, 33
- (1968) AIR 1968 Mys 89 (V 55) = 6 Law Rep. 855, Ganesh Mull Channilal v. Collector of Central Excise and Asst. Collector, Bangalore 34
- (1967) AIR 1967 SC 295 (V 54) = 1966 Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board 22, 26
- (1967) AIR 1967 SC 1269 (V 54) = 1967-2 SCR 625, State of Orissa v. Dr. (Miss) Binapani Dei 21
- (1967) AIR 1967 SC 1298 (V 54) = 1967 Cri LJ 1194, R. S. Sethi Gopi Kisan v. R. N. Sen 35
- (1967) AIR 1967 Bom 138 (V 54) = 1967 Cri LJ 715, Vasantlal v. Union of India 34
- (1967) 1967 1 All ER 226 = 1967-2 WLR 962, In re, H. K. (An Infant) 28
- (1967) 1967-2 All ER 770 = (1967) 3 WLR 348, R. v. Criminal Injuries Compensation Board; Ex Parte Lain 29
- (1966) 70 Cal WN 349, Nathmall Jalan v. Additional Collector of Customs 17
- (1965) AIR 1965 SC 1767 (V 52) = 1965-3 SCR 218, Bhagwan v. Ram Chand 23
- (1962) AIR 1962 SC 316 (V 49) = 1962 (1) Cri LJ 364, Collector of Customs, Madras v. N. Sampathu Chetty 15
- (1962) AIR 1962 SC 1559 (V 49) = 65 Bom LR 281, Pukhraj v. D. R. Kohli 16, 18

- (1961) AIR 1961 SC 372 (V 48)=
 1961 (2) SCR 241, Calcutta Dis-
 count Co., Ltd. v. Income Tax Offi-
 cer Companies District I Calcutta 25
- (1960) AIR 1960 SC 415 (V 47)=
 (1960) 2 SCR 403, Fedco (P) Ltd.
 v. S. N. Bilgrami 36
- (1960) 1960-11 STC 589 (Cal),
 Director of Supplies and Disposals,
 Calcutta v. Member, Board of
 Revenue, Govt. of West Bengal 13
- (1959) AIR 1959 Cal 219 (V 46),
 Nripendra N. Majumdar v. N. M.
 Bardhan 13
- (1957) AIR 1957 SC 877 (V 44)=
 1958 SCA 13, Babulal Amthalal
 v. Collector of Customs, Calcutta 16, 18
- (1950) AIR 1950 SC 222 (V 37)=
 1950 SCR 621, Province of Bom-
 bay v. Khushaldas S. Advani 43
- (1950) 1950-1 All ER 737=1950 AC
 361, Jacobs v. London County
 Council 33
- (1918) 1918 AC 557, De Vertuil
 v. Knaggs 30

ORDER:— This is an application for appropriate writs and orders directing the respondents to recall and cancel the seizure of the petitioner's goods and also an order dated December 5, 1965, authorising detention of the petitioner's goods and from giving any effect to the said order. There is a further prayer for a writ in the nature of mandamus directing the respondents to release and return to the petitioner the goods, books, papers and documents seized by the Customs authorities and a further writ restraining the respondents from starting any proceedings on the basis of the seizure and also detention of the goods.

2. The petitioner is the sole proprietor of a firm known as Anglo-Swiss Watch Company. On December 1, December 2, December 3 and December 5, 1965 the Customs authorities conducted searches at the petitioner's business premises and also in the show-room, factory and residence of the petitioner and seized various goods and documents. Thereafter the Customs Officers made inquiries and investigations regarding the violation by the petitioner of the Import and Export Control Act, 1947, the Sea Customs Act, 1878 and the Customs Act, 1962. It is alleged that with regard to the import of parts of Watches, Clocks and Time-pieces, show cause notices under the Customs Act, 1962, could not be served upon the petitioner within the prescribed period of six months from the date of the seizure as required by Section 110 (2) of the Customs Act, 1962.

3. On December 5, 1965, an order was made by the Customs authorities under the proviso to Section 110 (1) of the Customs Act, 1962, whereby the

petitioner was directed not to remove, part with or otherwise deal with the goods except with the previous permission of the respondents No. 3. With regard to this order the petitioner's case is that there was no material on the basis of which the respondents could have any reason to believe that the goods or any of them were liable to confiscation under the Act. In the petition there is a challenge to the vires of Section 110 of the Customs Act, 1962, on the ground that it confers upon the Customs Officer an absolute arbitrary, untrammelled and uncontrolled power without laying down any standard or principle for his guidance, and enables a Customs Officer to pick and choose any person for the favour of giving premission to deal with the goods so detained, and for that reason the said provision is violative of Article 14 of the Constitution, as it denies equal protection of laws to the owner or holder of goods. There is also a challenge to the vires of Section 110 (3) of the Customs Act, 1962, on the ground that it is violative of Articles 14, 19 (1) (f) and (g) and 31 (1) of the Constitution.

4. The seizure of the goods was followed by criminal proceedings against the petitioner and by an order dated 29th June 1966 the petitioner was discharged from one of the said proceedings and by another order dated August 26, 1967, the petitioner was again discharged in a second criminal case in which a proclamation was issued against the petitioner. This proclamation was also recalled.

5. In exercise of the powers under the proviso to section 110 (2) of the Act, an order was made whereby the period of six months was extended by two months with effect from June 1, 1966, and this order of extension was communicated to the petitioner by a letter dated May 30, 1966. The petitioner's contention is that the said order of extension was passed ex parte and without giving the petitioner an opportunity to show cause against the said extension and without hearing him. It was also contended that it was incumbent on the Customs authorities to serve notice on the petitioner before making the order of extension, and also to give him an opportunity of being heard, on the question whether extension of time should be granted or not. It is alleged that there was no cause or sufficient cause justifying extension of time and the order was passed without jurisdiction and for that reason is null and void.

6. On July 7, 1966, the petitioner moved this Court for a Rule Nisi and also for an order of injunction. On that date a Rule Nisi was issued and also an order

of injunction restraining the Customs authorities from taking any steps on the basis of or in connection with the order of detention whereby the petitioner was restrained from removing, parting with or otherwise dealing with the goods mentioned in the Schedule to the order. The injunction also restrained the Customs authorities from taking any steps on the basis of or in connection with the order of extension of the period of detention by two months as communicated by the letter of May 30, 1966, or from issuing any notice or initiating any proceedings whatsoever against the petitioner.

7. On May 31, 1966, the six months period prescribed by Section 110 of the Customs Act, 1962, for issue of a show cause notice under Sec. 124 of the Act expired. By a letter dated May 30, 1966, the petitioner was informed that the Additional Collector of Customs, on sufficient cause being shown, had extended the period by two months with effect from June 1, 1966. This extended period of two months expired on July 31, 1966, but before the expiry of this period however the petitioner obtained the Rule Nisi and the order of injunction mentioned above. On September 27, 1966, by consent of parties an order was made by this Court whereby the interim order already passed was modified so as to enable the Customs authorities to serve show cause notices on the petitioner. The order was made without prejudice to the rights and contentions of the parties and it was also ordered that the petitioner's contentions regarding the validity of the show cause notices was to be dealt with by the Court at the hearing of the Rule Nisi.

8. Although in the petition the vires of Section 110 of the Act and the sub-sections thereunder has been challenged on the ground of violation of Articles 14, 19 (1) (f), (g) and 31 (1) of the Constitution, the only question canvassed before me, was that the extension of two months granted by the Assistant Collector of Customs was bad, as the order was made without hearing the petitioner, and without giving him an opportunity of showing cause as to why such an order of extension should not be made. It was contended that in exercising the power of extension under the proviso to Section 110 (2) of the Act, the Customs Officer was acting quasi-judicially, and he was therefore bound to hear the objections of the petitioner to such an order of extension, before granting the extension. It was argued that the statute required the Customs Officer in dealing with an application for extension under the proviso to Section 110 (2) to adopt a judicial approach. The statute required, it was further argued, that an order for exten-

sion could be made on sufficient cause being shown, and this requirement of the statute, it was submitted, quite plainly indicated that the Customs Officer should act judicially or at any rate quasi-judicially, and for that reason the petitioner who would be vitally affected by an order of extension, should be given an opportunity of showing cause against such an order, and of being heard with regard to the objections that he may have, to such an order being made. In this case no such opportunity was given to the petitioner, and the order of extension was made without considering the petitioner's objections to such an order. The extension order was made, it was submitted, in violation of the rules of natural justice, and was therefore illegal and should be struck down. It was next contended that the extension order being bad, the petitioner has acquired a vested right to the return of the goods and also of the books and documents which had been seized. The respondents, it was further submitted, were not entitled to retain the goods any longer and were bound to return the same to the petitioner as required by the statute.

9. The argument in substance is that a valid order for extension to retain the goods beyond the period of six months, could be made only upon notice to the party whose goods had been seized, and after giving him an opportunity of being heard, and of making representations against such an order of extension; and if an order was made without hearing the party, and without giving him an opportunity of making representations against the proposed order of extension, such an order would be clearly violative of the rules of natural justice, as the statute required the Customs authorities to have a judicial or quasi-judicial approach to any request for extension of time.

10. The next contention on behalf of the petitioner was that even assuming that the order of extension was validly made, the period of extension expired on July 31, 1966, and as no show cause notice was served within the extended period, the petitioner was entitled to the return of the goods, as also of the books and documents seized by the Customs authorities. Several show cause notices dated 1-10-66, 3-10-66, 15-10-66 and 8-11-66 were issued and served on the petitioner. These notices, it was argued, were clearly served beyond the extended time which expired on July 31, 1966. Leave to serve show cause notices was obtained by the petitioner from this Court on September 27, 1966, on which date by consent of parties the order of injunction was modified to enable the respondents to serve

show cause notices on the petitioner. This leave was obtained after expiry of the extended period and thereafter the show cause notices were served as mentioned above. It was therefore submitted that as no show cause notice was served upon the petitioner within the period prescribed by the statute, the respondents were bound to restore the goods, books and documents seized, to the petitioner and the respondents had no authority in law to withhold or retain them any longer.

11. In my view there is no merit in the contention that the respondents are bound to restore to the petitioner all that was seized, as the show cause notices were served beyond the extended period. By the order of ad interim injunction passed by this Court the respondents were restrained from taking any steps in connection with the seizure and order of detention dated December 5, 1965, and also from issuing any notice or initiating any proceeding whatsoever against the petitioner. The respondents were restrained from issuing the show cause notices, and therefore, even though time was extended by two months from June 1, 1966, they could not possibly serve a show cause notice in violation of the ad interim injunction issued by this Court. Having regard to the ad interim injunction, it was not open to the respondents to serve any show cause notice on the petitioner for commencing proceedings which may terminate in an order for confiscation of the goods under Section 111 and an order imposing penalty under Section 112 of the Act. This is precisely what the petitioner apprehended, and it was on his prayer that the order of injunction was made restraining the respondents from taking any steps whatsoever in connection with the search and seizure of the goods. The order of injunction was wide and comprehensive in its terms, and having obtained this order it is not open to the petitioner now to contend that the show cause notices were not served upon him within the period prescribed by the statute. I shall revert to this question later in the judgment.

12. In support of the contentions mentioned above Mr. A. K. Sen learned counsel for the petitioner relied upon a Bench decision of this Court, Charan Das Malhotra v. Assistant Collector of Customs and Superintendent Preventive Service, AIR 1968 Cal 28. In that case also the appellant carried on the business of a watch dealer and a search was conducted at his place of business. Several watches of foreign make were seized on March 19, 1963, and a show cause notice was issued on March 6, 1964. Between the dates of the seizure and the issue of the

show cause notice, two extensions were granted under the proviso to Section 110 (2) of the Act. The first extension was granted on September 19, 1963, for four months and a second extension for two months was granted extending the time till March 17, 1964. The first extension for four months granted on September 19, 1963, expired on January 19, 1964. The second extension of two months, however, was granted after the expiry of the first extension on January 19, 1964, as the order of second extension of two months was made on February 20, 1964. The show cause notice under Section 124 of the Act in that case was given on March 6, 1964. Admittedly therefore in this case the second extension was granted after the expiry of the first extension on January 19, 1964. The contention of the appellant was that both the extensions were granted ex parte and without notice to him. It was held, however, that even if the first extension granted on September 19, 1963, was justified the ex parte order made on February 20, 1964, by which a second extension of two months was granted could not be justified. It was further held that notice under Section 124 of the Act must be given within six months of any extended time and if it was not so given, the goods seized must be returned to the person from whom they have been seized. It was further held that the first extension expired on January 19, 1964, and since on that date no extension order was made, the right to the return of the goods devolved on the appellant. The second extension was granted on February 20, 1964, a month after the expiry of the first extension and by this order of extension, it was held, a vested right of the appellant was being taken away. It was also held that as the Collector of Customs had to consider whether the cause shown was sufficient or not specially as it affected a vested right, he should have a judicial approach in the sense "that he would have to hear the pros and cons from all parties affected and then come to a decision as to whether the cause shown was "sufficient", so as to warrant the taking away of a vested right." It was held that under those circumstances a determination requires a judicial approach and could not be made ex parte. This decision to my mind does not uphold the petitioner's contention in the instant case now before me. In that case the second order of extension was admittedly made after the expiry of the first extension of four months, so that immediately on the expiry of the first extension of four months the appellant acquired a vested right to the return of the goods as there was no order of extension on January 19, 1964, on which

date, the first extension expired. Secondly in that case the first order of extension was made before the expiry of the initial period of six months and the Division Bench observed with regard to the first extension which also was made ex parte "that even if the first extension on the 18th September, 1963, was justified, the ex parte order made on 20th February 1964, cannot be justified." Quite clearly therefore although the Division Bench held that an order of extension made ex parte after the expiry of the period was bad, it did not hold, that an ex parte order extending the time within the period of six months as prescribed by the proviso to Section 110 (2) of the Act was bad. The question decided in that case was that where the period prescribed by the statute had expired or lapsed in consequence whereof a party had acquired a vested right to the return of the goods seized, such a vested right could not be taken away so as to deprive the party to the return of the goods by an order made ex parte extending the time. In other words it was held that where a party had acquired a vested right to the return of the goods by reason of the expiry of the time within which notice was to be served, such a vested right could not be taken away by an order of extension made ex parte without hearing the party. For these reasons this decision, to my mind, is of no assistance to the petitioner in this case.

13. The next decision relied upon by learned counsel for the petitioner was a decision of this Court reported in (1969) 73 Cal WN 340, *Bibhuti Bhushan Bagh v. I. J. Rao*. In that case on May 5, 1966, various type-writers adding and calculating machines were seized by the Customs Authorities after a search. Before the expiry of the period of six months within which a notice under Section 124 was to be served, the Additional Collector of Customs by an order made on November 3, 1966, extended the initial period of six months for giving notice under Section 124, and within this extended period a notice under Section 124 was served on December 16, 1966. The order of extension, however, in that case, was not served and communicated until December 16, 1966, that is to say, after expiry of the initial period of six months from the date of seizure. Ghose J. relying upon two decisions reported in AIR 1959 Cal 219 and (1960) 11 STC 589 (Cal), came to the conclusion that the order of extension though made on November 3, 1966, was to be treated as made on the day when it was communicated to the party namely December 16, 1966, and as by this time the right to get back the goods seized had become vested in the petitioners in that case, the order extending the time was

bad. The facts in this case are clearly distinguishable from the facts in the instant case now before me, in which the initial period of six months expired on May 31, 1966, but before the expiry of this period that is to say, on May 30, 1966, the petitioner was informed about the order of extension by two months with effect from June 1, 1966. Ghose J. came to the conclusion that the order of extension was to be treated to have been made on the day on which it was communicated to the petitioners in that case namely, December 16, 1966, and as on that date the petitioners had already acquired a vested right to the return of the goods, such a right could not be taken away without given an opportunity of being heard to the petitioner.

14. The decision reported in (1969) 73 Cal WN 340 was strongly relied upon by the learned counsel for the petitioner in support of his contention that in making the order of extension the Customs Officer must act judicially or quasi-judicially and must have a judicial approach; and therefore he must give notice to the party whose goods have been seized and give an opportunity of being heard to such a party and if an order was made extending the time without giving such an opportunity, and without hearing the party, such an order must be held to be bad and must be struck down. In dealing with this contention it is to be considered, if the phrase "on sufficient cause being shown, in the proviso to Sec. 110(2) of the Act requires an objective analysis of the grounds made out for extension of time or merely postulates a subjective satisfaction of the Collector of Customs who is empowered to make the order of extension.

15. The provisions in statute requiring public servants to make confiscatory orders, whenever they have reason to believe that grounds exist for formation of such a reason to believe have received judicial attention in several decisions to which I shall presently refer. It is necessary to go into these decisions to find out if the phrase "on sufficient cause being shown" in the proviso to Section 110 (2) of the Act is a matter of subjective satisfaction of the Customs Officer or postulates an objective analysis, which demands a show cause notice to the party likely to be affected by the order and also an opportunity of being heard being given to him. The first case to which I shall refer in this connection is a decision of the Supreme Court, *Collector of Customs, Madras v. N. Sampathu Chetty*, AIR 1962 SC 316. In that case Section 178 (1) of the Sea Customs Act, 1878, which prescribed that where goods

to which that section applied were seized in the reasonable belief that they were smuggled goods, the burden of proving that they were not smuggled goods shall be on the person from whose possession the goods were seized, came up for consideration and it was held that if circumstances existed to raise a reasonable suspicion that the goods seized had been obtained illicitly, that was sufficient to constitute in the words of the statute, "a reasonable belief that the goods (gold) were smuggled." It was held to be a matter of subjective satisfaction of the Customs Officer and a suspicion that goods were obtained illegally was sufficient to constitute a reasonable belief.

16. The next case to which I shall refer on this question is also a decision of the Supreme Court *Babulal Amthalal v. Collector of Customs, Calcutta* (1958) SCA 13 = (AIR 1957 SC 877), in which the Supreme Court considered the questions of reasonable belief that the goods were smuggled goods as prescribed by S. 178-A (1) of the Sea Customs Act 1878. In that case several pieces of diamond were seized by the Customs Officer upon a search. This seizure was made in the reasonable belief of the Customs authorities that the diamonds were smuggled goods. Under S. 178-A (1) the burden of proving that the goods were not smuggled goods is on the person from whose possession the goods were seized. Dealing with this provision and also the question of reasonable belief it was held at page 21 of the report as follows:—

No doubt the content and import of the section are very wide. It applies not only to the actual smuggler from whose possession the goods are seized but also to those who came into possession of the goods after having purchased the same after the same has passed through many hands or agencies. For example, if the Customs authorities have a reasonable belief that certain goods in the possession of an innocent party are smuggled goods and the same is seized under the provisions of this Act, then the person from whose possession the goods were seized, however innocent he may be, has to prove that the goods are not smuggled articles. This is no doubt a very heavy and onerous duty cast on an innocent possessor who for aught one knows, may have bona fide paid adequate consideration for the purchase of the articles without knowing that the same has been smuggled. The only pre-requisite for the application of the section is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled."

The question of 'reasonable belief' was again considered by the Supreme Court

in *Pukhraj v. D. R. Kohli*, AIR 1962 SC 1559. In that case the Collector of Central Excise, Nagpur, passed an order directing confiscation of gold found in the possession of a party and imposing upon him a personal penalty of Rs. 25,000 under Section 167 (8) of the Sea Customs Act, 1878, read with Section 19 of the said Act and Section 23-A of the Foreign Exchange Regulation Act, 1947. It was contended that there were nothing on record to show that the seizure of gold had been effected by the Officer acting on a reasonable belief that the gold was smuggled. It was also contended that the question whether there was a reasonable belief or not was justiciable and since there was no material on the record to show that the belief could have been reasonable the statutory presumption could not be raised. In rejecting this contention the Supreme Court held:

"After all, when you are dealing with a question as to whether the belief in the mind of the Officer who effected the seizure was reasonable or not, we are not sitting in appeal over the decision of the said Officer. All that we can consider is whether there is ground which prima facie justifies the said reasonable belief. That being so, we do not think there is any substance in the argument that the seizure was effected without a reasonable belief and so is outside Section 178-A."

17. The next case on this point relied upon by the learned counsel for the respondents was a Bench decision of this Court reported in (1966) 70 Cal WN 349, *Nathmull Jalan v. Additional Collector of Customs*. In that case certain gold bars were seized and thereafter a show cause notice under Section 167 (8) of the Sea Customs Act, 1878, read with Section 23-A of the Foreign Exchange Regulation Act, 1947, was served. It was argued in that case that as the bullion was purchased from a dealer at Bombay, the onus of proof that the gold involved was smuggled gold shifted from the party to the Customs authorities and that in those facts there could be no ground for having a reasonable belief that the bullion was smuggled. It was held that the question whether the gold was smuggled gold was a matter of subjective satisfaction of the Customs authorities and that it was not open to the party from whom the gold was seized to challenge the grounds of reasonable belief of the respondents as required by Section 178-A of the Sea Customs Act, 1878.

18. It is to be noticed that the decisions mentioned above have dealt with the question of 'reasonable belief' or 'reason to believe' in the Sea Customs

Act, 1878, and the matter with which I am concerned in this case is the phrase 'on sufficient cause being shown' in the proviso to Section 110 (2) of the Act. Under the proviso to Section 110 (2) of the Act, sufficient cause is to be shown to the Collector of Customs; and it is he who is to be satisfied about the sufficiency of the cause shown by the department for an extension of time. Section 178-A (1) which was considered by the Supreme Court in Babulal Amthlal Mehta's case, 1958 SCA 13 = (AIR 1957 SC 877) (supra) and also in Pukhraj's case, AIR 1962 SC 1559 (supra) runs as follows:—

"Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

In dealing with the question of reasonable belief in the section quoted above it was held in Pukhraj's case, AIR 1962 SC 1559 (supra) that the Court does not sit in appeal over the decision of the Customs Officer in dealing with a question as to whether the belief in the mind of the Officer was reasonable or not. In my view the same principles are attracted in construing the phrase 'on sufficient cause being shown' in the proviso to Section 110 (2) of the Act. With regard to the nature and sufficiency of the cause, it is the satisfaction of the Collector of Customs that provides the ground and justification for an order extending the time to complete the inquiry. Objections raised on behalf of the party from whose custody goods have been seized, however strong and cogent they may be, cannot in my view provide any grounds for challenging the legality or validity of an order of the Collector of Customs extending the time under the proviso to section 110 (2) of the Act. If the order of extension is made before expiry of the initial period of six months, or before expiry of the extended period, it cannot in my view be challenged on the ground that notice to show cause, or opportunity of being heard was not given to the party, provided however that such an order of extension is made within the limit of one year prescribed by sub-section (2) and the proviso thereto to Section 110 of the Act.

19. Let me now proceed to test the question from a different point of view. The proviso requires the department to show sufficient cause to the Collector of Customs. What is this cause that the department can show? Quite plainly the cause that can be shown is that the investigation is not complete and that inquiries have yet to be made from persons

A. B. and C at places X, Y and Z and that for one reason or another, such inquiries could not be completed either within the initial period of six months or within the extended period, which must not of course exceed a further period of six months. Such is the cause to be shown, and such is the cause that can provide the ground for an order of extension. If an order of extension is made after expiry of the initial period of six months or after expiry of the extended period, different considerations will apply, as a statutory right to the return of the goods vests in the party under sub-section (2) of Section 110 of the Act. But if it is held that notice must be given to the party whose goods have been seized, before making an order of extension, and that such order of extension can be made only upon hearing the party it must follow that the materials which have been produced before the Collector of Customs by the department, must also be placed before the party, and he must be told that inquiries have yet to be made from persons A, B and C at places X, Y and Z. What would be the result of disclosure of such materials to a party who is charged with smuggling and whose dealing with the goods are under investigation? It is obvious that such disclosure would lead to disappearance of or at any rate tampering with material evidence. Such a course of action in my view would defeat the purpose of the investigation itself and is entirely against public interest.

20. The purpose for which six months time has been given by Parliament to the department for serving a notice under S. 124 of the Act, and the purpose for which provision has been made for extension of the initial period of six months by a further period not exceeding six months, is quite plain. That purpose is to enable the department to commence and conclude investigation regarding the importation of the goods and subsequent dealings therewith. If the party from whose custody the goods have been seized, and who may be charged with smuggling of the goods, and against whom an order confiscating the goods, and imposing a personal penalty may be made, is informed that investigations with regard to the import of, and subsequent dealings with the goods are going to be made, from such and such persons at such and such places, the purpose of the investigation itself, and indeed the whole proceedings commencing from search and seizure would be altogether defeated. The investigation contemplated by the statute, must be made without the knowledge of the party (from whom the goods have been seized) as to the sources at which investigation is to be made. For such an in-

vestigation to succeed, it must be made behind the back of the party who has been charged with the offence of smuggling. Parliament in my view did not intend that when an order of extension was made before expiry of the statutory period or extension thereof notice must be given to the party from whom goods have been seized and such a party must be heard by the Collector of Customs before making the order. When Parliament desired that notice should be given, followed by an opportunity of making representations, and an opportunity of being heard, provision to that effect has been expressly made in the statute itself. This becomes clear on a reference to Section 124 of the Act in which mandatory provision has been made firstly for giving notice in writing of the grounds on which goods are proposed to be confiscated, or penalty imposed; secondly of giving an opportunity of making the representation and thirdly of giving reasonable opportunity of being heard. Keeping in mind the mandatory provisions regarding service of notice, written representations and opportunity of being heard in Section 124 of the Act, in my view it is not open to the Court in construing the terms of the proviso to sub-section (2) of Section 110 of the Act. In a case in which the order of extension was made before expiry of the initial period of six months, or expiry of subsequent extension not exceeding a further period of six months, to hold that the statute requires by implication though not expressly, that a notice and an opportunity of being heard is to be given to the party. That in my view would have the result of introducing in the proviso to sub-section (2) of Section 110 something which is not there at all. It is true that when statutory authorities are given jurisdiction to deal with the rights of citizen, they may be required to act judicially by the statute and in such cases there may be either an express provision in the statute or such a provision may be implied. In other words when a statutory authority is required by the statute to deal with the rights of citizens, they may be required to act judicially or quasi-judicially by implication, even though no express provision has been made in the statute. But such an implication, in my view cannot be inferred when the Collector of Customs is exercising his jurisdiction under the proviso to Section 110 (2) of the Act. From what I have said above it will be amply clear that in circumstances such as these, namely an investigation following seizure of goods, to hold that the Collector of Customs must act judicially, and give notice to the party and also an opportunity of being heard,

would defeat the purpose of the investigation itself. To read into the proviso to S. 110 (2) of the Act an implied provision requiring the Customs Officer to act judicially will be altogether contrary to the scheme of the Act in Chapter XIII which deals with search, seizure and arrests.

21. It was argued by learned counsel for the petitioner, that even if it was held that the order of the Collector of Customs was an administrative order and not a judicial or quasi-judicial order, notice should have been given to the petitioner, who should also have been given an opportunity of being heard. In other words, it was contended that even in case of an administrative order, the authority making the order is required to follow the rules of natural justice, and should therefore give to the party affected, a notice that an order affecting him may be made and also give such a party an opportunity of being heard. In support of this contention reliance was placed upon a decision of the Supreme Court, *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269. In that case there was a dispute with regard to the declared age of a Government servant who claimed that her age as recorded in the Civil List and the Service Records of Gazetted Officers should be accepted. The age of superannuation was raised from 55 to 58 from December 1, 1962. But before this alteration in the age of retirement, she was due to retire on April 10, 1965 upon completing 55 years. According to her, her age of birth was April 10, 1910. But upon an inquiry being made on the basis of some anonymous letters she was required to show cause why her date of birth should not be treated to be April 4, 1907. The Government of Orissa thereupon determined the date of birth of the Government servant to be April 16, 1907, and declared that she would be deemed to have retired on April 16, 1962, subject to certain extensions owing to which she was to retire on July 15, 1963. The High Court of Orissa held that the order whereby the Government servant was superannuated on April 16, 1962, on the basis of her date of birth as April 16, 1907, amounted to compulsory retirement before she attained the age of superannuation and was removed from service within the meaning of Article 311, and as the Government servant was not given a reasonable opportunity of showing cause against the order of removal, the order itself was invalid. In order to find out the correct position regarding the age, the Additional Director of Planning was asked to make a report, and he made a report regarding the age of the Government servant.

This report was not disclosed to the Government servant. It was in these facts that the Supreme Court held that the said authority should have placed all the materials before the Government servant and called upon her to explain the discrepancy, and to give an explanation, and that although the order was administrative in character, it should have been made consistently with the rules of the natural justice after informing the Government servant of the state of evidence with regard to her age, and after giving her an opportunity of being heard. It is to be noticed that in that case question of superannuation of an employee was involved. There was dispute on the question of the correct age and the State Government had collected various materials with regard to her age, and these materials were not placed before her and she was not given an opportunity of explaining the discrepancies. It was in the background of these facts that the observation of the Supreme Court that even in case of an administrative order rules of natural justice should be followed was made. This decision, to my mind, does not support the petitioner's contention in this case. Certain materials collected behind the back of the Government servant were going to be used against her and she was not informed of such materials, nor was she given an opportunity of explaining the discrepancy arising out of her declared age and the age arrived at on materials collected by the Government, and relying on the materials collected by the Government an order of superannuation was made. In the instant case now before me no order has been made against the petitioner to his prejudice nor has any materials collected against him been used. All that has been done was that of order of extension was made in terms of the proviso to Section 110 (2) of the Act. The decision of the Supreme Court mentioned above is not an authority for the proposition that rules of natural justice must be followed in the case of every administrative order and a notice should be served to the party against whom an order is proposed to be made. An order of search and seizure for instance under the Act is also an administrative order, and it is an order which is seriously detrimental to the party against whom it is made. But can it be said that notice must be given to the party against whom an order for search and seizure is going to be made and further that the party should be given an opportunity of being heard before making an order of search and seizure? Quite plainly the answer must be in the negative.

22. In support of the contention mentioned above reliance was also placed on another decision of the Supreme Court *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295. In that case an order of investigation under S. 237 of the Companies Act, 1957, was challenged on the ground that circumstances did not exist and they were not such as to enable the Central Government to form an opinion suggestive of the things set out in sub-clauses (i), (ii) and (iii) under Section 237 (b) of the Companies Act, 1957. It was held that if it was shown that circumstances did not exist or that they were such that it was impossible for any one to form an opinion suggestive of the aforesaid things, the opinion of the Central Government was challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral ground and was beyond the scope of the statute and was based on grounds extraneous to the legislation. This decision again, to my mind, is of no assistance to the petitioner in this case. Sub-clauses (i), (ii) and (iii) under Section 237 (b) of the Companies Act lays down certain condition precedent to the exercise of the power to appoint Inspectors to investigate into the affairs of a company, and it was held that if there was a challenge to the exercise of the power by the Central Government, it must be shown that circumstances did exist to enable the Central Government to form an opinion in the matter so as to exercise its power to direct investigation into the affairs of the company. In the instant case now before me there is no condition precedent to the exercise of the power to extend the time under the proviso to Section 110 (2) of the Act. The decision in *Barium Chemicals' case*, AIR 1967 SC 295 (supra) to my mind has no application to the facts of this case. Section 237 (b) of the Companies Act lays down conditions which must exist before the power to order an investigation can be exercised by the Central Government, and the majority view of the Supreme Court was that as the existence of 'circumstances' was the condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, had to be proved at least *prima facie* and that it was not enough to assert that circumstance existed and give no clue to what they were because the circumstances must be such as to lead to conclusions of certain definiteness, on the question of subjective satisfaction of the Central Government as to the existence of the circumstances. A material portion of the observations runs as follows:—

"No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the *sine qua non* for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out."

It will be amply clear that the questions considered by the Supreme Court in *Barium Chemicals'* case, AIR 1967 SC 295 (Supra) were entirely different from the question with which I am concerned in this application. There are no conditions precedent to the exercise of the power to extend the time, nor is there any challenge to the existence of any such conditions precedent.

23. On the same question reliance was also placed by the learned counsel for the petitioner on another decision of the Supreme Court, *Bhagawan v. Ram Chand*, AIR 1965 SC 1767. In that case the Supreme Court considered the question of the validity of an order of the State Government under the Uttar Pradesh (Temporary) Control of Rent and Eviction Act, on the ground that the State Government did not hear the parties who were affected by it. In that case the landlord applied to the Rent Controller and Eviction Officer under Section 3 of the said Act for permission to sue the tenant for ejectment. This permission was granted and the tenant thereupon appealed to the Additional District Magistrate. The Appellate authority declined to confirm the permission granted to the landlord and remanded the case for fresh hearing. On remand the officer changed his views and rejected the application for permission. The landlord then moved the Appellate authority again for extending the original order directing him to sue. The appellate authority granted permission to the landlord and thereupon the tenant moved the Commissioner of Agra in revision. This application in revision was allowed and the appellate order granting permission was set aside. Thereupon the landlord went up to the State Government under Section 7-F of the said Act, and the State Government directed the Commissioner to revise his order on the ground that it thought the need of the landlord to be genuine. On this direction the Commissioner passed an order cancelling the previous order and confirming the order passed by the Appellate Authority granting permission to the landlord to sue. The landlord thereupon sued the tenant in ejectment and obtained a decree. The matter went up to the

Allahabad High Court in second appeal and the only issue in the High Court was if the order of the State Government was valid as it was made without giving the tenant an opportunity of being heard. The Allahabad High Court came to the conclusion that the order of the State Government was invalid as exercising its power under Section 7-F of the Act the State Government did not give an opportunity of being heard to the tenant. Thereafter the matter went up to the Supreme Court and it was held that when an Act conferred jurisdiction and power on any authority to deal with the rights of citizens, it may be required by the statute to act judicially in dealing with matters entrusted to it and that an obligation to act judicially might in some cases be inferred from the scheme of the statute and its provisions. In such cases it was held, it is easy to hold that the authority must act in accordance with the principles of natural justice and that it was not necessary that the obligation to follow the principles of natural justice must be expressly imposed on the authority. On the obligation to act judicially the Supreme Court observed at page 1770 of the report as follows:—

"If it appears that the authority or body has been given power to determine questions affecting the rights of citizens, the very nature of the power would inevitably impose the limitation that the power should be exercised in conformity with the principles of natural justice. Whether or not such an authority or body is a tribunal would depend upon the nature of the power conferred on the authority or body, the nature of the rights of citizens the decision of which falls within the jurisdiction of the said authority or body, and other relevant circumstances."

This decision also to my mind, is of no assistance to the petitioner in this case. In making the order of extension the Collector of Customs, in my view, was not making any order determining a question affecting the rights of the petitioner. The rights of the petitioner, such as they were, were already affected by the search and the order of seizure. The extension order was made within the period of six months and it cannot therefore be said that the petitioner had acquired any right to the return of the goods. The order of extension merely enlarged the time within which the department was to complete its investigation. There was in my view, no determination of a question affecting the rights of the petitioner. It is to be remembered that the attack in this case was confined to the order of extension and not directed

against the order of search and seizure.

24. The next case relied upon by the learned counsel for the petitioner was also a decision of the Supreme Court *M. Gopal Krishna Naidu v. State of Madhya Pradesh*, AIR 1968 SC 240. That was again a case relating to certain orders made against the appellant who was a Government servant. The appellant was suspended from service and was prosecuted under the Indian Penal Code. He was convicted but this conviction was set aside on appeal, for want of a sanction to prosecute. He was prosecuted for the second time on the same charge but this prosecution was quashed on the ground that the investigation was not conducted by the proper authority. In revision the Nagpur High Court held that the Court below was in error in so holding but recommended that the prosecution should not be proceeded with as 10 years had gone by since it was lodged. Thereafter the prosecution was dropped but a departmental enquiry was held on the same charges. The appellant was found not guilty, but the Government disagreed with that view, and served a show cause notice for dismissal. On cause being shown, the Government held that the charges were not proved beyond doubt but that the suspension and the departmental enquiry were not wholly unjustified. The appellant was directed to be reinstated with effect from the date of the order, but retire from that date as he had attained the age of superannuation already, and the entire period of absence from duty was to be treated as spent on duty for pension only but he was not to be allowed any pay beyond what he had actually received or what was allowed to him by way of subsistence allowance. The appellant thereafter filed a writ petition for quashing the order of reinstatement without pay and for an order directing the Government to treat the period of absence from duty as period spent on duty. This petition, however, was dismissed by the High Court and the matter thereafter went up to the Supreme Court in appeal. It was held that the order passed under the relevant fundamental rule would affect the Government servant adversely if it was made under clauses III and V and that consideration of the case depended on facts and circumstances in their entirety, and an order resulting from a finding of the facts and circumstances would result in pecuniary loss to the Government servant and such an order must be held to be an objective rather than a subjective function. It was further held that the very nature of the function implied the duty to act judicially and if

an opportunity to show cause against the action proposed was not given the order was liable to be struck down as invalid on the ground that it was made in breach of the principles of natural justice. This decision, in my view, does not uphold the contentions advanced on behalf of the petitioner. The order made on the face of it caused pecuniary loss to a Government servant and seriously affected the question of his pension and it was held that an order causing pecuniary loss to a Government servant by non-payment of salary and also reducing his pension could not be made without giving him an opportunity of being heard. The questions raised and decided in this case have no application to the question with which I am concerned in the instant writ petition.

25. The next decision relied upon by the learned counsel for the petitioner was also a decision of the Supreme Court, *Calcutta Discount Co. Ltd. v. Income-Tax Officer, Companies District I, Calcutta*, AIR 1961 SC 372. In that case the Supreme Court considered the validity of a notice issued under Section 34 of the Income-tax Act, 1922. It was held that Section 34 of the said Act laid down two conditions precedent to the exercise of the power to issue of notice namely that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to tax had been under-assessed and secondly that the Income-tax Officer must have reason to believe that the under-assessment had occurred by reason either of omission or failure on the part of the assessee to make a true return of his income, or omission or failure on his part to disclose fully and truly all material facts necessary for his assessment. It was held that both these conditions precedent must be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond four years but within eight years from the end of the year in question. In the facts of that case it was found that the conditions precedent mentioned above did not exist and the Income-tax Officer therefore had no jurisdiction to issue notices under Section 34 of the Act. This decision again, to my mind, has no application to the question with which I am concerned in this case. There are no conditions precedent to the exercise of the power by the Collector of Customs under the proviso to Section 110 (2) of the Act. The only requirement of the statute is that an order for extension can be made on sufficient cause being shown and whether the cause shown by the department, for extension of time to complete investigation into the charge of illegal importation is sufficient or not, as

I have said earlier must be a matter of subjective satisfaction of the Collector of Customs.

26. The next case relied upon by the learned counsel for the petitioner was the decision of the Supreme Court, *Rohtas Industries Ltd. v. S. D. Agarwal*, 1969-1 SCC 325 = (AIR 1969 SC 707). In that case also the validity of an order made by the Central Government under sub-clauses (i), (ii) of clause (b) of Section 237 of the Companies Act, 1956, appointing Inspectors to investigate into the affairs of a company was considered by the Supreme Court. The challenge to the order was on the ground that the Central Government had no material before it from which it could have come to the conclusion that the appellant's business was being conducted in violation of the provisions of the statute. Agreeing with the majority view in *Barium Chemicals' case*, AIR 1967 SC 295 (supra) it was held as follows:—

"For the reasons stated earlier we agree with the conclusion reached by *Hidayatullah* and *Shelat JJ.* In *Barium Chemicals' case* that the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause (1) or the persons mentioned in sub-clause (2) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and if the existence of these conditions is challenged the Courts are entitled to examine whether those circumstances were existing when the order was made. In other words, the existence of the circumstances in question are open to judicial review though the opinion formed by the Government is not amenable to review by the Courts. As held earlier the required circumstances did not exist in this case."

For the reasons mentioned by me while dealing with *Barium Chemicals' case*, this decision also is of no assistance in deciding the questions with which I am concerned in the case.

27. The next case relied upon by Mr. Sen was also a decision of the Supreme Court, *Purtabpore Co. Ltd. v. Cane Commissioner of Bihar*, 1969-1 SCC 308 (SC). In that case there was a dispute between two sugar manufacturing companies with regard to allotment of sugarcane producing villages in Bihar and U. P. The Cane Commissioner had allotted certain villages to the appellant, but the Chief Minister of Bihar intervened in the matter and passed an order for alteration of the allotment made. On the order of the Chief Minister, the Cane Commissioner revised his earlier order of

allotment, and this revised order was challenged in a writ petition. The ground of challenge was that though the order was made by the Cane Commissioner it was in substance the order of the Chief Minister and the Cane Commissioner had abdicated his authority and function and therefore the order revising the earlier allotment was bad. The second ground of challenge was that the Cane Commissioner acted in a quasi-judicial capacity and as no opportunity was given to the appellant for making representation against the order of revision, the order was bad. The third ground of challenge was that even if the order was an administrative order, it was liable to be set aside on the ground of violation of rules of natural justice. The Supreme Court held that though the impugned order was purported to be made by the Cane Commissioner, it was in fact made by the Chief Minister, and hence they were invalid. The Cane Commissioner, it was held, merely carried out the orders of the Chief Minister and though the order was that of the Cane Commissioner, he had merely carried out the directions of the Chief Minister and the Chief Minister had imposed his opinion on the Cane Commissioner. It was further held that the power exercisable by the Cane Commissioner was a statutory power and he alone could have exercised that power and he could not abdicate his responsibility in favour of any one, and that the Cane Commissioner acted in a quasi-judicial capacity as there was a lis between two contending parties and this lis commenced as soon as one of the parties moved the Government for altering or modifying the reservation made in the earlier order. It was further held that the order was bad on the ground that though the Cane Commissioner acted in a quasi-judicial capacity no opportunity for making representation was given to the appellant. I do not see how this decision helps the petitioner in the instant case now before me. There is no question involved in this case of the order having been made by any authority other than that whom the statute has empowered to make the order. There is no question of abdication of power or authority by the Collector of Customs in favour of anybody else, and there is no challenge to the order of extension on that ground. Secondly there was no lis between two rival or contending parties. The only question is whether the Collector of Customs should have granted the extension in exercise of the powers under the proviso to Section 110 (2) of the Act. This decision, to my mind, is therefore of no assistance to the petitioner in this case.

28. The next contention of Mr. Sen was that even if an order is an administrative order, the authority making the order must act fairly if not judicially. It was argued that if it was held that the Collector of Customs was not bound to act judicially, he was nevertheless bound to act fairly. In support of this proposition reliance was placed on an English decision *Re: H. K. (an infant)*, (1967) 1 All E. R. 226. In that case a national of Pakistan to whom the Commonwealth Immigrants Act, 1962, applied, had settled in England leaving his wife and family in Pakistan. In order to bring his eldest son to England he forwarded to the Pakistan High Commission in England a sworn declaration dated June 8, 1966, stating that his son was 15½ years old and that it was his intention to be responsible for and maintain his son in England. A Passport was issued in Pakistan to the son in which his date of birth was given as February 29, 1951. Thereafter the Pakistan national arrived at London Airport with his son and they were interviewed by the Immigration authorities. The Immigration Officer was of the view that the son was not more than 16 years old and thereupon sent the son to the Medical Officer whose opinion was that the son was 17 plus. Thereafter the father and son were again interviewed and this interview was followed by a formal notice in writing from the Chief Immigration Officer to the son refusing him admission. Subsequently it appeared that the son had in his possession a school leaving certificate in Arabic script which showed that the son was born on February 29, 1951. An application was made for the issue of Writ of Habeas Corpus to secure release of the son from the custody of the Chief Immigration Officer and there was also a prayer for a Writ of certiorari for quashing the decision refusing the son's admission to the United Kingdom. After referring to an earlier decision of the Judicial Committee under a statute which required the officer to hold an inquiry and specific provision was made for service of notice and for hearing. Lord Parker C. J. held that that was a clear case where the officer was acting judicially or quasi-judicially and he was required to adopt a judicial process and then went on to hold at p. 231 of the report:

"This, as it seems to me is a very different case, and I doubt whether it can be said that the Immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. At the same time, however, I myself think that even if an Immigration Officer is not acting in a judicial or quasi-judicial capa-

city, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly and to the limited extent that the circumstances of any particular case allow and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this merely a duty to act fairly."

In the same case *Salmon L. J.* held at page 232 of the report:

"I have no doubt at all that in exercising his powers under that section, the Immigration Officer is obliged to act in accordance with the principles of the natural justice. That does not of course mean that he has to adopt judicial procedure or hold a formal inquiry, still less that he has to hold anything in the nature of a trial, but he must act, as Lord Parker C. J. has said fairly in accordance with the ordinary principles of natural justice. If for example, and this I am sure would never arise, it could be shown that when he made an order refusing admission he was biased or had acted capriciously or dishonestly, this Court would have power to intervene by the prerogative writ."

In the facts of that case, however, it was held that it was impossible to hold that the decision made by the Chief Immigration Officer was not arrived at fairly and that both the father and son knew full well of what they had to satisfy the authorities and they were given ample opportunity to do so and the fact that the officer was not satisfied was not a matter for the Court. It is clear that in that case it was held that an administrative officer must act fairly in dealing with a matter under a statute which did not require the officer to act judicially or quasi-judicially. But this decision, to my mind, is of no assistance to the petitioner in this case, firstly because an immigrant under the English Act was required to satisfy the officer about the age of his son whom he wanted to bring into England for permanent residence. The officer was required to come to a decision on the fact of the correct age and he was empowered either to admit or to refuse admission to the son of the immigrant. Secondly, evi-

dence regarding age is required to be produced and the officer is required to apply his mind in coming to a decision on the question. In the case with which I am concerned, the party whose goods have been seized is not required by the statute to produce any evidence as to why an order of extension should not be made because all that the statute requires is a cause to be shown by the department and not by the party from whose custody goods have been seized. Secondly there is no charge in this case that the Collector of Customs was biased or had acted capriciously or dishonestly. There is nothing in the petition to show that the order of extension was unfairly made.

29. In support of the same contention reliance was placed on another English decision *R. v. Criminal Injuries Compensation Board, Ex parte Lain*, (1967) 2 All E. R. 770. In that case a police constable became blind as a result of shooting by suspect, whom he was about to question. He applied to the Criminal Injuries Compensation Board for compensation under the scheme. He was offered and accepted an interim compensation of £300. Later he committed suicide which was attributable to the injury. His widow became entitled to the interim award and also applied for further compensation. On this application a single member of the Board made a final award of £300. The widow thereupon applied for a hearing before three members of the Board who decided that having regard to other payments made she was not entitled to any compensation and made a nil award. The widow thereupon applied for a certiorari to quash the decision. The contention that the jurisdiction of the Court did not extend to the Board was repelled by Lord Parker C. J. and it was held that the Court had jurisdiction although the Board was not a statutory Board. It was held that the Board was a body of persons, of a public as opposed to a purely private or domestic character, that they were performing public duties and were quite clearly under a duty to act judicially. This decision, again, to my mind, is of no assistance to the petitioner as the main question with which the Court was concerned in that case was whether the Board not being a statutory body, the Court had jurisdiction to issue a prerogative writ against its decision. On the question whether an applicant was entitled to the hearing there could be no dispute because the scheme which provided for disposal of the matter by our members of the Board, itself laid down that the applicant would be entitled to a hearing before three other members excluding one who had

made the initial decision. It is clear therefore that the constitution of the Board itself provided for a hearing and therefore this decision does not touch the question with which I am concerned in this application.

30. The next case relied upon by Mr. Sen was a decision of the Judicial Committee *De Verteuil v. Knaggs*, (1918) A. C. 557. In that case the validity of an order made by the acting Governor of Trinidad was challenged on the ground that it was not made on a statutory exercise of discretion vested in the Governor, by Section 203 of the Immigration Ordinance No. 161. That section empowered the Governor to transfer the indentures of immigrants "on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom." The Governor in exercise of this power transferred the indentures and certain immigrants from a particular estate upon a complaint with regard to the treatment and condition of the indentured immigrants on the estate. It was held that the Governor could not carry out the duty entrusted to him without making some inquiry if sufficient grounds had been made out that the immigrants indentured on a particular estate should be removed and that in making such inquiry there was a duty of giving to any person against whom the complaint was made a fair opportunity to make any relevant statement which he might desire to bring forward and a fair opportunity to controvert any statement made to his prejudice. This decision, again, is of no assistance to the petitioner in this case, because upon a complaint being made against the employer of indentured labourers an inquiry was to be made by the Governor and all that was held was that before coming to a decision the Governor who was to hold the inquiry must give the party against whom a complaint was made an opportunity of making representation against the complaint. An inquiry was to be made on a complaint of a particular nature and quite plainly the person against whom the complaint was made must be given opportunity of making proper representation. To my mind, this decision, has no application to the instant case now before me.

31. I now turn to the next contention of the learned counsel for the petitioner. This was based on the definition of "imported goods" in sub-section (25) of Section 2 of the Act. This definition is as follows:—

"(25) 'Imported goods' means any goods brought into India from a place

outside India but does not include goods which have been cleared for home consumption."

It was argued that the goods in this case had been cleared upon payment of Customs duty and as these goods were cleared for home consumption they were not 'imported goods' within the meaning of the Act. It was argued that the Customs authorities had released the goods upon payment of the duty imposed, and this decision of the customs authorities to release the goods could not be revised or rescinded by any authority other than the Central Board of Revenue in exercise of its jurisdiction under S. 130 (1) of the Act. In other words, the argument was that the Customs authorities had released the goods upon payment of the duty assessed; and these goods were meant for home consumption and therefore they ceased to be imported goods within the meaning of the Act; the goods were imported under a valid licence and the duty assessed on the import was duly paid. The decision to release the goods upon payment of duty was conclusive and irrevocable; this decision could be revised only by the Central Board of Revenue under Section 130 of the Act. In this case, it was argued, there was no such decision by the Board and therefore the goods which were lawfully imported, and which were released upon payment of duty had ceased to be imported goods and no action could be taken with regard to them.

32. This argument though attractive, seems to me to be without merit. The different sections of the Act cannot be read in isolation. The definition of "imported goods" in Section 2 (25) has to be read along with Section 111 of the Act which deals with goods brought from a place outside India. This section is in Chapter XIV of the Act which provides for confiscation of goods and conveyances and imposition of penalties. Under Section 111 (d) of the Act any goods which are imported contrary to any prohibition imposed by or under this Act or any other law for the time being in force shall be liable to confiscation. The goods which have been seized in this case cannot be imported into India without a licence under the Import Control Act and there is therefore a prohibition in law for the import of the goods except in compliance within Import Control Act. It is true that the goods were cleared from the Customs barrier on the basis of import licence produced by the petitioner, but the respondents' case is that the import licences, on the basis of which the goods were cleared were not genuine. The licences which were utilised by the peti-

tioner for the purpose of clearing the goods, according to the respondents, were forged licences. If a licence is forged it is no licence at all, and any import of goods, of which the importation is prohibited by law, cannot be a valid import under the Act. Goods so imported cannot therefore be treated to be lawfully "imported goods" within the definition of that term in Section 2 (25) of the Act. Since the respondents' case is that the licences on the basis of which the goods were imported were forged licences, if the allegation of forgery is true, the goods must be held to have been brought into India contrary to a prohibition imposed by law as contemplated by Section 111 (d) of the Act, and in that case such goods are liable to confiscation and the power to seize under Section 110 (1) of the Act can be invoked by the Customs authorities and the goods, though cleared after payment of duty can be seized under Section 110 (1) of the Act. The contention on behalf of the petitioner that the goods having been imported into India for home consumption would cease to be imported goods and the decision of the Customs authorities to release the goods upon payment of the duty imposed cannot be revised by any authority other than the Board in exercise of its power under Section 130 (1) of the Act therefore fails and is rejected.

33. Before turning to the decision relied on by the learned counsel for the respondents in support of the proposition that the order is an administrative order and no show cause notice need therefore be served and no opportunity to make representation need be given, I should refer to one decision relied on by Mr. R. C. Deb learned counsel for the petitioner in Matter No. 359 of 1966. The facts involved in that case are the same, and the same questions arise for consideration. Mr. Deb adopted the arguments advanced by Mr. A. K. Sen and supplemented them by certain further contentions. He argued that in Bibhuti Bhushan Bagh's case, (1969) 73 Cal WN 340 (supra) Ghose, J., had given two reasons in making the Rule absolute namely that the order of extension was served and communicated after the expiry of the initial period of six months from the date of seizure, and secondly that the Customs Officer was bound to have a judicial approach in making the order of extension and therefore should have given a notice to the party whose goods were seized, before making the order of extension. Mr. Deb submitted that both these reasons were ratio decidendi of the case and that it was not open to the learned counsel for the respondents to contend that the conclusion of Ghose, J.

that the order of extension was bad on the ground that a show cause notice and an opportunity of being heard was not given to the party, was an obiter dictum. In support of this contention Mr. Deb relied upon a decision of the House of Lords *Jacobs v. London County Council* (1950) 1 All ER 737. I accept Mr. Deb's contention that both the reasons given by Ghose J. are to be taken as the ratio decidendi of that case. But as I said earlier while dealing with *Bibhuti Bhusan Bagh's case*, (1969) 73 Cal WN 340 (supra) the decisions of Ghose J. were based on the facts of that case which are quite distinguishable from the facts in the present writ petition. The order of extension in that case was not served and communicated until December 16, 1966, after the expiry of six months, although it was made within the period of six months, and Ghose J. held that the order must be treated to have been made on the day on which it was communicated. In this case, on the other hand, the order of extension was made before the expiry of the period of six months and therefore the facts in this case are quite distinguishable from the facts in *Bibhuti Bhusan Bagh's case*. By the time the order of extension was served on the party in *Bibhuti Bhusan Bagh's case*, 1969-73 Cal WN 340 (supra) the six months had expired and it was contended that the petitioner had acquired a vested right to the return of the goods. It was in these facts that Ghose J. came to the conclusion following the Bench decision in *Charandas Malhotra's case*, AIR 1968 Cal 28 (supra) that the Customs Officer should have had a judicial approach and should have given a show cause notice and an opportunity of being heard.

34. Let me now turn to the decisions relied on by the learned counsel for the respondents on the question namely whether the Customs Officer should have a judicial approach in making the order of extension or whether the order is an administrative order and no show cause notice and opportunity of being heard need be given to the party. The first decision relied upon was a Bench decision of the Mysore High Court reported in AIR 1968 Mys 89, *Ganesh Mul Channilal v. Collector of Central Excise and Asst. Collector, Bangalore*. In that case the same question was raised namely the validity of an order of extension made under the proviso to Section 110 (2) of the Act. Certain pieces of gold were seized under Section 110 (1) of the Act on the ground that there was reason to believe that the goods were liable to confiscation. The seizure was made on February 21, 1963. On September 19, 1963, a communication was sent by the

Collector of Customs to the parties which purported to be an order of extension under the proviso to Section 110 (2) of the Act extending the time, within which a notice under Section 124 of the Act could be served, till February 20, 1964. This communication was followed by a show cause notice under Section 124 dated December 19, 1963. A writ petition was filed challenging the order of extension and also the seizure of the goods under Section 110 (1). The Division Bench held that there could be hardly any doubt that before an order of seizure could be made the proper officer should have reason to believe that the goods which were proposed to be seized were liable to confiscation and that it was equally clear that the belief which he should form in his mind was a subjective belief on ground which he need not disclose and which were not subject to judicial review. On the question whether a show cause notice should be given by the Collector of Customs before making the order of extension it was held as follows at p. 93 of the report:

"We take the view that the power created by the proviso to Section 110(2) by the exercise of which the Collector could extend the period for service of the notice, could be exercised by the Collector without hearing the person from whom the goods were seized. That power is an administrative power, through the exercise of which all that the Collector does is to extend the period during which the investigation should be completed before the commencement of the proceedings in which the question has to be decided whether the goods have to be confiscated or not. At that stage, what the Collector has to do is to apply his mind to the question whether there was any special difficulty which constituted impediments to the completion of investigation within the period of six months to which Section 110 (2) refers and exercise his discretion in favour of its extension if he was satisfied that there was any such justification for non-completion of the investigation. It would surely be a very unusual and inconvenient thing for the Collector at this stage to call upon the person from whom the goods were seized to show cause why the delay should not be condoned or to reveal to him the difficulties which were encountered during the investigation and which was responsible for its non-completion within the prescribed period. Disclosure of these grounds to the person from whom the goods were seized would be against public interest and would be utterly detrimental to the completion of the investigation. We therefore take the view that the petitioner had no right to be

heard at the stage when the Collector ordered the extension."

Reliance was next placed on a Bench decision of the Bombay High Court reported in AIR 1967 Bom 138, *Vasantlal v. Union of India*. In that case the Enforcement Department conducted a search on the strength of a search warrant and recovered certain diamonds. On the day following the search, a safe was opened and some further packets of diamonds were recovered. All the diamonds remained in the custody of the Enforcement Directorate till September 14, 1964, on which day the Customs Department took charge of the diamonds and seized them under Section 110 of the Customs Act. On March 4, 1965, the Collector of Customs made an order of extension under the proviso to Section 110 (2) of the Act and on May 27, 1965, a further extension of three months was granted. It was contended that as the seizure by the Customs Officer was made on September 4, 1964, the period of six months expired on March 3, 1965, and no order of extension could have been made after that date. It was held that Section 9 of the General Clauses Act applied and the order of extension which was made on March 4, 1965, was made within time. The order of extension was held to be valid although no show cause notice or opportunity of being heard was given to the party. I must point out, however, that the question of validity of the order on the ground that no show cause notice was given by the Collector of Customs in making the order of extension under the proviso to Section 110 (2), and also on the ground of an opportunity of being heard was not given were not canvassed before the Court and these questions were not discussed in the judgment. The order, however, was held to be valid. I have already expressed my views on these questions namely the validity of the order of extension having regard to the fact that no notice to show cause was served upon the petitioner and no opportunity of being heard was given to him. All that I need say at this stage is that with respect I agree with and accept the views expressed by the Division Bench of the Mysore High Court and of the Bombay High Court mentioned above.

35. The next case relied upon by the learned counsel for the respondents was a decision of the Supreme Court *R. S. Sethi Gopi Kisan v. R. N. Sen*, AIR 1967 SC 1298. In that case upon information received that the appellant was in possession of undeclared gold the Customs authorities issued an authorisation under the Defence of India (Amendment) Rules, 1963, (Gold Control Rules) for

searching the appellant's premises. The search was accordingly carried out and gold and other articles, foreign currency and documents were seized. Writ petition filed by the parties before the Bombay High Court was dismissed and thereafter the matter went up to the Supreme Court. The first contention was that in the authorisation it was not stated that there was a reason to believe that goods were secreted. It was held that though the words 'reasons to believe' were not embodied in the authorisation the phraseology used in it had the same effect. The next point decided was that the S. 105 of the Act did not require the Customs Officer to give reasons for his belief and that while it was advisable and proper to give reasons the non-mention of reasons in itself did not vitiate the order. The next question decided was that it was not necessary to set out the particulars of the nature of the goods and of the documents in the authorisation. To my mind, this decision is not of any assistance in this case. The question of validity of the authorisation on the ground that the reason to believe had not been set out in it or on the ground that goods and documents had not been specified was not canvassed on behalf of the petitioner in this case.

36. The next contention of the learned counsel for the respondents was that the license used by the petitioner for the purpose of clearing the goods was not a genuine license, but was a forged one, and therefore there was no license at all; and that being so, the import of the goods was unlawful and the goods even though cleared from the Customs barrier, were liable to confiscation and the petitioner who was responsible for using a forged licence for clearing the goods was in addition liable to an order of penalty. In support of this contention reliance was placed on a decision of the Supreme Court, *Fedco (P) Ltd. v. S. N. Bilgrami*, AIR 1960 SC 415. In that case it was held that the entire scheme of control and regulation of imports by licences was on the basis that the licence was granted on a correct statement of relevant fact and that if the grant of the licence was induced by fraud or misrepresentation that basis disappeared. It was also held that it would be absolutely unreasonable that such licence should be allowed to continue. In my view this contention of the learned counsel for the respondents is well founded. The import of goods on a licence, in the case of goods the import of which is prohibited, must be confined to imports made on a licence lawfully obtained. If a licence is forged, and I wish to make it clear that in this case I do not say that it has been forged, as that would be a matter for determina-

tion in other proceedings against the petitioner, there is no licence at all. The respondents' case is that the licence used by the petitioner is a forged one, and if such forgery is proved in appropriate confiscatory and penal provisions of the proceedings, the import of the goods would be unlawful and would attract the Customs Act and other statutes.

37. I shall now proceed to deal with the question of validity of the show cause notices under Section 124 of the Act. The respondents moved an application for modification of the order of injunction made by this Court while issuing the Rule Nisi. That application was disposed of by me by a judgment delivered on March 12, 1968. In opposing the application learned counsel for the petitioner had contended that under the order of extension by two months communicated by the letter of May 30, 1966, the two months extension commenced from June 1, 1966, and expired on July 31, 1966, and no further extension was granted and therefore the extended period expired on July 31, 1966. The notices under S. 124 of the Act were served on 1-10-66, 3-10-66, 15-10-66 and 8-11-66 and in Matter No. 359 of 1966 these notices were served on October 3, 1966 and October 15, 1966. These show cause notices under Section 124 of the Act were issued after the Rule Nisi was issued, and the order for interim injunction was made restraining the respondents from taking any steps on the basis of or in connection with the seizure of the goods and the order of detention dated December 5, 1965. I have already dealt with this contention earlier in this judgment. I need not therefore say anything more on this question except that the order of injunction obtained by the petitioner restrained the respondents from taking any steps in connection with the seizure and the order of detention. Quite clearly the show cause notices under Section 124 of the Act could not be issued by the Customs authorities in violation of the order of injunction. The injunction restrained the respondents from issuing the show cause notices under S. 124 of the Act, and the respondents became entitled to serve the show cause notice only after the order modifying the order of injunction was made on September 27, 1966. The petitioner had moved the Court for the order of injunction, and had obtained the same, and it is not open to him to contend that the show cause notices are bad as they were issued beyond the extended period of two months which expired on July 31, 1966.

38. These show cause notices were served, as I noticed earlier, after the Rule Nisi was issued by this Court and

is therefore outside the scope of the Rule Nisi, and strictly speaking in disposing of this application, I am not called upon to deal with the question of validity of the show cause notices. But by the consent order made on September 27, 1966, the question of validity of the show cause notices is to be dealt with by the Court at the hearing of the Rule. That being the position I have to go into the question if the show cause notices issued by the Customs authorities under Section 124 of the Act are valid.

39. The contention of the learned counsel for the petitioner with regard to these notices is that they are invalid as they were issued beyond the extended period of two months, even assuming the order of extension was good. As I have noticed earlier the order of injunction restrained the respondents from taking any further steps in connection with the seizure and with the order of detention. The respondents could not, even if they wanted to, issue the show cause notices by reason of the order of injunction obtained by the petitioner. The show cause notices were issued, as they could only be issued, after the injunction was modified enabling the respondents to serve the show cause notices. As the order of this Court prevented the respondents from issuing the show cause notices, and as they were enabled to issue such notices only after the order made on September 27, 1966, I cannot hold that the show cause notices are invalid because they were issued after the expiry of the extended period of two months. Time in this case for issue of the show cause notices lapsed because of the order of injunction issued by this Court, and this injunction was obtained by the petitioner, and in my view the petitioner cannot now plead lapse of time as the ground of the invalidity of the show cause notices. In my view, therefore, the show cause notices issued by the Customs authorities under Section 124 (1) of the Act are valid.

40. Let me now examine the question if the respondents had acted fairly in making the order of seizure and detention and also in extending the original period of six months in exercise of the powers conferred by the proviso to Section 110 (2) of the Act. In paragraph 14 of the affidavit-in-opposition affirmed by Maurich Galestine on August 31, 1968, it is said that there were definite materials for the reason to believe that the goods were liable to confiscation, particularly the documents relating to import of watch parts against forged I. T. C. licence on account of Messrs. Bhagwan Dass and Company, which was recovered from the show-room at premises No. 6, Dalhousie Square East and the disclosure

made in the course of inquiry revealed that the goods were prima facie liable to confiscation. In paragraph 32 of this affidavit it is said that there are systematic infringement of prohibition committed by the petitioner regarding import of parts of watches and time-pieces parts, on the strength of documents recovered from the petitioner's premises which relate to forged import trade licences valued at Rs. 1,73,946. In paragraph 38 of this affidavit it is said that inquiries made had disclosed that the petitioner with others at Calcutta, Delhi and other places had been party to a conspiracy for unlawful import of watch-parts and time-pieces parts valued at Rs. 25 lacs. In paragraph 12 of the affidavit-in-opposition affirmed by Chittaranjan Dutta on September 12, 1966, in Matter No. 359 of 1966, it is said that there were facts and circumstances to indicate that the petitioner with other person was concerned in the fraudulent importation of the parts of the time-pieces, watches etc. against the various forged I. T. C. Licences including those forged and purported to have been issued for a sum of Rs. 3,08,600 in favour of Sudershan Industries and that documents concerning this firm were recovered from the petitioner's premises and for that reason there was reason to believe that the goods in question were smuggled goods and were liable to confiscation. In paragraph 27 of this affidavit it is said that there was sufficient cause for extension of the period under S. 110 (2) of the Act and that inquiries with regard to systematic infringement of the orders of prohibition committed by the petitioner and others in and outside West Bengal could not be completed within the period of six months from the date of seizure and/or detention.

41. The respondents have disclosed in the affidavits filed on their behalf the materials which provided the reasons to believe, that the goods which had been seized are liable to confiscation. According to the respondents forged licences had been used by the petitioner for the purpose of importation of the goods. According to the respondents again the petitioner had entered into a conspiracy with other persons at Delhi and other places for unlawful import of watch parts and time-pieces valued at a large sum of money. Show cause notices under Section 124 of the Act had been served upon the petitioner. He will therefore have the opportunity of disproving the charge of importation of goods on forged licence. The allegations in the affidavits-in-opposition, to which I have referred, disclosed in my view, prima facie at any rate, that there were grounds for reason to believe that the

goods were liable to confiscation. Sufficiency of the grounds for a reason to believe is a matter of subjective satisfaction of the Customs Officer.

42. Turning now to the impugned order of extension made in exercise of the powers under the proviso to Section 110 (2) of the Act, it is to be noticed that there is no charge against the Collector of Customs that this order has been made capriciously or arbitrarily or dishonestly or that the Collector of Customs was biased against the petitioner. The only ground of attack on the order of extension was that it was made in violation of the rules of natural justice, inasmuch as no notice was served upon the petitioner to show cause why an order of extension should not be made, and the petitioner was given no opportunity of being heard. Chapter XIII of the Act deals with searches, seizure and arrest, and Section 110 of the Act is in this chapter. The order of extension contemplated by the proviso to Section 110 (2) of the Act is to be made where a notice under Section 124 of the Act could not be served within the initial period of six months. As I have noticed earlier the cause that can be shown for an order of extension is that inquiries from particular persons or at particular places could not be completed within the specified period for one reason or another. If notice is to be served upon the persons whose goods have been seized, that inquiries have yet to be made from particular persons or at particular places, the purpose of the investigation itself would be defeated. Such investigation to succeed must in its very nature be of a confidential character. It must be made in secrecy and behind the back of the party whose goods have been seized. To give notice to the party against whom the investigation is to be made, that inquiries have yet to be made from particular persons at particular places, would not only be contrary to the scheme of the Act but would be against public interest. It can by no means be said that there was lack of fairness on the part of the Collector of Customs in making the order of extension without notice to the party and without giving an opportunity of being heard. The Collector of Customs must be satisfied that there is sufficient cause for making an order of extension. The scheme of the Act, in my view, does not demand that he should have a judicial approach in coming to a decision if there is sufficient cause for making an order of extension when such an order is made before expiry of the time. The satisfaction of the Collector of Customs on the question of sufficiency of the cause is not justiciable and there

can be no judicial review of an order of extension duly made by the Collector of Customs, unless such an order is made in violation of the provision in the statute, after expiry of six months fixed by the statute or expiry of the period of extension.

43. The question when an administrative or executive officer is required to act judicially or quasi-judicially is by no means uncertain. As early as 1950 this question came up before the Supreme Court and two tests were laid down which have since been adhered to in all other decisions of the Supreme Court on this question. These two tests were laid down in *Province of Bombay v. Khushaldas S. Advani*, AIR 1950 SC 222. After reviewing merely all the decisions on the question it was held at pp. 259-260 of the report as follows:—

"What are the principles to be deduced from the two lines of cases I have referred to? The principles, as I apprehend them, are: (i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a *lis* and *prima facie*, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

In the instant case the second principle is attracted and applying that principle can it be said that the statute in this case requires the authority to act judicially? On an analysis of the scheme of the Act and the requirement by the statute itself of notice to a party in particular cases, the answer to the question cannot but be in the negative. There is nothing in the statute which requires the Collector of Customs to act judicially and to direct him to act judicially or quasi-judicially and compel him to serve notice upon the party whose goods have been seized before making an order of extension under the proviso to Section 110 (2) of the Act would be contrary to the statute itself and would defeat its purpose.

44. For the reasons mentioned above this application fails and is accordingly dismissed. The Rule is discharged. There will be no order as to costs. All interim orders are vacated.

45. The questions involved in Matter No. 359 of 1966 *Sheikh Serajuddin v. The Assistant Collector of Customs for Preventive* and others which was heard along with Matter No. 332 of 1966 are identical. For the reasons mentioned in my judgment in Matter No. 332 of 1966 this application is also dismissed. The Rule is discharged. All interim orders are vacated. Each party to pay its own costs.

Petition dismissed.

AIR 1970 CALCUTTA 154 (V 57 C 22)

A. K. DAS AND K. K. MITRA, JJ.

Haripada Moitra, Petitioner v. President, Calcutta Improvement Tribunal, Opposite Party.

Civil Revn. No. 2440 of 1965, D/- 27-6-1969.

(A) Constitution of India, Article 227 — Power of superintendence — Nature of, stated.

The power of superintendence is in addition to the power conferred upon the High Court to control inferior Courts and Tribunals by means of writs under Article 226 but the power under Article 227 is not as extensive as that under Article 226 in certain respects and in exercise of the powers under Article 227, the High Court cannot exercise its powers under Article 226. This power again is discretionary and cannot be claimed as of right by any party. The power of general superintendence conferred under Article 227 invokes a duty on the part of the High Court to keep all Courts and Tribunals within its territorial jurisdiction, within bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. This power, however cannot be used as an appellate or revisional power and must be exercised most sparingly when interference is called for in cases of grave dereliction of duty or flagrant violation of law.

(Para 24)

(B) Constitution of India, Art. 226 — Natural justice — Formal cross-examination is not part of natural justice but of legal and statutory justice. AIR 1967 Cal 80 Foll.

(Para 27)

(C) Calcutta Improvement Act (5 of 1911), S. 74 — Power to reduce, suspend or dismiss any member of staff — It is exercised by President as administrative

officer and not as Court or tribunal though he has to act observing principles of natural justice — Power of superintendence of High Court under Art. 227 of Constitution does not extend to exercise of administrative power — (Constitution of India, Art. 227.) (Para 36)

(D) Constitution of India, Art. 226 — Natural justice — Disciplinary proceedings against employee — Employee deliberately not appearing and explaining charges against him, with an eye to future legal remedy — Such conduct goes against his plea that he had no opportunity to defend and that proceedings were conducted in violation of the principles of natural justice.

(Para 26)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 361 (V 54)=

1967-1 SCR 739, Bharat Barrel and Drum Mfg. Co. v. L. K. Bose 29

(1967) AIR 1967 SC 1269 (V 54)=
1967-2 SCJ 339, State of Orissa v. Dr. (Miss.) Binapani Dei 28

(1967) AIR 1967 Cal 80 (V 54)=
1967 Cri LJ 174, Kishanlal Agarwalla v. Collector of Land Customs 27

(1967) 71 Cal WN 152, B. Halder v. P. M. Chakraborty 28

(1967) 71 Cal WN 926, Jyoti Prakash Mitter v. Union of India 28

(1964) AIR 1964 SC 1140 (V 51)=
1964 (2) Cri LJ 234, Indo China Steam Navigation Co. Ltd. v. Jasjit Singh 31

(1953) AIR 1953 SC 325 (V 40)=
1953 Cri LJ 1432, Maqbul Hossain v. State of Bombay 31

Nani Coomar Chakravarti and Nepal Chandra Sen, for Petitioner; G. P. Kar and Somen Bose, for Respondent.

DAS, J.: This is an application under Art. 227 of the Constitution for setting aside an order dt. March 10, 1965, passed by the opposite party President Calcutta Improvement Tribunal, dismissing the petitioner and imposing a penalty by way of deducting a portion of the contributory provident fund.

2. The petitioner Haripada Moitra joined the Improvement Trust Tribunal as accountant in 1935 and was promoted as Chief Ministerial Officer in 1938, the designation of which part was changed to Superintendent of the Improvement Tribunal.

His retirement was due on March 15, 1959 on attainment of the age of 55 but he was granted extension of service for one year at a time for six such terms, the last of which expired on March 15, 1965.

3. In 1936, the then President of the Tribunal directed the petitioner to look after the records of the tribunal in addition and to stay in a portion of the office

premises of the tribunal as a Court keeper, though such stay was not a condition of the employment relating to this additional work.

In 1941, Government sanctioned a special allowance of Rs. 30 for this additional job which however, did not entail any responsibility for furniture of the tribunal, as he was placed merely in overall supervision of the furniture. In August 1, 1964, he relinquished the charge of this additional work, under pressure from the opposite party, president of the tribunal.

4. The opposite party assumed charge as President and started with bias against him, as he pointed out several illegal and irregular acts done by him in connection with appointment and discharge of officer of the tribunal. Trouble then started over the opposite party's demand on petitioner to vacate a portion of accommodation which the petitioner was holding adjacent to the quarter of the court keeper — which the petitioner refused.

5. Petitioner went on leave in August 1964 and after a short break again went on medical leave due to expire on December 6, 1964.

6. By an order dated December 5, 1964, the Opposite party placed the petitioner under suspension with effect from December 5, 1964 and his application for extension of leave was rejected. On December 28, 1964, the petitioner was served with charge-sheet and two proceedings were started against him.

7. The charges related to furniture, his failure to stay in the quarters during his term as Court Keeper, for which he drew allowance, for not immediately making over possession to the entire premises in his occupation as Court Keeper to his successor and for breach of office discipline and misappropriation of office articles.

8. The petitioner was thereafter directed to show cause why he should not be dismissed from service, make good the property, refund the allowances, and also, why deduction shall not be made from his provident fund under Rules of the tribunal.

9. The petitioner who was ill and on medical leave, denied all the charges and prayed for copies of documents, specified in the list annexed to the letter and for time to submit explanations.

10. The petition was rejected and the petitioner was informed that the copies of the documents could not be furnished 'at that stage'. His subsequent prayer for transferring the proceeding to some other authority, as the opposite party was himself a material witness, was also rejected.

11. Various correspondence thereafter followed but the petitioner's requests were not complied with and the proceedings continued ex parte, and the petitioner was not allowed to be represented by a lawyer.

12. By an order dated February 24, 1965, the opposite party found the charges proved and passed an order directing refund of Rs. 3,500 drawn by petitioner over a period of 10 years for failure to stay in the quarters, for compensation for the loss of furniture, and dismissing him from service.

13. The petitioner was served with a copy of the order and directed to show cause why he should not be dismissed from service.

14. The petitioner submitted a representation showing cause against the proposed penalty and submitting comments on the entire case.

15. The petitioner contends that the action of the opposite party amounts to violation of the principles of natural justice, as he was denied sufficient opportunity to show cause, by supplying the copies of documents, by adjourning the hearing and allowing him to be represented by a lawyer and by the further fact that the opposite party being himself the accuser and a material witness, started with a bias against him.

16. The petitioner contends that the opposite party President has been vested with 'larger, untrammelled and uncontrolled power' and the said powers have not been regulated by any Rules made under Section 74 (2) of the Act. The petitioner further contends that the provisions of S. 74 of the Act giving absolute powers to the President in the matter of reduction, suspension and dismissal of officers and servants of the tribunal are discriminatory and ultra vires Art. 14 of the Constitution.

17. Petitioner therefore contends that the order of dismissal and deduction from the provident fund is wrongful, mala fide, illegal and should be set aside.

18. The opposite party President of the tribunal filed an affidavit in opposition claiming that this application under Art. 227 is not maintainable as the President of the tribunal does not act as Judicial or quasi-judicial Tribunal in the matter of taking disciplinary action against officers appointed by him under the provisions of the Calcutta Improvement Act, 1911. He contends that Art. 311 of the Constitution does not apply and no rules have been framed under the provision of this Act for disciplinary action against employees and therefore the ordinary law of master and servant applies. The order passed by the President is an administrative order and as

such, it is not amenable to High Court's jurisdiction under Art. 227 of the Constitution.

19. There is a general denial of the allegations on fact made in the petition and a claim that the power of suspending and dismissing officers and servants of the Tribunal vests in the President alone.

20. The petitioner could not be easily contacted at his house though he was instructing his solicitors in several matters relating to the proceeding, repeating prayers for copies of documents and for adjournments and for transfer of proceedings. The depositions of witnesses and exhibits and the copy of list of furniture were sent to petitioner by messenger but he made no submissions and only prayed for adjournment on the ground of illness which was not believed by the opposite party.

21. The opposite party contends that the petitioner's story of illness was false and mala fide and that he was given sufficient opportunity to appear and answer the charges but he did not avail of that and should not therefore now be permitted to raise the plea that the principles of natural justice were not observed in dealing with the charges against the petitioner.

22. Final order in respect of the two proceedings was passed on 10-3-65, Annexure X to the petition. The President thereafter recorded the following order:

"On the findings, therefore, as recorded in order No. 22 of 24-2-64, in proceeding No. 1 of 1964 and order no. 22 of 3-3-1965 in proceeding No. 2 of 1964 and on his being found guilty on the charges therein, he be dismissed from service as superintendent of this office with effect from the afternoon of this date.

It was further found that the grounds on which he was dismissed are acts of grave misconduct including act of embezzlement and negligence causing loss to the tribunal and to the Trust. It was therefore ordered that a sum of Rs. 3,500 be deducted from his provident fund under Rule 12 of the Contributory Provident Fund Rules, read with Section 6 (b) of the Provident Funds Act.

23. The petitioner has challenged the order passed by the President particularly on the ground of jurisdiction and also on the ground of violation of the principles of natural justice. The President was himself the prosecutor and a witness and had a bias against him, which rendered him unfit to hold the enquiry and to punish him. The charges framed are bad in law and no opportunity was given to petitioner who was ailing, to appear and defend his honour and

honesty. He was not given copies of papers upon which charges were framed even after the President made a tentative decision to dismiss him and this ex parte enquiry and order of dismissal and deduction of Provident Fund Money is violative of the principles of natural justice.

24. Art. 227 of the Constitution gives power of Superintendence over Courts and Tribunals to the High Court and the relevant portion of the Article read as follows:—

"Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction" except Military Courts and Tribunals.

This power of Superintendence is in addition to the power conferred upon the High Court to control inferior Courts and Tribunals by means of writs under Art. 226 but the power under Art. 227 is not as extensive as that under Art. 226 in certain respects and in exercise of the powers under Art. 227, the High Court cannot exercise its powers under Art. 226. This power again is discretionary and cannot be claimed as of right by any party. The power of general superintendence conferred under Art. 227 invokes a duty on the part of the High Court to keep all Courts and Tribunals within its territorial jurisdiction, within bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. This power, however, cannot be used as an appellate or revisional power and must be exercised most sparingly when interference is called for in cases of grave dereliction of duty or flagrant violation of law.

25. Mr. Chakraborty, learned Advocate for the petitioner has principally rested his argument on what he termed as arbitrary exercise of power as President of the Calcutta Improvement Trust Tribunal in violation of the principles of natural justice and he, therefore, invoked the aid of the Court's jurisdiction under Art. 227 for interference.

26. The petitioner was the Chief Ministerial officer in the office of the Improvement Trust Tribunal of which the opposite party was the President. Petitioner was due to retire with effect from March 15, 1959 and he was given several successive extensions — six terms of one year each. Petitioner went on leave in August, 1964 and after a short break, again went on medical leave due to expire on December 6, 1964. He was, however, placed under suspension with effect from December 5, 1964 and on December 28, 1964, petitioner received 2 charge-sheets against him. Then started

a series of correspondence between petitioner and the President — Petitioner's claim for certain papers were turned down, petitioner did not attend the enquiry and his request to engage a solicitor to defend him was rejected, though copies of proceedings including evidence recorded and documents were sent to him at his residence. His plea for transfer of the enquiry to a different authority and his plea for long adjournments on medical grounds were also turned down. The President-opposite party made a tentative decision to dismiss him and communicated the decision to him for further explanation. The petitioner again raised similar contentions and did not participate by personal appearance. Long and protracted correspondence, all with the object of delaying consideration of the charges ill-befits petitioner's plea of serious illness, making his participation difficult on grounds of health. Such correspondence with reservation that he was not participating in the ex parte proceeding is likely to raise a suspicion that it is motivated. This is abundantly clear from his letter dated February 18, 1965, Annexure Q(1) where he wrote "Please note that by this it must not be thought that I am taking part in ex parte proceeding." Obviously, he was advised against appearing and explaining the charges and he was acting with an eye to future legal remedy. Such conduct goes against his plea that he had no opportunity to defend and that the proceeding was conducted in violation of the principles of natural justice. It is true that at times, the President's order seemed strange and harsh and smacked of arbitrariness; his requests for certain copies were turned down without recording reasons, his petitions for time at all stages were rejected and he was given only a week's time to show cause against dismissal. These are, however, matters within the discretion of the President and in view of the determined refusal of the petitioner to participate in the hearing of the proceedings, it is difficult to say that the principles of natural justice were violated. A departmental proceeding is a two-sided affair — the officer drawing up the proceeding must be reasonable and helpful in allowing the person who is charge-sheeted to meet the case; equally, the latter must participate, instead of attempting to block the enquiry. Unfortunately neither went by that standard and the occasional lapses by the President is more than compensated by the studied refusal of the petitioner to participate on pleas which do not appear to be substantiated. We are therefore, unable to hold that the principle of natural justice was violated, to the prejudice of the petition.

27. Mr. N. C. Chakravarti, learned Advocate for petitioner has submitted that the President had a bias against the petitioner and combined in himself a prosecutor and judge, in spite of protest and petitioner was condemned unheard, as he had no reasonable opportunity to appear and defend his honour. We have already discussed the circumstances in which the charges against the petitioner were heard ex parte. The petitioner indulged in lengthy and protracted correspondence while pleading inability to attend on grounds of health which makes it abundantly clear he never wanted to participate but merely to delay it, for future favourable circumstances. The learned Advocate strenuously argued the principle of natural justice, forgetting that no natural justice requires that, there shall be a formal cross-examination. A Division Bench of this Court held in the case, reported in AIR 1967 Cal 80 that formal cross examination is procedural justice, it is governed by the rules of evidence, it is the creation of court, not a part of natural justice, but of legal and statutory justice. In the instant case, charges were framed, evidence was taken and considered and even copies of evidence and document sent to the petitioner, although he refused to participate. Indeed, he sent lengthy letter, disclosing the nature of his defence, though at the same time attempting to make it clear that he was not participating in the ex parte enquiry. It is not for this court to lay down what documents should be furnished at what stage or what adjournments should be granted or whether a medical certificate should be believed, but the entire proceeding leaves an impression that the petitioner was determined not to participate in the enquiry by the opposite party. The plea of a bias and prayer for transfer of the proceeding to some other authority is apparently not bona fide but merely out of a motive for delaying the consideration of the charges. No failure of the principles of natural justice is, therefore, involved and the argument is misconceived.

28. This brings us to the question whether this principle can be invoked in an application under Art. 227 of the Constitution against decision by the opposite party President of the tribunal. The jurisdiction of the High Court on an application under Art. 227 of the Constitution is supervisory over all courts and tribunals when it outstrips the limits of its jurisdiction or acts in excess of authority vested under the law. Tests for exercise of this power under Art. 227 have been laid down in the case reported in (1967) 71 CWN 152, B. Haldar v. P. M. Chakraborty and several other decisions and the High Court draws its juris-

diction over Courts and Tribunals and none over administrative decisions or orders. Mr. Chakraborty has drawn our attention to several decisions based on the failure of natural justice but these are decisions under Art. 226 of the Constitution where the Court exercised its control over the inferior Courts and Tribunals by means of the writs. The power of judicial superintendence conferred by Art. 227 is not as extensive as the power conferred by Art. 226 and it can be exercised over Courts and Tribunals only in certain circumstances, earlier pointed out and enumerated in the decision reported in (1967) 71 Cal WN 152. Mr. Chakraborty referred to Binapani Dei's case, reported in AIR 1967 SC 1269 in support of the argument that even administrative orders which involve evil consequences have to be passed consistently with rules of natural justice, but that was a decision in exercise of the power under Art. 226. It was also pointed out in J. P. Mitter's case reported in (1967) 71 Cal WN 926, that the doctrine of natural justice is not attracted where the function is purely administrative as distinguished from quasi-judicial. It is true also that the "area where principles of natural justice have to be followed and judicial approach has to be adopted has become wider and consequently the horizon of writ jurisdiction has been extended in a corresponding measure but then this power can be exercised in exercise of the writ jurisdiction under Art. 226 and not in exercise of the power of superintendence under Art. 227 of the Constitution.

29. In the case reported in AIR 1967 SC 361 Bharat Barrel and Drum Mfg. Co. v. L. K. Bose, it was pointed out by the Supreme Court that while considering the question, the Court should not proceed as if there are only inflexible rules of natural justice of universal application. Court has to consider in each case whether in the light of the facts and circumstances of the case, nature of issues involved, nature of order passed, and interests affected merely, a fair and reasonable opportunity of being heard was furnished to the person affected.

30. As already pointed out, the supervisory jurisdiction under Art. 227 is over Courts and Tribunals and does not extend to acts in the exercise of administrative jurisdiction where the relationship is that of master and servant. The aggrieved party may have other remedy but this Court has no jurisdiction to interfere under Art. 227 in exercise of supervisory jurisdiction.

31. The President is the administrative head, empowered to take disciplinary

action. He framed charges, served copies, took evidence, invited petitioner to participate and cross-examine witness. He considered the evidence and documents and passed certain orders. One aspect of Mr. Chakraborty's argument has been that the President was acting as a tribunal and therefore subject to supervisory jurisdiction of the Court under Art. 227. In Maqbul Hossen's case, reported in AIR 1953 SC 325, it was held that the customs officer is not a Court or Tribunal though in adjudicating upon matters under S. 167 of the Act he has to act in a judicial manner.

An identical question was again considered by the Supreme Court in a decision reported in AIR 1964 SC 1140. *Indo China Steam Navigation Co. Ltd. v. Jasjit Singh*, in connection with an application under Article 136 of the Constitution. This Article empowers the Supreme Court to entertain an application on two conditions being satisfied, firstly the order impugned must be an order of judicial or quasi-judicial character and should not be purely an administrative or executive order; secondly, the said order should have been passed either by a Court or a Tribunal in the territory of India. Article 136 of the Constitution relates to orders passed by "Court" or "Tribunal". Court's power of superintendence under Article 227 is also over courts and tribunals and therefore the view expressed by Supreme Court as to what constitutes a Court or tribunal should form the guiding line in deciding the question. The Supreme Court held as follows:

"It is clear that before an appeal can be entertained in this Court under Art. 136, two conditions have to be satisfied; the order impugned must be an order of a judicial or quasi-judicial character and should not be purely an administrative or executive order; and the said order should have been passed either by a Court or a Tribunal in the territory of India. It is difficult to lay down any definite or precise test for determining the character of a body which is called upon to adjudicate upon matters brought before it. Sometimes in deciding such a question, courts enquire whether the body or authority whose status or character is the subject matter of the enquiry, is clothed with the trappings of a Court. Can it compel witnesses to appear before it and administer oath to them, is it required to follow certain rules of procedure, is it bound to comply with the rules of natural justice, is it expected to deal with the matters before it fairly, justly and on the merits and not be guided by subjective considerations; in other words, is the approach which it is required to adopt judicial or quasi-judicial

approach? If all or some of the important tests in that behalf are satisfied the proceedings can be characterised as judicial proceedings and the test of trappings may be said to be satisfied. But apart from the test of trappings, another test of importance is whether the body or authority had been constituted by the State and the State has conferred on it its inherent judicial power. If it appears that such a body or authority has been constituted by the legislature and on it has been conferred the State's inherent judicial power, that would be a significant, if not a decisive indication that the said body or authority is a Tribunal." It was further pointed out as follows:—

"All the proceedings under the Act, whether before the Customs Officer or whether in appeal or revision, have to be conducted in accordance with the principles of natural justice and they are in that sense judicial or quasi-judicial proceedings. The fact that the status of the Customs Officer who adjudicates under Section 167 (12A) and Section 183 of the Act is not that of a tribunal, does not make any difference when we reach the stage of appeal or revision. A period of limitation is prescribed for the appeal, a procedure is prescribed by Rule 49 that the appeal or revision must be accompanied by a copy of the decision or order complained against, and the obvious scheme is that both the appellate and the revisional authorities must consider the matter judicially on the evidence and determine it in accordance with law."

The Custom Officers therefore did not form a court or tribunal, though proceedings had to be conducted in accordance with principles of natural justice and jurisdiction under Art. 227 cannot be involved except against the order passed by a court or tribunal.

The result, therefore, is that an officer acting in exercise of its administrative function does not constitute a tribunal or a court so as to invoke the jurisdiction under Article 227 of the Constitution, even if he has to act observing principles of natural justice. It would now be useful to examine the provisions of the Calcutta Improvement Act for examining how far the President of the Tribunal in dealing with the employees was acting as a Court or Tribunal.

Section 70 of the Act provides for Constitution of a Tribunal for the purposes of performing the functions of the Court in reference to acquisition of lands.

Section 71 provides that for the purposes of acquiring land under Land Acquisition Act, the Tribunal shall be deemed a Court (except for certain pur-

poses) and the President of the Tribunal shall be deemed to be a judge.

Section 72 provides that the Tribunal shall consist of a President and two assessors.

Section 74 provides for officers and servants of the Tribunal, and for preparation of a statement by the President showing number and grades of the clerks and other officers and servants and their salaries.

Clause (2) of the section authorises the President to make service rules prescribing age of superannuation and other conditions including leave, allowances etc. and for establishing and maintaining provident or annuity fund.

Sub-clause (4) reads as follows:—

"(4) Subject to any directions contained in any statement prepared under sub-section (1) and any rules made under sub-section (2), and for the time being in force, the power of appointing, promoting and granting leave to officers and servants of the Tribunal, and the power of reducing, suspending or dismissing them, shall vest in the President of the Tribunal."

32. The President of the tribunal, therefore, sits with two assessors and forms the Court and exercises powers under the Land Acquisition Act. The President is also the administrative head and controls the staff and has the power of 'reducing, suspending or dismissing them'. Clause 4 makes it clear that such power vests in the President of the Tribunal and he exercises the powers "subject to any rules made under sub-section (2). Admittedly no rules have been made and the President has the power to reduce, suspend or dismiss them. This administrative power is exercised by the President alone and shall not be confused with what is termed a Court within the meaning of Sections 71 and 72 formed by the President and the 2 assessors. The President sitting with assessors forms a Court but President alone exercises administrative functions subject to rules framed but no rules have been framed.

33. Mr. Chakraborty submitted that under the scheme of the Act, President alone performs certain judicial functions as enumerated in Section 77 (6) of the Act. This is in respect of determination of the person to whom compensation is payable and apportionment of compensation, which may be done in the absence of assessors if the President considers this procedure unnecessary.

This, however, is in the nature of a routine matter and in any case, it authorises the President to do it in certain circumstances but in doing so, he does not himself constitute a court or tribunal within the meaning of the Act.

34. The President alone, therefore, controls the staff in its administrative capacity and has the right to reduce, suspend, or dismiss any member of the staff. This power is exercised as an administrative officer and the relationship is that of master and servant and he does not exercise such power as a Court or tribunal. No rules have been framed and no question of violating any such Rule arises. This court has power of superintendence over all courts and Tribunals within the limits of its jurisdiction but it does not extend to administrative orders, by persons or bodies which do not constitute a court or a tribunal.

35. Mr. Chakraborty next argued that rules governing Provident Fund are statutory Rules and in deducting the sum of Rs. 3000, President acted illegally and in violation of the rules. The relevant rule reads as follows:—

"(2) The reasons for which a dismissal from the service may, under Section 6 (b) of the Act, authorize a deduction from the sum standing to the credit of the subscriber in the fund, are:—

- (i) grave misconduct,
- (ii) any act of embezzlement,
- (iii) any wilful default or neglect of duty by such subscriber by reasons of which the President or the Board may at any time have paid, sustained or been put to any loss, damage, costs or expense."

If therefore the petitioner has been dismissed and his dismissal order is valid, the order of deduction of Provident Fund money is only consequential and not in violation of these rules and it calls for no action from this Court.

36. We, therefore, conclude as follows:

(1) Out of the facts disclosed, it is difficult to say that the petitioner had no opportunity to explain the charges or put his case before the President and the question of violation of the principles of natural justice, therefore, does not arise.

(2) President of the tribunal in exercising disciplinary jurisdiction did not constitute a Court or a tribunal but acted in exercise of his administrative duty and therefore the law of master and servant applied and whatever other remedies the petitioner might have, he cannot invoke the aid of this court's power under Art. 227 for redress of his grievances.

(3) Even though not a court or tribunal, the proceeding before the President has to be concluded observing principles of natural justice but in any case the High Court cannot interfere in exercise of its power under Art. 227.

37. This application therefore stands dismissed.

38. There will be no order as to costs.

39. K. K. MITRA, J. :— I agree.
Application dismissed.

holding that the petitioner's preparation "Dhanantari Rasayan" was liable to be assessed at the rate of Rs. 17.50 P. per London Proof Gallon for purposes of excise duty with effect from April 1, 1957.

AIR 1970 CALCUTTA 161 (V 57 C 23)
P. N. MOOKERJEE AND A. K. DUTT, JJ.

Abhoy Pada Roy, Petitioner v. Excise Commissioner, West Bengal and another, Opposite Parties.

Civil Rule No. 300 of 1961, D/- 29-2-1968.

Medicinal and Toilet Preparations (Excise Duties) Act (1955), S. 3 and Schedule, Item 1 and Clause 2 (iii) — Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, Rules 60 and 67 — Presumption under Rule 67 possible only if the preparation is an Ayurvedic one — Higher rate under Item 1 cannot also be charged.

The Commissioner of Excise sought to charge a preparation 'Dhanantari Rasayan' at the higher rate under Item 1 of Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act treating it as an Ayurvedic preparation, on the ground that the petitioner had not proved it to be an allopathic preparation and that it was not licensed under the Drugs Act. The preparation was thus presumed under R. 67 to be Ayurvedic one and higher duty was levied under Item 1 of Schedule to the Act in the place of the lower duty under residuary Cl. 2 (iii) of the Schedule.

Held, that under S. 3, the charging section, the taxing authority had to satisfy the test for holding that a preparation was chargeable to higher duty. For higher duty the medicinal preparation should not only be one to which alcohol has been added, but must be capable of being consumed as ordinary alcoholic beverage. For establishing that it is capable of being consumed as ordinary alcoholic beverage, presumption under R. 67 can be relied upon only when the preparation in question is an Ayurvedic preparation. In the absence of any material on record to indicate that it was an Ayurvedic preparation, the presumption under R. 67, namely, that for purposes of duty Ayurvedic preparations to which alcohol is added shall be treated as alcoholic beverages, would not apply and the higher rate of duty could not be levied. (Para 3)

Shaila Dhar Chowdhury, for Petitioner; Soumendra Chandra Bose and Dwijendra Nath Lahiry, for Opposite Parties.

ORDER:— This Rule was obtained by the petitioner against an order of the Commissioner of Excise, West Bengal,

2. The reason, given by the learned Commissioner, is that, in view of Rule 60 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, as subsequently amended, the appellant not having adduced any proof that the preparation in question is manufactured according to the allopathic system of medicine and the Deputy Commissioner having reported that the preparation in question has not been licensed under the Drugs Act, the said preparation has to be classed as an Ayurvedic preparation and, accordingly under Rule 67, the above higher duty, in place of the lower duty of Rs. 5/- under the residuary clause 2 (iii) of the Schedule to the Act, will be leviable.

3. The point raises a short question. The above taxing statute contains, as its charging section, Section 3, and the taxing authority has to satisfy the test for holding that it is chargeable to higher duty. The schedule to the statute [The Medicinal and Toilet Preparations (Excise Duties) Act, 1955] mentions, in the relevant item No. 1, to quote its relevant part, "Medicinal ***preparations containing alcohol *** to which alcohol has been added; and which are capable of being consumed as ordinary alcoholic beverages" as liable to the higher duty of Rs. 17.50 P. There is no dispute that the preparation in question is a medicinal preparation. There is no dispute either that it is a medicinal preparation to which alcohol has been added. The parties, however, are not agreed on the point whether this preparation is capable of being consumed as ordinary alcoholic beverage. That aspect, therefore, has to be established before the department can assess the preparation in question to the higher duty. For establishing the same, the department relies on Rule 67 of the Rules which, to quote the relevant facts, is in these terms: "For purpose of duty Ayurvedic preparations *** to which alcohol is added at any stage of manufacture, shall be treated as alcoholic preparations capable of being used as ordinary alcoholic beverages." This presumption, however, will apply only when the preparation in question is an Ayurvedic preparation. There is no material on the present records to indicate that the disputed preparation is an Ayurvedic preparation and, unless this is established, the presumption under Rule 67, or, for the matter of that, the application of the higher duty under the above item 1 of the Schedule to the Act, cannot be

made. In this view, we are unable to uphold the order or decision of the Commissioner, which is the subject-matter of the present Rule, and, in our opinion, the matter requires further consideration.

4. We would, accordingly, make this Rule absolute, set aside the impugned order and send the matter back to the Commissioner for fresh and further consideration on the materials, already on record, and on such further materials as may be made available to him by the parties, in accordance with law, in the light of the observations, made in this judgment.

5. There will be no order for costs in this Rule.

Petition allowed.

AIR 1970 CALCUTTA 162 (V 57 C 24)
AMARESH ROY AND S. N. BAGCHI, JJ.

The State, Appellant v. Golam Rasul, Respondent.

Govt. Appeal No. 6 of 1963, D/- 7-2-1969.

Criminal P. C. (1898), Section 492 — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — Calcutta High Court (Extension of Jurisdiction) Act (41 of 1953) — (Criminal P. C. (1898), S. 4(1)(i)) — (Civil P. C. (1908), S. 2 (7) (a)) — (Constitution of India, Art. 258 (1)).

The Calcutta High Court under the Act 41 of 1953 exercises jurisdiction as the High Court for the Andaman and Nicobar Islands. The State Government of West Bengal has not been authorised to perform the functions of the State Government of the Central Territory in Andaman and Nicobar Islands. That being so, the Legal Remembrancer of Government of West Bengal has no connection with the appeal from acquittal preferred by the Chief Commissioner of the Islands through the Public Prosecutor and therefore, has no authority to appoint any lawyer either for the appellant State or for the accused-respondent in the appeal. A provision in the Legal Remembrancer's Manual under which there is an arrangement between Central Government and the State Government of West Bengal for appointing lawyers does not enable the Government of West Bengal to appoint any Public Prosecutor in respect of the Central Territory under Section 492 Cr. P. C. In an appeal against an order of acquittal it is the appellant-State, which is the Central Government in the case, that has the right

to prosecute the appeal by appointing a properly authorised lawyer. (Para 12)

Per Bagchi J. :— Legal Remembrancer of West Bengal, can however, if appointed by Central Government by virtue of provisions of Art. 258 (1), read with S. 492 (1) of Criminal P. C. (1898), represent Andaman and Nicobar Islands i. e. Central Government in any appeal or proceedings before Calcutta High Court and can also nominate counsel for the Union Territory to prosecute the appeal for and on behalf of the Union Territory and can also appoint, upon the High Court's approval, Counsel to represent the respondent accused. Case law reviewed. (Para 28)

Cases Referred: Chronological Paras

(1952) AIR 1952 Madh B 13 (V 39) =
1952 Cri LJ 153 = Madh BLJ 1955
HCR 1399, State v. Brindawan 25
(1949) AIR 1949 PC 263 (V 36) =
50 Cri LJ 886 = 1949 All LJ
325, Bhagwan Das v. The King 20
(1933) AIR 1933 Cal 118 (V 20) =
34 Cri LJ 662 = ILR 60 Cal 603,
Tushar Kanti Ghosh v. Governor
of Bengal 26
(1919) AIR 1919 Cal 203 (V 6) =
20 Cri LJ 170 = ILR 46 Cal 544,
Supdt. and Remembrancer of Legal
Affairs Bengal v. Tularam Baro-
dia 24

Dipak Kumar Sen Gupta, for Appellant; J. C. Sinha and I. A. Qayum, for Respondent.

AMARESH ROY, J. :— This appeal is from Andaman and Nicobar Islands and has been preferred by the State through the Public Prosecutor, Andaman and Nicobar Islands, against an order of acquittal passed by the Additional District Magistrate, Andaman and Nicobar Islands on 27th December, 1962 in a trial held in Port Blair in Criminal Case No. 63/40 of 1962 in which the respondent Golam Rasool was charged for an offence under Section 408 of the Indian Penal Code alleged to have been committed by him on or about 16th December, 1959 at Long Islands as a servant in the employment of Forest Co-operative Chain Stores in respect of Rs. 977.08 nP. That amount was alleged to be the money recovered from the Forest Mazdoors against goods supplied to them on credit which the Range Officer Henry Lawrence sent through N. Kaniappa Mudaliar and alleged to have been received by Golam Rasool.

2-5. Case started on the report of the President of the Forest Co-operative Chain Stores Ltd., Chatham to the Superintendent of Police, Port Blair, in which it was alleged that Rs. 2721.06 nP. was found short.

(His Lordship reviewed the evidence in the case and proceeded).

6. In that state of evidence the finding of the learned Magistrate at the trial court that prosecution has failed to prove that the money was entrusted to Golam Rasool is, in our view, the correct and proper finding. That being so, apart from other infirmities in the prosecution case and evidence referred to by the learned Magistrate in his judgment the order of acquittal is the only legal order that could be made in the case. We, therefore, dismiss the appeal.

7. Besides dismissing the appeal on merits, we also need mention a feature in prosecuting this appeal. As we have already mentioned the appeal was preferred under Section 417 (1) Cr. P. C. by the State Government through the Public Prosecutor at Andaman and Nicobar Islands. In the Memorandum of Appeal it has been stated in paragraph 23 that the appeal was so filed by the Public Prosecutor — "Being directed by the Chief Commissioner, Andaman and Nicobar Islands in exercise of the powers of the State Government under Section 417 of the Code of Criminal Procedure (vide Order No. 193 dated 27th January, 1963)". A copy of that Order was appended to the Memorandum of Appeal as Annexure 'B'. When the appeal was presented in the Islands it was admitted by the order of Sri Halve who was functioning as the Registrar in the Islands in the absence of the Chief Commissioner. Thereafter on 24th April, 1963, an order was made by a Division Bench of this Court (D. Mukherjee and D. N. Das Gupta, JJ.) in these terms:—

"Consequent on the order of admission of the appeal we direct the respondent Golam Rasool to be re-arrested and released on bail to the satisfaction of the Chief Commissioner of the Andaman & Nicobar Islands. We also direct the issue of usual notices."

Order for bail was modified by an Order dated 15th of July, 1964 passed by the Division Bench (D. N. Das Gupta and A. C. Gupta, JJ.). It remains doubtful if a proper order admitting the appeal for hearing was made according to the Rules of the Appellate Side on this Court.

8. At the hearing before us Mr. Dipak Sen Gupta appeared for the prosecution being so appointed by the Legal Remembrancer of West Bengal. Mr. Sen Gupta stated before us that he has not been authorised either by the Public Prosecutor of Andaman and Nicobar Islands, nor has he been appointed as Public Prosecutor for the purpose of this case by the State Government of Andaman and Nicobar Islands which is a Central Territory. Mr. Sen Gupta frankly stated that he

was in doubt whether he has proper authority and locus standi to represent the appellant in this appeal.

9. It also appears that upto a stage during the pendency of the appeal in this Court the accused-respondent Golam Rasool had not entered appearance through any lawyer appointed by him. At that stage the Legal Remembrancer of West Bengal Government appointed a learned Advocate of this Court Mr. Jogesh Chandra Sinha to represent and appear for the respondent in this appeal. Before the date of hearing, however, a learned Advocate Mr. Inamdar Abdul Quayum has filed a Vakalatnama executed by the respondent Golam Rasool. The said learned Advocate Mr. Abdul Quayum appeared before us at the hearing. The situation thereby created was one of doubt and confusion regarding the position of the learned Advocate Mr. Jogesh Chandra Sinha who was appointed to appear for defence by the Legal Remembrancer of West Bengal.

10. It is also noticeable that during the pendency of the appeal in this Court, for the State the learned Dy. L. R. of West Bengal, Mr. S. N. Banerjee appeared before the Division Bench on 24th April, 1963 and on 25th of July, 1964 another learned Advocate Mr. Prasun Chandra Ghosh appeared before the Division Bench for the State.

11. The appeal was by the State Government under Section 417 (1) Cr. P. C. The territory of Andaman and Nicobar Islands is a Central Territory and the State Government in relation to that territory is the Central Government of India. The Chief Commissioner appointed by the Central Government exercises the functions of the State Government for that territory and the appeal was filed through the Public Prosecutor of Andaman and Nicobar Islands under the directions of the Chief Commissioner given under Section 417 (1) Cr. P. C.

12. This High Court under the Act of 1953 exercises jurisdiction as the High Court for the Andaman and Nicobar Islands. The State Government of West Bengal has not been authorised to perform the functions of the State Government of the Central Territory in Andaman and Nicobar Islands. That being so, the Legal Remembrancer of Government of West Bengal has no connection with the appeal, and therefore, has no authority to appoint any lawyer either for the appellant State or for the accused-respondent in this appeal. The learned Dy. L. R. Mr. S. N. Banerjee has referred to a provision in L. R.'s Manual under which there is an arrangement between Central Government and the State Government of West Bengal for appointing

lawyers. That provision, however, does not enable the Government of West Bengal to appoint any Public Prosecutor in respect of the Central Territory under Section 492 Cr. P. C. In an appeal against an order of acquittal. It is the appellant-State, which is the Central Government in the present case, that has the right to prosecute the appeal by appointing a properly authorised lawyer. Mr. Dipak Sen Gupta was not so authorised.

13. For the accused-respondent in the appeal a lawyer appointed by him on a vakalatnama appeared before us at the hearing. The learned Advocate Mr. Jogesh Chandra Sinha, who was appointed by the Legal Remembrancer of West Bengal, was rendered functus officio and had no proper authority to represent the accused-respondent.

14. Such state of confusion in the important matter of proper representation at the Bar of the parties in the appeal is likely to hamper proper disposal of the appeals for doing justice between parties. Governments concerned should be alive to the necessity of proper appointment of lawyers and avoid such confusion. As, however, the learned Advocates, who were before us, had prepared the case, we availed their assistance at the hearing of the appeal. They made their submissions on the evidence in the case and the order we have made above was upon hearing of all the three learned Advocates above mentioned.

15. The appeal is dismissed. The Respondent Golam Rasool is discharged from the Bail bond.

16. **BAGCHI, J. :—** I agree with my Lord that the appeal be dismissed and the respondent, Golam Rasul, be discharged from the bail bond. But I like to add a few words of my own on some question of law.

17. In the matter of appointment of the Public Prosecutor and the defence Counsel in this appeal, there has been utter confusion and violation of law. My Lord has been pleased to deal with the matter regarding how they were appointed to represent this appellant, the Union Territory of Andaman and Nicobar Islands and the respondent, Golam Rasul.

18. Section 492 of the Code of Criminal Procedure reads as follows:—

"The Central Government or the State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors (added by Sec. 3 — Anti-Corruption Laws Amendment Act, Act XL of 1964 which came into force on and from 18-12-64)."

Section 4, sub-section (1), clause (i) of the Code of Criminal Procedure says:—

"'High Court', in relation to the Andaman and Nicobar Islands, means the High Court in Calcutta, and, in relation to any other local area, means the highest court of criminal appeal for that area"

19. The High Court of Calcutta has jurisdiction over the local area of the State of West Bengal as well as of the local area of the Andaman and Nicobar Islands. The Andaman and Nicobar Islands are a centrally administered territory. The executive power of the State Government under Art. 154 of the Constitution vests in the Governor whereas the executive power of a centrally administered territory vests in the President under Art. 73 of the Constitution.

20. Section 492 of the Code of Criminal Procedure, 1898 since the amendment in 1964 authorises the Central Government or the State Government, as the case may be, to appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors. The emphasis lies in the expression 'in any local area' as occurring in Sec. 492, sub-section (1) of the Code of Criminal Procedure, 1898. Their Lordships of the Privy Council in the case of *Bhagwan Das v. The King*, reported in AIR 1949 PC 263, had to interpret the executive authority of the province under Section 49 of the Government of India Act, 1935, to make appointments to the post of a Public Prosecutor under Section 492, sub-section (1) of the Code of Criminal Procedure as it then stood, and in that context, their Lordships were pleased to observe that it was a part of the executive authority of the province to make appointments to the post of a Public Prosecutor and the executive authority of the province being vested by Section 49, Government of India Act, 1935, in the Governor, he only was entitled to appoint the Advocate General, a Public Prosecutor.

21. The local area of a State and the local area of an Union Territory are well defined. The Andaman and Nicobar Islands constitute an Union territory administered by the Central Government through the Chief Commissioner. The local area of an Union territory administered by the Chief Commissioner, as in the case of the Andaman and Nicobar Islands, is a centrally administered State and the executive power of a centrally administered State vests in the President of India under Art. 73 of the Constitution. That is why in regard to appointments of Public Prosecutors in any local area in relation to a State or the Union, amendment had to be made in

sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898 in 1964 and the two groups of words in the alternative, the "Central Government" or the "State Government" had to be introduced in sub-section (1) of Section 492 of the Code of Criminal Procedure. The executive power of the Governor of a State in the matter of appointment of a Public Prosecutor by virtue of the authority of article 154 of the Constitution, read with Section 492, Sub-section (1) of the Code of Criminal Procedure, 1898, extends within the local area of a State, while the executive power of the President under Art. 73 of the Constitution, read with Section 492, sub-section (1) of the Code of Criminal Procedure extends within the local area of an Union territory, such as, in the case of Andaman and Nicobar Islands.

22. Art. 258 of the Constitution CL (1) reads as follows:—

"Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends."

23. The President may, with the consent of the Government of a State, such as that of West Bengal, entrust to such State Government or its officers functions in relation to the appointment of a Public Prosecutor in regard to cases arising within the local area of the Union territory, as in the case of Andaman and Nicobar Islands, within which the executive power of the Union, vested in the President, extends. In the present appeal, neither the learned Counsel, appointed by the learned Legal Remembrancer of the State of West Bengal, representing the Union territory of Andaman and Nicobar Islands, the appellant, before us at the hearing of this appeal, nor the learned Counsel, appointed by the learned Legal Remembrancer of the State of West Bengal, appearing for the respondent who had not been initially represented, but later on, represented by the lawyer of his own choice, could enlighten us as to whether or not the President with the consent of the Government of West Bengal entrusted either the Government of West Bengal or the learned Legal Remembrancer, West Bengal, the function in relation to the appointment of a Public Prosecutor for the appellant, Andaman and Nicobar Islands, to prosecute with this appeal before this High Court at Calcutta for and on behalf of the said appellant, and to appoint a learned Counsel to represent the unrepresented respondent in this appeal before

this Court. The Central Government could also appoint by virtue of the provisions of sub-clause (1) of Art. 258 of the Constitution, read with sub-sec. (1) of Section 492 of the Code of Criminal Procedure, 1898, with the previous consent of the State Government, the Legal Remembrancer, West Bengal as Public Prosecutor for the Union territory of Andaman and Nicobar Islands for the purpose of this appeal under Section 417, sub-section (1) of the Code of Criminal Procedure, and in that event, the learned Legal Remembrancer, West Bengal could well have nominated the learned Counsel appearing for the appellant, Union territory, to prosecute with the appeal for and on behalf of the Union territory, and could also appoint, upon this Court's approval, the learned defence Counsel to represent the respondent in this appeal before this Court. Neither of the learned Counsel appearing for either side, nor the learned D. L. R. of West Bengal could show us any notification under sub-art. (1) of Art. 258, read with sub-section (1) of Section 492 of the Code of Criminal Procedure whereby the President with the consent of the Governor of the State of West Bengal entrusted, by appointing L. R., West Bengal, a Public Prosecutor for and on behalf of the centrally administered territories of Andaman and Nicobar Islands with the function of prosecuting with this appeal before this Court. If there was such a notification the learned D. L. R. West Bengal, could well represent as Public Prosecutor for the Union Territory of Andaman and Nicobar Islands, the appellant, in this appeal before this High Court at the hearing of this appeal and he could have also authorised the learned counsel appearing for the appellant in this case to represent the Union territory of Andaman and Nicobar Islands. the appellant, in this appeal. In that event also, the learned L. R.'s nomination of the learned Defence Counsel representing the respondent in this appeal could have been approved by this Court at the hearing of this appeal.

24. In the case of Supdt. and Remembrancer of Legal Affairs, Bengal v. Tularam Barodia, reported in AIR 1919 Cal 203, their Lordships of the Division Bench of this Court had to consider Section 417 of the Code of Criminal Procedure, 1898, in a case there the Superintendent and Remembrancer of Legal Affairs, Bengal, appointed by the then Bengal Government to be the Public Prosecutor in the case heard by the High Court at Calcutta. That was a case of appeal against acquittal filed by the Superintendent and Remembrancer of Legal Affairs, Bengal appointed by the Government of Bengal as it then was,

Tracing the history of the office of the Legal Remembrancer, their Lordships at column '2' of the Report at p. 203 observed:—

"The appeal was presented by the Superintendent and Remembrancer of Legal Affairs, Bengal, who by notification of date 19th May, 1915, has been appointed by the Local Government to be by virtue of his office Public Prosecutor in all cases heard by this Court in the exercise of its appellate jurisdiction."

In that observation, their Lordships were pleased to pin-point the question of appointment of Superintendent and Remembrancer of Legal Affairs, Bengal, that emanated from the notification of the Local Government of Bengal and to put emphasis on the words 'Local Government'. In sub-section (1) of Section 492 of the Code of Criminal Procedure, the emphasis lies also on the words 'in any local area.'

25. In the case of the State v. Brīndavan, reported in AIR 1952 Madh B. 13 (Dixit and Chaturvedi, JJ.), their Lordships observed at p. 14 of the report: "The appointment may be in respect to particular case or in respect to a particular class of cases or in regard to cases generally. But it must in any event be with reference to a local area for exercising the powers of Public Prosecutor. The words "in any local area" which occur in Section 492 qualify not only the words "for any specified class of cases" but also the preceding words "generally", or "in any case". It must be noted that the word "generally" has been used to contra-distinguish all cases from a particular case or a particular class of cases. If the words "in any local area," which are preceded by a comma are taken to qualify only the words "for any specified class of cases" and if the word "generally" is to be read independently of the words following it, the result would be to create a conflict between the jurisdiction of officers appointed as public prosecutors in regard to cases generally. A Public Prosecutor has specific powers under the Code and he cannot exercise these powers in regard to cases generally or in regard to a particular case or a class of cases unless the local area within which he is to exercise the powers is specified. In my view, under Section 492 of the Code it is incumbent on the Govt. to specify the local area within which the person appointed as Public Prosecutor is to exercise his powers." In regard to Andaman and Nicobar Islands, the High Court of Calcutta is also the High Court for that Union territory, but the Local Government of that territory and

the Local Government of the State of West Bengal are two different and distinct constitutional and juristic entities and the executive power of those two Local Governments under the Constitution vests in two different Constitutional heads, having their well-defined local areas, former in the State of West Bengal, latter in the Union territory of Andaman and Nicobar Islands.

26. In the case of Tushar Kanti Ghosh v. Governor of Bengal in Council, reported in AIR 1933 Cal 118 at p. 118, their Lordships of the Division Bench of this Court had to consider the legal position of Legal Remembrancer of Bengal. Interpreting Section 4, CL (t) and Section 493 of the Code of Criminal Procedure, their Lordships at page 120 of the Report expressed themselves as follows:

"The Legal Remembrancer is ex-officio Public Prosecutor on the appellate side of the Court and as such has the power to instruct counsel, his authority to act for the Local Government being in no way dependent on anything in the nature of a Vakalatnama or warrant of attorney."

In this observation their Lordships also emphasised on the words "His authority to act for the Local Government."

27. I respectfully accept the principle laid down in the decisions I have just now reviewed.

28. In the present appeal, the "Local Government" means the Union territory of Andaman and Nicobar Islands and the "Local area" also relates to those Islands, a Centrally administered territory, administered by the Union of India, the executive power of which vests in the President under Art. 73 of the Constitution (vide Constitution, Seventh Amendment Act, 1956, 1st Schedule — II, Union territories, Clause 5). In view of the principles, enunciated in the decisions discussed above, for the local area of a Centrally administered territory and for the local area of a State, the Central Government and the State Government have their respective powers under sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898, as amended in 1964, to appoint a Public Prosecutor to represent the Union territory and the State, as the case may be, in any appeal or proceedings before this High Court. The High Court of Calcutta is undoubtedly the High Court for Andaman and Nicobar Islands — a Union territory as well as the High Court for the State of West Bengal. But the local area of the State of West Bengal and the local area of the Andaman and Nicobar Islands are distinct and different from each other and the executive power in the case of the State of West Bengal vests in the

Governor of the State of West Bengal, and in the case of Andaman and Nicobar Islands, vests in the President of India. Accordingly, the State of West Bengal has appointed only for the local area of the State of West Bengal, the learned Legal Remembrancer, West Bengal, to be a Public Prosecutor having authority to represent the State Government before the High Court of Calcutta in its appellate jurisdiction which extends over the local area of the State of West Bengal and the local area of the Union territory of Andaman and Nicobar Islands. But the learned Legal Remembrancer of West Bengal cannot, unless appointed by the Central Government by virtue of the provisions of sub-art. (1) of Art. 258, read with sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898, represent the appellant-Andaman and Nicobar Islands — a Centrally administered Union territory i. e. the Central Government in any appeal or proceedings before this High Court. I have observed earlier in this judgment that the learned Deputy Legal Remembrancer, West Bengal, could not show us any notification appointing him a Public Prosecutor by the Central Government to represent the appellant Union territory of Andaman and Nicobar Islands as the Public Prosecutor for that territory before this High Court in its appellate jurisdiction. The learned Legal Remembrancer of West Bengal, therefore, had no authority to appoint either the learned Counsel for the appellant or the learned Counsel for the respondent to represent either the appellant or the respondent respectively before us in this appeal since he himself had not been appointed by the Central Government to be a Public Prosecutor for the Union territory of Andaman and Nicobar Islands and to represent that territory in this appeal before the appellate jurisdiction of this Court. We hope that such illegality, as I have just now pointed out, would not recur in future. We have, however, with pleasure, acknowledged the assistance given to us in this appeal by the learned Counsel for the appellant and the learned Counsel for the respondent appointed by the learned L. R. of West Bengal and the learned Counsel for the respondent appointed by the respondent at the time of hearing of this appeal.

Order accordingly.

AIR 1970 CALCUTTA 167 (V 57 C 25)

R. N. DUTT AND A. P. DAS, JJ.

Superintendent and Remembrancer of Legal Affairs, West Bengal, Appellant v. Prohlad Agarwalla, Respondent.

Govt. Appeal No. 14 of 1962, D/- 20-6-1969.

HM/JM/D323/69/MBR/D

Essential Commodities Act (1955), Ss. 3, 7, 5 — Iron and Steel (Control) Order (1956), Para. 14 (2) — Order under S. 3 — Contravention of direction contained in notification issued under para 14(2) of Order — It is not contravention of provisions of Order and so not punishable under S. 7.

A person can be convicted under S. 7 of the Essential Commodities Act, 1955, only when it is proved that he has contravened any 'order' made under S. 3 of the Act. When there was a contravention of a direction given under the notification made by the Controller in exercise of the powers given to him under paragraph 14(2) of the Iron and Steel (Control) Order, 1956 which was made under S. 3 of the Act and the direction was not a direction contained in the order but that was a direction contained in the notification, the contravention of the direction could not be said to be the contravention of a provision of the Order.

(Para 5)

The notification made by the Controller was not an Order under S. 3. Firstly, there was no notified Order made by the Central Government under S. 5 of the Act directing the Controller to make an Order under S. 3. If the Central Government is to delegate its power to make an order under S. 3 to some Officer, it has to make a notified Order under S. 5. Secondly, the notification itself showed that it was not an Order under S. 3 but it was just a direction to the stockholders in exercise of the powers to the Controller under paragraph 14 (2) of the Order. The Controller did not say that he was making the order by virtue of powers under S. 3 on the basis of a delegation made by the Central Government under S. 5.

(Para 6)

An Order under S. 3 can be made by the Central Government. The Central Government made such an Order, i. e., Order of 1956. Paragraph 14 of the Order no doubt authorised the Controller to make certain directions but those directions do not relate back to the Order or form part of the Order under S. 3 because that would involve double delegation of legislative power not authorised by Parliament.

(Para 7)

Furthermore, contravention of the provisions of paragraph 12(1) of the Order is punishable under S. 7. But paragraph 14 (2) does not require the stockholder to do a particular thing. Therefore, contravention of a direction contained in a notification issued under paragraph 14(2) of the Order is not a contravention of the provisions of the Order and so is not punishable under S. 7.

(Para 8)

Priti Bhushan Burman, for Appellant;
Ajit Kumar Dutt and J. P. Sribastava,
for Respondent.

R. N. DUTT, J.:—The respondent was tried by a Magistrate under Section 7 of the Essential Commodities Act, convicted and sentenced to a fine of Rs. 51, in default to rigorous imprisonment for three weeks. The respondent thereafter made an appeal and the Sessions Judge set aside the conviction and sentence and acquitted the respondent. Thereafter the State Government has filed this appeal against this order of acquittal.

2. The prosecution case was as follows:

3. The respondent was employed under Messrs. Nandaram Deotram, a firm at Kurseong. The firm was an authorised dealer in iron and steel under the Iron and Steel (Control) Order, 1956. On November 17, 1960 the respondent sold three bundles of galvanised corrugated sheets to one Beharilal Bahsaria against permit no. 69/60, dated November 10, 1960, granted by the Sub-Divisional Controller of Food and Supplies. Beharilal paid Rs. 294.52 P. as price and a cash memo was written and granted to him mentioning the rate at Rs. 880 per ton. The weight was not however mentioned in the cash memo. On November 19, 1960 Beharilal had certain suspicion about the weight and got the three bundles weighed and found the total weight as 5 Cwt. 3 Qrs. 6 lbs. whose price at Rs. 880 per ton would be Rs. 255.34 P. The allegation against the respondent was, therefore, that he sold the G. C. sheets at a rate higher than the controlled rate.

4. On this allegation the respondent was charged under Section 7 of the Essential Commodities Act for having contravened paragraphs 15 and 27 (4) of the Iron and Steel (Control) Order, 1956. The learned Magistrate found that the respondent did not charge a rate in excess of the controlled rate but he held that the respondent did not mention the weight of the G. C. sheets in the cash memo which he was required to do under notification no. S. R. O. 1111/ESS. Comm. Iron & Steel and on this finding the learned Magistrate convicted the respondent under Section 7 of the Essential Commodities Act. The learned Sessions Judge set aside this conviction primarily on the ground that there was want of mens rea in what the respondent did, namely, in not mentioning the weight of the G. C. sheets in the cash memo.

5. Having heard Mr. Burman and Mr. Dutt we do not think that the order of acquittal should be interfered with in this appeal. It is not necessary for us to consider the grounds for which the learned Sessions Judge set aside the conviction of the respondent. We think that even otherwise the respondent can-

not be convicted under Section 7 of the Essential Commodities Act on the findings of the learned Magistrate. Section 7 of the Essential Commodities Act makes contravention of any 'order' made under Section 3 of the Act punishable. So a person can be convicted under Section 7 only when it is proved that he has contravened any 'order' made under Section 3 of the Act. Here, the Iron and Steel (Control) Order, 1956 is an order made by the Central Government under Section 3 of the Essential Commodities Act. There is no contravention of any provision of this 'Order' as such. Paragraph 14(2) of this Order states as follows:

"The Controller, may by notification in the official Gazette, direct that every producer, stockholder or other person holding stocks of iron or steel when selling any iron or steel shall give to the purchaser a memorandum containing the particulars specified in such notification."

By virtue of this power the Controller issued notification No. S. R. O. 1111/ESS. COMM/Iron and Steel and that notification required a stockholder, here the respondent, to issue a memorandum relating to every sale of iron and steel showing certain particulars; weight of the goods sold is one of such particulars. So, what the learned Magistrate has found was that there was a contravention of a direction given under this notification made by the Controller in exercise of the powers given to him under paragraph 14(2) of the Iron and Steel (Control) Order. The question, therefore, arises if contravention of this direction is a contravention of any provision of the Iron and Steel (Control) Order which was made under Section 3 of the Act. This direction is not a direction contained in the Iron and Steel (Control) Order. But this is a direction contained in a notification issued by the Controller in exercise of a power given to him under the Iron and Steel (Control) Order. On the face of it, therefore, a contravention of this direction cannot be said to be a contravention of a provision of the Iron and Steel (Control) Order, 1956.

6. But Mr. Burman submits that the Central Government may delegate its authority to make an Order under Section 3 of the Essential Commodities Act to an Officer or Authority subordinate to the Central Government under Section 5 of the Act. So, the Central Government may direct an officer or Authority subordinate to it to make Orders under Section 3 of the Act and the provision of paragraph 14(2) of the Iron and Steel (Control) Order is, such a direction and notification No. S. R. O. 1111/ESS. Comm. Iron & Steel made by the Controller is an order under Section 3 of the Act.

This contention is not tenable. Firstly, there is no notified Order made by the Central Government under Section 5 of the Act directing the Controller to make an Order under Section 3. If the Central Government is to delegate its power to make an Order under Section 3 to some Officer it has to make a notified Order under Section 5 but here in this case there is no such notified Order. Secondly, the notification itself shows that this was not an Order under Section 3 of the Act but this was just a direction to the stockholders in exercise of the powers to the Controller under paragraph 14(2) of the Iron and Steel (Control) Order. The Controller does not say that he was making this order by virtue of powers under Section 3 of the Act on the basis of a delegation made by the Central Government under Section 5 of the Act.

7. Mr. Burman then argues that since this was a direction made by the Controller in exercise of a power conferred on him by the Iron and Steel (Control) Order, 1956 the direction should be regarded as part of the Order made by the Central Government. This argument again cannot be accepted. An order under Section 3 can be made by the Central Government. The Central Government made such an Order, i. e., the Iron and Steel (Control) Order, 1956. Paragraph 14(2) of this Order no doubt authorised the Controller to make certain directions but those directions do not relate back to the Order or form part of the Order under Section 3 because that would involve double delegation of legislative power not authorised by Parliament.

8. Furthermore, we do not think that contravention of such direction was intended to be made punishable under Section 7 of the Essential Commodities Act. When we compare, say, paragraph 12 (1) with paragraph 14 (2) this will be clear. Paragraph 12 (1) says that every stockholder shall keep such books, accounts and records relating to the business carried on by him as the Controller may require. Obviously, the requirement to keep books of accounts and records is a part of the Iron and Steel (Control) Order. But what books are to be kept is left to the discretion of the Controller. Here, if a stockholder does not keep the required books and accounts and records, that act being a contravention of the provisions of the Iron and Steel (Control) Order is punishable under Section 7. But paragraph 14(2) does not require the stockholder to do a particular thing. It only empowers the Controller to give directions to the stockholders to give a memorandum or sale containing some specified particulars. Whatever

that may be, we have no doubt that contravention of a direction contained in a notification issued under paragraph 14(2) of the Iron and Steel (Control) Order is not a contravention of the provisions of the Iron and Steel (Control) Order, 1956 and so is not punishable under Section 7 of the Essential Commodities Act. The respondent cannot, therefore, be convicted.

9. In the result, the appeal is dismissed. The respondent is discharged from his bail bond.

10. A. P. DAS, J. :— I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 169 (V 57 C 26)

R. N. DUTT AND B. BANERJI, JJ.

Mahadeb Karmakar, Petitioner v. Adhir Kumar Karmakar and another, Opposite Parties.

Criminal Revn. Case No. 345 of 1968, D/- 21-3-1969.

Criminal P. C. (1898), Ss. 133 and 192 — S. 133 does not exclude provisions of transfer of cases contained in S. 192 after the party has shown cause against the conditional order. AIR 1949 Cal 637 held Overruled by AIR 1956 Cal 24; AIR 1956 Cal 220, Not foll.; AIR 1960 All 244 & AIR 1958 Raj 248 Dissented from.

Under S. 133 of the Code the Magistrate who draws up the proceeding can no doubt ask the opposite parties to show cause against the conditional order before some other Magistrate. The terms of S. 133 of the Code cannot and should not be construed as to exclude the general provisions of transfer contained in S. 192 of the Code. Transfer of the proceedings after the party has shown cause against the conditional order, before the Magistrate drawing up the proceedings is not invalid. AIR 1956 Cal 24, Rel. on; AIR 1949 Cal 637 held Overruled by AIR 1956 Cal 24; AIR 1956 Cal 220; Not foll.; AIR 1960 All 244 & AIR 1958 Raj 248, Dissented from. (Para 2)

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(1960) AIR 1960 All 244 (V 47) =
1960 Cri LJ 450, Kishorilal v. State 2
(1958) AIR 1958 Raj 248 (V 45) =
1958 Cri LJ 1243, Ram Charan
v. Residents of Shahabad 2
(1956) AIR 1956 Cal 24 (V 43) =
1956 Cri LJ 212, Bardeshwari Pro-
sod Bhattacharjee v. Rabi Nandan
Saha 2
(1956) AIR 1956 Cal 220 (V 43),
Jhatu Charan Das v. Bhanu
Chandra Das 2
(1949) AIR 1949 Cal 637 (V 36) =
51 Cri LJ 205, Pran Krishna
v. Shyam Sundar 2

(1929) AIR 1929 Cal 813 (V 16) =
31 Cri LJ 673, Inasaddar Ali v.
Isimulla

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Kalipada Trivedi, for Petitioner;
Ramendra Nath Chakraborty, for the
State; Biswa Ranjan Ghoshal, for Opp.
Parties.

R. N. DUTT, J. :— On an application by the petitioner before the Sub-Divisional Magistrate, Barrackpore, a proceeding under Section 133 of the Code of Criminal Procedure was started against the opposite parties and a conditional order was issued and they were asked to show cause. They appeared and showed cause before the Sub-Divisional Magistrate. Thereafter the Sub-Divisional Magistrate transferred the case to Shri M. N. Pramanick, Magistrate 1st Class, for disposal. Shri Pramanick examined witnesses, heard arguments but ultimately held that the transfer of the proceeding to him was incompetent and as such he dropped the proceeding. The petitioner has obtained this Rule against this order of the said Magistrate, Shri M. N. Pramanick.

2. When the opposite parties were directed to show cause, there was no specific direction as to whether cause should be shown before the Sub-Divisional Magistrate or any other Magistrate. We find that though the order does not specifically say that cause was to be shown to the Sub-Divisional Magistrate, the cause was in fact shown before him because there was no direction that cause was to be shown before some other Magistrate. We then find that after cause was shown, the Sub-Divisional Magistrate transferred the proceeding to Shri M. N. Pramanick. The question for consideration is if such transfer is competent in law? On this point the latest Division Bench decision of this Court is contained in Bardeshwari Prosad Bhattacharjee v. Rabi Nandan Saha, AIR 1956 Cal 24. The previous decisions on this point were considered by the Division Bench in this case. A. N. Sen, J. held in Pran Krishna v. Shyam Sundar, AIR 1949 Cal 637 that, no such subsequent transfer under Section 192 of the Code was competent. Sen, J., purported to rely on the decision in Inasaddar Ali v. Isimulla, AIR 1929 Cal 813. The Division Bench deciding Bardeshwari's case, AIR 1956 Cal 24, overruled A. N. Sen J. and held that such subsequent transfer can be made under Section 192 of the Code. Debabrata Mookerjee, J., no doubt followed the previous decision in Jhatu Charan Das v. Bhanu Chandra Das, AIR 1956 Cal 220. Though this case was decided in February, 1956 it appears that the Division Bench decision in Bardeshwari's case, AIR 1956 Cal 24, decided in

June, 1955 was not considered as obviously it was not brought to his Lordship's notice. The Single Bench decision of the Allahabad High Court in Kishorilal v. State, AIR 1960 All 244 was relied upon by the learned Magistrate. We may also refer to the Bench decision of the Rajasthan High Court in Ram Charan v. Residents of Shahabad, AIR 1958 Raj 248. These decisions have no doubt held that Section 133 of the Code is self-contained and proceedings thereunder cannot be subsequently transferred under Section 192 of the Code. But as we have said the latest Division Bench decision of this Court has held in Bardeshwari's case, AIR 1956 Cal 24 that such transfer is competent. The learned Magistrate should have followed this decision instead of the Single Bench decisions. We have considered the matter in all its aspects. True, under Section 133 of the Code the Magistrate who draws up the proceeding can no doubt ask the opposite parties to show cause before some other Magistrate. But the terms of Section 133 of the Code cannot and should not be construed as to exclude the general provisions of transfer contained in Section 192 of the Code. We do not think that this is a matter which should be referred to a larger Bench for further consideration; rather we think that we should follow the Bench decision in Bardeshwari's case, AIR 1956 Cal 24. In that view of the matter the instant order should be set aside.

3. In the result, the Rule is made absolute. The order of the learned Magistrate is set aside and the learned Magistrate is directed to proceed with further hearing of the matter in accordance with law.

4. Let the records be sent down at once.

5. **B. BANERJI, J. :—** I agree.
Rule made absolute.

AIR 1970 CALCUTTA 170 (V 57 C 27)

D. BASU AND AJAY K. BASU, JJ.

Asiatic Society's Employees Union, Appellant v. Asiatic Society and others, Respondents.

Appeal No. 74 of 1967, D/- 15-7-1969.

Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Meaning — Institution carrying on different activities — Dominant purpose will determine its character as "industry" or otherwise — Society catering for intellectual needs of men — Improvement of general know-

HM/LM/D393/69/GGM/P.

ledge of men through research and publication of journals — Society having no press of its own — Society is not an "industry" — Neither it is an "undertaking".

In determining whether an undertaking is an industry the following propositions emerge from the case law.

(a) The definition of 'industry' S. 2 (j) contains two parts: The first part determines an industry by reference to the activities of the employer and the second part looks at it from the angle of employees. But the second part, standing alone, cannot define industry. It is only if an activity of the employer comes within the first part of the definition, then it will be an industry and thereupon any kind of activity carried on by the employees of such employer will also be included within the concept of industry, as applied to that establishment.

(b) An activity will constitute an industry only if it caters to the material needs (as distinguished from intellectual or cultural needs of the society) and that is done as part of trade or business or as analogous to trade or business.

(c) The concept of industry postulates partnership between capital and labour but any activity in which there is co-operation between the employer and the employee is not an industry. It will be an industry only if the co-operation is directly and necessarily involved in the production of the goods or in the rendering in the service which is the object of the establishment concerned and the contribution made by the employer is of capital as distinguished from intellectual and educational equipment.

(d) When an institution carries on activities of different kinds, it is its dominant purpose, which will determine its character as an industry or otherwise. In the modern world, pure organisms are rarely available and that is why the test of dominant purpose has been introduced even in the sphere of ultra vires in administrative law. AIR 1968 SC 554 & AIR 1961 SC 484 & AIR 1963 SC 1873 & AIR 1964 SC 903 & AIR 1962 SC 1081, & (1907) 96 LT 762 & 1952 AC 362, Ref. (Para 11)

A Society having for its object catering to the intellectual as distinguished from material needs of men by promoting general knowledge of the country by conducting research and publishing various journals and books is not an "industry". Even though it publishes books for sale in market, when it has no press of its own, the Society cannot be termed even an "undertaking" selling of its publications being only an ancillary activity and the employees being engaged in rendering clerical assistance in this matter

just as the employees of a solicitor's firm help the solicitors in giving legal advice and service. The test of dominant purpose, would also lead to the same conclusion. (Para 14)

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| (1909) AIR 1909 SC 276 (V 56) =
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1968-2 SCJ 138, Madras Gym-
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| (1962) AIR 1962 SC 1080 (V 49) =
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| (1961) AIR 1961 SC 484 (V 48) =
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Association v. State of Bombay | 11 |
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Union | 11 |
| (1952) 1952 AC 362 = 1952-1 All
ER 509, Fitzwilliams Wentworth
Estates Co. v. Minister of Hous-
ing and Local Govt. | 11 |
| (1907) 96 LT 762, R. v. Brighton
Corporation | 11 |

K. K. Maltra and N. K. Bhattacharya,
for Appellant, Subimal Roy and B.
Sarkar, for Respondents.

D. BASU, J:— The appellant before us is the Union of the Employees of Respondent no. 1, the Asiatic Society, a society registered under Act XXI of 1860 (hereinafter referred to as 'the Society'). There was a dispute between the Society and its employees, which was referred by the State of West Bengal for adjudication to the First Industrial Tribunal (Respondent 3), by the order of 23-12-63, which is at p. 9 of the Paper-book. When the reference came up before the Tribunal, the Society raised the preliminary objection to the jurisdiction of the Tribunal on the ground that the reference was ultra vires since the Society did not carry on any 'industry' and its employees were not 'workmen' within the meaning of those terms as defined by the Industrial Disputes Act, 1947.

2. The Tribunal rejected the said objection by its order of 28-6-64 (p. 11 of the Paper-book), holding that the Society was not an educational institution, but

an 'undertaking', coming within the definition of 'industry' and that, accordingly, the parties were governed by the Industrial Disputes Act and the reference was competent.

3. Thereupon the Society came to this Court with a Petition under Article 226 (p. 1 of the Paper-book), challenging the validity of the order of reference of 1963 and the order of the Tribunal of 28-6-64 rejecting the Society's objection as to jurisdiction. On 16-9-66, B. C. Mitra, J. allowed that petition and quashed the two impugned orders, holding that the Society was not an undertaking or industry within the purview of the Industrial Disputes Act (pp. 57-66).

4. It is against the aforesaid decision of Mitra, J. that the instant appeal has been preferred.

5. The question involves the interpretation of several definitions of the Industrial Disputes Act, as applied to the established objects of the Society.

6. The Industrial Disputes Act, 1947, provides for the investigation and settlement of 'industrial disputes'. The machinery set up by the Act, therefore, cannot be used unless there is an 'industrial dispute' as defined in Sec. 2 (k) of the Act, "(k) 'industrial dispute' means any dispute between employers and workmen . . . which is connected with the employment or non-employment . . ."

7. The definition of 'employer' and 'workman' import the concept of an 'industry'. Thus,

(s) " 'Workman' means any person ... employed in the industry..."

8. We have, therefore, to turn to the definition of 'industry' in Section 2 (j) — " 'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

9. According to the Tribunal, the Society, in the instant case, is an 'undertaking' as explained by the Supreme Court in the case of State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610 (616), in these words —

"... an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking."

10. We have, therefore, to determine whether the Society's activities fall under the description of an 'undertaking' as given by the Supreme Court in the cited decision.

11. Before proceeding further, it must be noted that the above definition of 'industry' is an artificial definition, which is wider than the ordinary connotation of

the term when it is used to denote activities other than agriculture and similar other occupations. In interpreting this definition, therefore, Courts have been guided by a twofold consideration, namely, that unless the definition is given a liberal interpretation, the beneficial object of the legislation, namely, to secure peace and amicable relations between capital and labour may be defeated; on the other hand, if a too wide interpretation be given, the carrying on of intellectual and other pursuits which are beneficial to society at large may be hampered by interference from external agencies. Naturally, therefore, the decisions of our Supreme Court, on this subject, have proceeded along these two apparently opposite directions, and it will be seen that the wide observations in the Hospital case, AIR 1960 SC 610 have by this time *been qualified and limited by exceptions* acknowledged in favour of various institutions, with more or less similar features.

A. In the Hospital group of cases, the following have been held to be 'undertakings'.—

(i) A hospital giving medical relief to citizens. The Hospital case, (AIR 1960 SC 610 *ibid.*)

(ii) An Ayurvedic College Pharmacy, manufacturing medicines for sale, and for the benefit of the students in the college (L. H.A. College Pharmacy v. Worker's Union, AIR 1960 SC 1261.)

(iii) A research Association which is an adjunct of a textile industry, whose object is to discover ways and means by which the member-mills may obtain larger profits in connection with the industry (A. T. I. Research Association v. State of Bombay, AIR 1961 SC 484 (487).)

(iv) A company formed for the purpose of producing agricultural products for sale as a trader (Harinagar Cane Farm v. State of Bihar, AIR 1964 SC 903.)

B. In the other group of cases, the following have been held not to be undertakings. —

(i) A solicitor's firm (N. U. C. Employees v. M. R. Meher Industrial Tribunal, AIR 1962 SC 1080.)

(ii) Educational Institutions like a college, University. (University of Delhi v. Ram Nath, AIR 1963 SC 1873.)

(iii) A members' club (as distinguished from a proprietary club) providing a venue for sports, recreation and entertainment (Madras Gymkhana Club Employees' Union v. Management of the Gymkhana Club, AIR 1968 SC 554.)

(iv) A members' club promoting sports including cricket, having residential arrangements on payment. (Cricket Club v. Bombay Labour Union, AIR 1969 SC 276.)

Though in this sphere it is difficult to hazard general propositions, the following

propositions may be gathered from the observations made in the foregoing cases:

(a) The definition of 'industry' in Section 2 (j) contains two parts. The first part determines an industry by reference to the activities of the employer and the second part looks at it from the angle of employees. But the second part, standing alone, cannot define 'industry'. It is only if an activity of the employer comes within the first part of the definition, then it will be an 'industry' and thereupon any kind of activity carried on by the employees of such employer will also be included within the concept of industry, as applied to that establishment, (AIR 1968 SC 554 (561).)

(b) An activity will constitute an industry only if it caters to the material needs (as distinguished from intellectual or cultural needs of the society, AIR 1961 SC 484 (486); AIR 1963 SC 1873 (1874-5) and that is done as part of trade or business or as analogous to trade or business (AIR 1968 SC 554 (565); AIR 1964 SC 903 (Para 12); AIR 1961 SC 484.)

(c) The concept of 'industry' postulates partnership between capital and labour but any activity in which there is co-operation between the employer and the employee is not an industry. It will be an industry only if the co-operation is directly and necessarily involved in the production of the goods or in the rendering in the service which is the object of the establishment concerned, AIR 1962 SC 1080 (1083), and the contribution made by the employer is of capital as distinguished from 'intellectual and educational equipment' (p. 1085, *ibid*).

(d) When an institution carries on activities of different kinds, it is its dominant purpose, which will determine its character as an 'industry' or otherwise (AIR 1963 SC 1873 (para 8); AIR 1962 SC 1080 (para 11)). It may not be out of place to mention in this context that in the modern world, pure organisms are rarely available and that is why the test of 'dominant purpose' has been introduced even in the sphere of ultra vires in administrative law (vide *R. v. Brighton Corporation*, (1907) 96 LT 762 (764); *Fitzwilliams Wentworth Estates Co. v. Minister of Housing and Local Government* (1952) AC 362).

12. Applying the foregoing principles to the Society before us, it is evident at once that the object and activities of this Society are to cater to the intellectual as distinguished from the material, needs of men. According to its Rules —

"The bounds of its investigations will be the geographical limits of Asia, and within these limits its enquiries will be

extended to whatever is performed by Man, or produced by Nature."

13. The Tribunal indeed came to this conclusion in unequivocal terms (p. 13) —

"In my opinion it is a cultural institution, the aim is to promote the general knowledge of the country by conducting research and by publishing various journals and books".

The Tribunal, nevertheless, as observed in the Hospital decision had held that if a hospital could be an 'undertaking' a research institution could not be otherwise. But the Tribunal failed to notice how the Hospital decision had been explained and distinguished in later decisions of the Supreme Court. The distinction, primarily, is that while a Hospital caters to the material needs of men, a research institution caters to their intellectual needs. The Tribunal's finding cannot, accordingly, be upheld.

14. It was argued by Mr. Maitra on behalf of the Appellants that the Society should nevertheless be held to be an undertaking because it publishes books for sale in the market and the employees contribute their labour in that production. It must be noted however that the Society has no press of its own, and the employees are not engaged in any such industrial establishment. The selling of its publications is only an ancillary activity and the employees are engaged in rendering clerical assistance in this matter just as the employees of a solicitor's firm help the solicitors in giving legal advice and service. The test of 'dominant' purpose, as explained above, wipes out the contention raised by Mr. Maitra.

15. It was argued, as a matter of last resort, that the Court below should have remanded the case to the Tribunal for taking evidence on facts. But the Rules of the Society as well as other facts as appear from the statements of the parties were already before the Court, together with the affidavits. The Court did not travel beyond these materials nor was it necessary to collect other evidence.

16. The judgment of the Court below was correct. The appeal is accordingly dismissed with costs.

17. AJAY K. BASU, J:— I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 174 (V 57 C 28)

A. K. SINHA, J.

Shib Kumar Dutta, Petitioner v. Appellate Sub-Committee of the State Transport Authority, W. B. and others, Respondents.

Civil Revn. No. 1025 (W) of 1965, D/-19-2-1969.

(A) Motor Vehicles Act (1939), S. 60 (1) (a) and (c) — Cancellation of permit — R. T. A. acts quasi-judicially — It has also to give reasons for its decision.

The Regional Transport Authority while exercising its power under S. 60 for cancellation of a permit is supposed to act quasi-judicially. Therefore, a conclusion drawn by it must be reached not by a subjective process but on an objective basis. Clearly, therefore, such a conclusion must be based on some evidence on which it is reasonably possible to come to a conclusion that such a charge made against the permit holder for the proposed cancellation of his permit stood established. If, such a conclusion is not based on any evidence or material, prima facie, appearing on the resolution, such resolution cannot be sustained as valid. The R. T. A. has also to give reason for its action as required by S. 60(2) of the Act. It is not possible to hold that simply because the permit-holder was keeping his car in another garage without the permission of the concerned authority, a reasonable conclusion could be drawn from that fact alone without more that he parted with the ownership of the car. (Para 5)

(B) Motor Vehicles Act (1939), S. 64 (b) — Appeal against cancellation of permit — Additional evidence admitted — Appellate Authority should give opportunity to rebut it.

Even assuming that Appellate authority is competent to take additional evidence then also proper opportunities are to be given to the aggrieved party to contradict such evidence taken or relied on at the appellate stage. Where the Appellate Authority relies on a report made by the Special Officer of the Public Vehicles Department without disclosing the same to the aggrieved party but comes to the conclusion solely on the basis of that report, that he had transferred his car sometime back, the action is opposed to fundamental principles of all judicial procedure and cannot be sustained as valid. (Para 6)

(C) Motor Vehicles Act (1939), Sections 60 (1) (a) and 59 (3) (a) — Bengal Motor Vehicles Rules, Rule 108 — Cancellation of permit under Section 60 (1) (a) — Contravention of Chapter V or Rule framed thereunder necessary — Rule 108 contravened, framed under Chapter IV.

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— Permit cannot be cancelled under Section 60 (1) (a).

It is only on breach of the conditions under Section 59, namely, failure to comply with the requirements of chapter V or the Rules made thereunder that the permit holder may be deprived of his rights to hold such permit. Where the specific allegation against the licence holder is that he kept the car in another garage without the permission of the authority, it is a contravention of Rule 108 of the Bengal Rules which are framed under Chap. IV of the Act and not Chap. V of the Act which is contemplated by S. 59(3)(a). Permit cannot be cancelled under S. 60 (1)(a) in such a case. (Para 7)

(D) Motor Vehicles Act (1939), S. 60 (3) — Duty of R. T. A. under sub-section (3) — Matter not considered at all by Authority — Infirmary is introduced in the resolution to cancel the permit.

Sub-section (3) of S. 60 casts a duty upon the transport authority to form an opinion having regard to the circumstances of each particular case as to whether holder of permit should be directed to pay a certain sum of money before cancelling or suspending the permit. The failure to consider this aspect of the matter introduces an infirmity in the resolutions passed by the R. T. A. and the State Transport Authority. (Para 8)

S. K. Biswas, for Petitioner; D. N. Lahiri, for Respondents.

ORDER:— In this Rule, the petitioner prays for quashing certain orders made by the Regional Transport Authority, respondent No. 2 and affirmed by the Appellate sub-committee of the State Transport Authority, the respondent No. 1 cancelling the petitioner's permit relating to his vehicle No. WBT 1709 (Landmaster Baby Taxi) as a contract carriage. The facts briefly are:

2. The petitioner was granted the above permit some time in August 1956. Since then he had been using the said Taxi Cab for the purpose of serving the public convenience. By a notice dated October 28, 1964, the Secretary of the respondent no. 2 directed the petitioner to show cause against a proposed cancellation of the said permit under Section 60(1)(a) & (c) of the Motor Vehicles Act, 1939 (referred to herein as the Act).

3. The petitioner furnished an explanation in which he denied that he ceased to own the vehicle but admitted that he had changed the garage from 137/3, Upper Circular Road no. 7, Ganapat Bagla Lane, without prior permission of the concerned authority for which he regretted. Thereafter, by a memorandum dated March 26, 1965, the secretary of the

respondent no. 2 informed the petitioner that his explanation was found to be 'thoroughly unsatisfactory' by the Regional Transport Authority, Calcutta which in its meetings held on January 18, 1965 passed a resolution for cancellation of the said permit and directed the petitioner to surrender the permit in respect of the above vehicle within seven days from the cancellation.

4. As against this resolution, the petitioner preferred an appeal before the State Transport Authority. The appellate Sub-Committee dismissed the petitioner's appeal and thus affirmed the resolution passed by the respondent no. 2.

5. Upon these facts several grounds were taken but Mr. Biswas, learned Advocate for the petitioner, in the first place, contended that since in the resolutions of respondent no. 2 no reason was given it could not be sustained as valid. Then, the decision taken by respondent no. 1 regarding change of ownership of the vehicle was based not on any evidence but on report never disclosed to the petitioner. The petitioner made it clear that the disputed car stood in his name duly registered under the Act. He possessed the Registration Certificate, Insurance Certificate etc. in his own name. There were no other relevant materials excepting so called report by which any reasonable conclusion could be drawn that the petitioner ceased to own his vehicle or parted with its ownership in any way. This report, Mr. Biswas submitted, was totally inadmissible and extraneous and the respondent went beyond its jurisdiction in drawing such a conclusion against the petitioner on the question of ownership of the car solely relying on such a report. I think there is substance in what Mr. Biswas contends. It cannot be denied that the respondent no. 2 while exercising its power under Section 60 for cancellation of the permit is supposed to act quasi-judicially. If that be so, the conclusion drawn by the concerned Regional Transport Authority must be reached not by a subjective process but on an objective basis. Clearly, therefore, such a conclusion must be based on some evidence on which it is reasonably possible to come to a conclusion that such a charge made against the petitioner for the proposed cancellation of his permit stood established. If, such a conclusion is not based on any evidence or material, prima facie, appearing on the resolution, I do not think that such resolution can be sustained as valid. In the instant case, the petitioner has denied that he sold the car or parted with his ownership in any way relating to that car and he also produced the registration certificate (Blue book) and gave all particulars relating to his owner-

ship and possession as required under the Act. As against these, there is nothing to indicate as to how the Regional Transport Authority could hold that the petitioner's explanation was thoroughly unsatisfactory. The Transport Authority did not also give any reason as required under sub-section (2) of Section 60 of the Act. It is not possible to hold that simply because the petitioner was keeping his car in another garage without the permission of the concerned authority, a reasonable conclusion could be drawn from that fact alone without more that the petitioner parted with the ownership of the car. This transfer of garage without permission of the concerned authority may no doubt raise some suspicion but that fact by itself cannot be accepted as proof of the fact that the petitioner ceased to be the owner of the vehicle.

6. Then again, the Appellate Sub-Committee introduced an enquiry report made by the Special Officer of the Public Vehicles Department and relying on this report it came to the conclusion that the car was transferred to some other person some time in 1962. This, I think, is not permitted under the Act. Even assuming that the Appellate Sub-Committee is competent to take additional evidence then also proper opportunities are to be given to the aggrieved party, in the present case, the petitioner, to contradict such evidence taken or relied on at the appellate stage by the Appellate Sub-Committee. It is an admitted fact that this report of the Special Officer of the public vehicles department was never disclosed to the petitioner; nevertheless the conclusion that the petitioner transferred his car some time in 1962 was solely based on this report. This is opposed to fundamental principles of all judicial procedure. So, the conclusion drawn by the Appellate Sub-Committee on the view that there had been a transfer of the car some time in 1962 cannot be sustained as valid.

7. In the second place, Mr. Biswas contended that so far as the breach of Section 60 (1) (a) was concerned, the specific allegation was that the petitioner kept the car in another garage without the permission of the authority but this was not one of the conditions contemplated in Section 59 (3) of the Act, on breach of which alone, the petitioner's permit might be liable to be cancelled. The transfer of a garage without the permission of the authority, in other words, Mr. Biswas submitted, did not come within chapter V of the Act or the Rules made thereunder as contemplated in sub-section (3) Clause (a) Section 59 of the Act. The relevant Rule, namely, Rule 108 of the Bengal Motor Vehicles

Rules relating to transfer of garage is framed under chapter IV of the Act; clearly therefore, such a transfer from a garage to another garage without the permission of the concerned authority, did not entail cancellation of the permit under Section 59 (3) (a) read with Section 60 (1) (a) of the Act. I think having regard to the above provisions of the Act and the Rule the correctness of the contentions made by Mr. Biswas cannot be doubted. It seems to me quite clear that it is only on breach of the conditions under S. 59 (3) (a), namely, failure to comply with the requirements of chapter V or the Rules made thereunder that the permit holder may be deprived of his rights to hold such permit. So, if the Rules relating to transfer of garage under Rule 108 is a Rule framed under chapter IV of the Act, then there cannot be any question of violation of such a condition so as to make the petitioner liable to cancellation of the permit. Mr. Lahiri on behalf of the respondents also could not seriously oppose this position, in law.

8. There is yet another aspect of the matter. Under Section 60 (3) of the Act before cancellation or suspension of the permit if the Transport Authority which granted the permit is of opinion that "having regard to the circumstances of the case, it would not be necessary or expedient so to cancel or suspend the permit if the holder of the permit agrees to pay a certain sum of money", then "notwithstanding anything contained in Sub-section (1) the Transport Authority may, instead of cancelling or suspending the permit, as the case may be, recover from the holder of the permit the sum of money agreed upon". I find that this aspect of the matter was not considered at all by the Transport Authority, namely, respondent no. 1. It cannot be denied that this Sub-section casts a duty upon the transport authority to form an opinion having regard to the circumstances of each particular case as to whether the petitioner should be directed to pay a certain sum of money before cancelling or suspending the permit. In my view, failure to consider this aspect of the matter has introduced another infirmity in the impugned resolutions passed by the respondents nos. 1 and 2. Considering all these, it must be held that both the impugned resolutions passed by the respondents nos. 1 and 2 are invalid.

9. The result is, the petition succeeds. Both the impugned resolutions are quashed.

10. I make it clear, however, that the Regional Transport Authority will be at liberty to decide the matter afresh if it so likes in accordance with law and in the light of the observations made

above. Before I part with this case I must notice one argument made by Mr. Lahiri. His argument was that transfer of garage without permission of authority is a condition attached to the permit and, therefore, the petitioner's permit, in any case, was liable to be cancelled.

11. The original permit was produced before me and no such condition was found attached to the permit. This argument has, therefore, no substance. Let a true copy of this permit be kept with the record.

12. The Rule is made absolute to the extent indicated above.

13. Let a writ both in the nature of mandamus and certiorari issue accordingly.

14. There will be no order as to costs.

Revision allowed.

AIR 1970 CALCUTTA 176 (V 57 C 29)

BIJAYESH MUKHERJI, J.

Bhikari Behara, Petitioner v. Sm. Dhanapatie Bentia, Opp. Party.

Civil Revn. Case No. 1030 of 1969 D/-6-8-1969.

(A) Civil P. C. (1908), Section 60 (1) Proviso (h) — "Labourer" — Winchman working under Calcutta Dock Labour Board is not a domestic servant or a labourer — Training prescribed under Rule 21 of Calcutta Dock Workers (Regulation of Employment) Scheme is precondition to employment as winchman — (Calcutta Dock Workers (Regulation of Employment) Scheme, 1956, R. 21).

A winchman working under the Calcutta Dock Labour Board is neither a domestic servant nor a Labourer within the meaning of Clause (h) of Proviso to Section 60 (1) of Civil P. C. and his salary can therefore, be attached in execution of a decree. A winchman cannot be equated to a labourer or a domestic servant because a person has got to undergo training prescribed under R. 21 of the Calcutta Dock Workers (Regulation of Employment) Scheme, before he can be employed as a winchman. Thus, he is not a manual labourer only. A 'Labourer' is a person who earns his daily bread by personal manual labour, or in occupation which requires little or no art, skill or previous training. AIR 1956 Bom 276, Dist.; AIR 1957 Mad 773, Foll.

(Paras 4 & 5)

(B) Civil P. C. (1908), Order 21 R. 48 (1) — Calcutta Dock Labour Board is a local authority — Rules 38 and 52 of the

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country is to be decided by the Central Government and not by this Court in the present proceedings. We are, in the circumstances, inclined to direct the respondents to consider and adjudicate upon the question of the petitioner's citizenship under S. 9 of the Citizenship Act.

7. The petitioner's argument that the Citizenship Act and the Rules framed thereunder contemplate dual citizenship has not impressed us and we are unable to accept this submission. Dual citizenship does not seem to us to be possible under our law except to the limited extent as contemplated by the proviso to Section 9 (1) of the Citizenship Act.

8. Before concluding, we may point out that on behalf of the petitioner, his Solicitors and Advocates have had correspondence both with the Bombay Government and the Ministry of Home Affairs of the Government of India in connection with the question of his citizenship. On 21-8-1967, a letter was addressed on behalf of the petitioner by Anand Dasgupta & Sagar, Solicitors and Advocates, to the Secretary to the Government of India, Ministry of Home Affairs, pointing out that the question of the termination of the petitioner's citizenship had never been determined under Section 9 (2) of the Citizenship Act, with the result that the petitioner must be held never to have been deprived of his Indian citizenship. The Government was called upon to accept the petitioner as an Indian citizen and not to interfere with his right to enter the territories of India and to stay there. Unfortunately, the Central Government was not expressly required by this letter to decide the question as contemplated by Section 9. From the record it does not appear that any reply was sent thereto.

It seems that neither the petitioner formally required the Central Government to decide the question of his citizenship nor did the Central Government itself undertake to do so. This attitude on the part of both the parties seems to us to be difficult to appreciate. Apparently, they were both labouring under some misapprehension about the legal position. The same having now been clarified, it is hoped that the disputed question of the termination or continuation of the petitioner's Indian citizenship would soon be determined as required by Section 9 of the Indian Citizenship Act and the petitioner's Advocates would place before the Central Government all material on which reliance is placed in support of his claim to Indian citizenship. We are unable to give any further direction at this stage in the present proceedings. This petition is thus disposed of in the terms just stated. In the peculiar circumstances of the case, there will be no order as to costs.

Order accordingly.

AIR 1970 DELHI 81 (V 57 C 16)

I. D. DUA, C. J.

Kewal Krishan, Petitioner v. Khazan Singh, Respondent.

Civil Revn. No. 77 of 1967, D/- 11-10-1968.

(A) Civil P. C. (1908), O. 33, Rr. 6, 7—Enquiry into pauperism of plaintiff — Decision is to be by the Court — Report from Collector — Use of.

According to the Code of Civil Procedure, the Court is expected itself to hold an enquiry into the question of pauperism. The report from the Collector is to be called for in cases where the Collector is supposed to be better fitted to hold enquiries. The Court cannot, however, blindly and automatically adopt the report which is only to help the Court in judicially determining the ability of the plaintiff to pay court-fee. The issue of pauperism is to be decided by the Court and delegation and sub-delegation of this duty and power is not easy to sustain.

(Paras 3, 4)

(B) Civil P. C. (1908), O. 33, R. 7 — Pauperism of plaintiff — Inquiry into — Capacity to pay court-fee — Capacity of plaintiff himself and not of his next friend or near relations is to be considered. AIR 1929 Lah. 746(2) & AIR 1946 Lah. 81, Rel. on. (Para 3)

Cases Referred: Chronological Paras (1946) AIR 1946 Lah. 81 (V 33)=

47 Pun. L. R. 402, Mohammad

Ashraf v. Muhammad Bibi

(1929) AIR 1929 Lah. 746 (2) (V 16)

=31 Pun. L. R. 898, Sharan Singh

v. Mt. Man Kaur

M. S. Chadha, for Petitioner.

ORDER:— This revision by Kewal Krishan plaintiff is directed against the order of a learned Subordinate Judge Ist Class, Delhi, dated 15-11-1966, whereby the petitioner-plaintiff's application for permission to sue as a pauper was disallowed.

2. The trial Court on 26-3-1966, called for a report from the Collector on the petitioner's application under Order 33, Rule 1, Civil P. C. The report was required to be sent to the Court by 12-5-1966. After several hearings, on 15-11-1966, the learned Subordinate Judge, in the presence of the counsel both for the plaintiff and for the defendant, considered the report of the Collector and on the basis of that report, disallowed the plaintiff's application. The report, which is really made by a Naib-Tehsildar, and is dated 16-5-1966, reads as under:—

"This is a pauper case filed by Sh. Kewal Krishan s/o Shri Nathu Ram. He was called in this office and his statement was recorded. He gave two wit-

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nesses in support of his statement. From the statement of the petitioner, it appears that he (has) seven brothers who are employed and his father is also doing some business. The petitioner himself is a earning member. With the earning of the petitioner and help from his brothers he can arrange for the Court-fees stamp charges.

In view of the above, I cannot recommend his case and I am in view that he can easily arrange for the Court-fees stamp charges."

This report was sent on to the Tehsildar, who forwarded to the A. D. M. (Judicial) who sent it on to the Court.

3. This, in my view, is a hardly satisfactory way of dealing with pauper applications. According to the Code of Civil Procedure, the Court is expected itself to hold an enquiry into the question of pauperism. The report from the Collector is to be called for in cases where the Collector is supposed to be better fitted to hold enquiries. Such is not the case before me. Only if the learned Subordinate Judge had cared to look at the report, he would have discovered that a report of this type can hardly be proper material for holding that the petitioner-plaintiff has sufficient means to be able to pay court-fee. One outstanding error which underlies the report of the Naib-Tehsildar is that he has taken into account the financial capacity of the petitioner's brothers and father. This, normally speaking, is not to be taken into account. In *Sharan Singh v. Mt. Man Kaur* AIR 1929 Lah. 746(2), it was observed by Tek Chand, J. that in dealing with pauper applications, the capacity of the plaintiff himself to pay the court-fee and not that of his next friend or relations is to be considered. In the reported case, the means of the adoptive father, the natural father and uncle of the minor-plaintiff were taken into account. This was held to be a material irregularity and the High Court allowed the revision. In *Mohammad Ashraf v. Muhammad Bibi*, AIR 1946 Lah. 81 *Abdur Rahman, J.* also observed that in case of a minor plaintiff, his resources are to be considered and the fact that his next friend is fairly rich, is immaterial. There too, the revision was allowed, as the court below was held to have acted with material irregularity. This view seems to me to be correct.

4. In the case in hand, so far as the plaintiff's own resources are concerned, there is precious little to be said in support of the Naib-Tehsildar's report. The Court cannot, however, blindly and automatically adopt the report which is only to help the Court in judicially determining the ability of the plaintiff to pay court-fee. It is a matter for regret that the Tehsildar and the Additional District Magistrate (Judicial) did not apply their

own mind to the report of the Naib-Tehsildar and forwarded the same as if with their approval. It must be remembered that the issue of pauperism is to be decided by the Court and delegation and sub-delegation of this duty and power is not easy to sustain. The learned Subordinate Judge has completely ignored this vital aspect and has dealt with the matter, in common with the A. D. M. (Judicial), the Tehsildar and the Naib-Tehsildar, more in an administrative than in a judicial manner. Such a course cannot be approved by this Court.

5. For all the foregoing reasons, I unhesitatingly allow this revision and setting aside the order of the Court below, send the case back to it for a proper judicial enquiry into the plaintiff-petitioner's pauperism and for further proceedings in accordance with law as contained in Order 33, Civil P. C. The plaintiff-petitioner is directed to appear in the Court below on 28-10-1968 when a short date would be given for further proceedings. As there is no appearance for the respondent, there is no order as to costs in this Court.

Revision allowed.

AIR 1970 DELHI 82 (V 57 C 17)

S. N. ANDLEY, J.

Harbans Singh and another, Appellant v. Custodian of Evacuee Property 'F' Block and others, Respondents.

Ex. First Appeal No. 175-D of 1962 D/- 24-1-1969, from Order of Sub. J. 1s Class, Delhi, D/- 3-9-1962.

(A) Administration of Evacuee Property Act (1950), Ss. 17 and 50 — Limitation Act (1908), Art. 181 — Application under S. 17 — Article 181 applies — Time begins to run from the date of sale of property — Fact that only symbolic possession and not actual physical possession of property was given in sale is immaterial.

The status of the Custodian is not the status of a stranger or an entirely different person qua the evacuee. It is no doubt true that he has been given certain rights and even powers by the Evacuee Act, which were not possessed by the evacuee. Nevertheless, the fact remains that he is a Custodian of the property of the evacuee in the capacity of a representative or manager. The possession of the evacuee property by the Custodian or its vesting in him does not create any sort of independent statutory title in him with reference to that property. In view of the fact (1) that the title of the Custodian cannot be said to be independent of the title of the judgment-debtor and (2) that the Custodian merely steps into the shoes

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of the judgment-debtor, the law of limitation for an application under S. 17 of the Act by the Custodian has to be applied to the Custodian as it would have been applied to the judgment-debtor himself. Lack of notice to or the ignorance of the Custodian cannot be taken into consideration in determining the commencement of the running of the period under Art. 181. (Paras 9 and 14)

Further, S. 50 of the Act certainly requires the Courts mentioned therein to give notice to the Custodian. But that is only if it appears to such Courts that a question relating to the property of an evacuee or an intending evacuee is involved in the proceedings before that Court. This section cannot arrest the running of time under the Limitation Act if time has already begun to run.

(Para 11)

The fact that only the symbolical possession and not actual physical possession of the property sold in Court execution sale has been given is not material as delivery of symbolical possession has been given the same status as delivery of actual physical possession. AIR 1956 S.C. 87 & (1948) 50 Pun. L. R. 210 & AIR 1964 Andh. Pra. 126 & AIR 1959 Punj. 515, Rel. on.

(Para 13)

(B) Administration of Evacuee Property Act (1950), S. 8 (2-A) as amended in 1966 — Administration of Evacuee Property (Chief Commissioner's Province) Ordinance 12 of 1949 — Vesting of property under Ordinance — Defect if any in the Ordinance held was cured by the Amendment Act of 1966 by which subsection (2-A) was added to S. 8. AIR 1961 S.C. 365, Rel. on; AIR 1960 Punj. 341 (FB), Ref. to.

Cases Referred: Chronological Paras (1964) AIR 1964 Andh. Pra. 126

(V 51)=ILR (1963) Andh. Pra. 223, Mohd. Ali Hasan Khan v. Bhagirathilal

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(1961) AIR 1961 S.C. 365 (V 48)= (1961) 2 SCR 91, Azimunnissa v. Deputy Custodian, Evacuee Properties

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(1960) AIR 1960 Punj. 341 (V 47)= ILR (1960) 2 Punj. 159 (FB), Durga Parshad v. Custodian of Evacuee Property

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(1959) AIR 1959 Punj. 515 (V 46)= 61 Pun. L. R. 249, Mst. Mewa v. Amar Singh

13

(1956) AIR 1956 S.C. 87 (V 43)= (1955) 2 SCR 938, Ramanna v. Nallaparaju

7

(1949) AIR 1949 P.C. 124 (V 36)= ILR 28 Pat. 207, Adyanath v. Krishna Prasad Singh

13

(1948) 50 Pun. L. R. 210, Abda v. Yusuf Khan

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Roshan Lal, for Appellants; H. Shiv Charan Singh, for Respondents.

JUDGMENT:— The property in question was mortgaged by Mohd. Ismail, respondent No. 9 and at the instance of the mortgagee, who had filed a suit and in whose favour a Mortgage Decree had been passed it was put to sale through the Court Auctioneer. In this sale, Kabool Singh (original appellant) and Raghunath Das (original respondent No. 2) were declared the joint purchasers and the sale in their favour was confirmed by an order of the Court dated January 19, 1952. It is not disputed that Raghunath Das (original respondent no. 2) transferred all his rights, title and interest as an auction purchaser in favour of Kabool Singh aforesaid.

2. Since the property was tenanted, mere symbolical possession was given to Kabool Singh on February 28, 1952 under Rule 96 of Order 21 Civil Procedure Code. After a few years of obtaining symbolical possession Kabool Singh on February 2, 1956 filed a suit which was dealt with by the Additional Judge, Small Cause Court, against Lekh Ram, one of the tenants in the said property for recovery of arrears of rent. Lekh Ram resisted the suit on the ground, inter alia, that the property was evacuee property and that the Custodian of Evacuee Property should be impleaded as a party defendant. Upon this objection, the Custodian was impleaded and on July 20, 1956, he raised an objection that inasmuch as the property had vested in him under the provisions of the Administration of Evacuee Property (Chief Commissioner's Province) Ordinance XII of 1949, the sale thereof, was void and ineffective by reason of the provisions of S. 17 of the Administration of Evacuee Property Act 31 of 1950. The claim of the Custodian was rejected by an Order of the Additional Judge, Small Cause Court on December 18, 1956.

3. In the meantime, the Custodian, filed an application in the Court of Mr. P. R. Aggarwal, Sub-Judge, Ist Class Delhi which was the executing Court in so far as the aforesaid mortgage decree was concerned. This application was filed on October 4, 1956 under Sec. 17 of the Administration of Evacuee Property Act 1950 read with S. 151 of the Civil Procedure Code. The executing Court dismissed this application by its order dated August 14, 1957 on the ground that it was barred by res judicata on account of the aforesaid order dated December 18, 1956 of the Additional Judge, Small Cause Court.

4. Against both the orders, namely the order dated December 18, 1956 of the Additional Judge, Small Cause Court and the order dated August 14, 1957 of Mr. P. R. Aggarwal, Sub-Judge Ist Class, Delhi the Custodian filed revisions in the Punjab High Court (Circuit Bench) at Delhi. Both these orders were set aside

in revision by R. P. Khosla, J. by his order dated January 27, 1961. The learned Judge, however, remanded the case for determination of three issues which were framed by him and which are in the following terms:—

1. Whether the claim put in by the Custodian was in time?

2. Whether the property vested in the Custodian on 5th December 1951 the date of the sale and remained so vested?

3. Relief.

5. The issues were tried by Mr. M. L. Jain, Sub-Judge, Ist Class, Delhi, who by his order dated September 3, 1962 allowing the application dated October 4, 1956 which had been filed by the Custodian under Sec. 17 of the Administration of Evacuee Property Act, 1950. He held that inasmuch as the property had vested in the Custodian on the date of sale i.e., December 5, 1951, the sale itself was void under S. 17 of the said Evacuee Act and that the said application was not barred by time. It is against this order that Kabool Singh, who is now represented by his legal representatives, has filed the present appeal.

6. Mr. Raushan Lal, learned counsel for the appellant, has argued that the notification dated December 14, 1949 whereby the property is alleged to have vested in the Custodian had been issued in exercise of powers conferred by the said Ordinance No. XII of 1949 and this Ordinance had been declared ultra vires by a Full Bench of the Punjab High Court in the decision which is reported in AIR 1960 Punj. 341 in re: Durga Parshad v. Custodian of Evacuee Property. He therefore, contends that there was no vesting of the property in the Custodian as claimed by him. It is not necessary to go into the validity of this argument for the simple reason that the defect, if any, in the said Ordinance No. XII of 1949 was cured by the Administration of Evacuee Property Amendment Act of 1966 whereby sub-section (2-A) had been added to Section 8 of the said Evacuee Act of 1950 and with regard to this amendment Act, the Supreme Court in its decision reported in AIR 1961 S.C. 365 in re: Azimunnissa v. Deputy Custodian Evacuee Properties has said:

"The effect of S. 8 (2-A) is that what purported to have vested under S. 8(2) of the Administration of Evacuee Property Ordinance XXVII of 1949 and which is to be deemed to be vested under S. 8 of the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate (1) What

purports to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under S. 8(2) of the Ordinance XXVII of 1949 or S. 8(2) of the Act which repealed the Ordinance; (3) makes the decree and judgments to the contrary of any Court in regard to the vesting ineffective; (4) makes the property evacuee property by its deeming effect; (5) validates all orders passed by the Custodian in regard to the property." Therefore even if Mr. Raushan Lal is right that there had not been any vesting of the property in 1949 when the aforesaid notification was issued, it will not help him because by reason of S. 8(2-A) vesting was made retrospective.

7. The next question that has to be determined is whether the application dated October 4, 1956 filed by the Custodian under S. 17 of the Evacuee Act of 1950 was within time. In view of the decision of the Supreme Court reported in AIR 1956 SC 87 in re: Ramanna v. Nallaparaju, it is not disputed that the appropriate article of the 1908 Limitation Act would be Article 181 and no other. This Article prescribes the period of limitation for an application for which no period of limitation has been prescribed. The period prescribed is three years and the time from which the period begins to run is "When the right to apply accrues".

8. The contention on behalf of the appellant is that assuming that the property vested in the Custodian, his possession was disturbed by the delivery of symbolical possession to the appellant on February 28, 1952 and, therefore, the right to apply accrued on this date. On the other hand, Bawa Shiv Charan Singh, learned counsel for the Custodian contends that the sale being void by reason of S. 17 of the Evacuee Act of 1950, it was open to the Custodian not to take any notice of it and that he could take notice of it only when he was made aware that somebody else was claiming a right in the property to his prejudice. According to the argument, such awareness came to the Custodian only on July 20, 1956 when he was served with the notice by the Additional Judge, Small Cause Court, and, therefore, the right to apply accrued only on this date.

9. The status of the Custodian is not the status of a stranger or an entirely different person qua the evacuee. It is no doubt true that he has been given certain rights and even powers by the Evacuee Act, which were not possessed by the evacuee. Nevertheless, the fact remains, that he is a Custodian of the property of the evacuee in the capacity of a representative or manager. It is difficult, for me to accept the argument that the possession of the evacuee property by the

Custodian or its vesting in him creates some sort of independent statutory title in him with reference to that property. A Division Bench of the Punjab High Court has expressed the view in the case *Abda v. Yusuf Khan* (1948) 50 Pun. L. R. 210, that the object of the Evacuee Act is to preserve the property of an evacuee and that even though the property of the evacuee vests in the Custodian such vesting does not deprive an evacuee of his right to continue his case in a Court of law.

10. Similar observations have been made in the case reported in AIR 1964 Andh. Pra. 126 in re: Mohd. Ali Hasan Khan v. Bhagirathilal where it is stated that it is not the object of the Administration of Evacuee Property Act to make the Government or the Custodian of Evacuee Property the owner of the property declared as evacuee property. Notwithstanding such a declaration the property shall continue to be the property of the evacuee and the vesting thereof in the Custodian would only mean that the Custodian is stepping into the shoes of the evacuee as a statutory agent or manager for continuing administration and management of the same.

11. The question of limitation, has therefore, to be looked at from the point of view that the Custodian is an agent or manager of the evacuee. Bawa Shiv Charan Singh has drawn my attention to S. 50 of the Evacuee Act of 1950 which provides that if in any suit, it appears to the Civil Court that a question relating to the property of an evacuee or an intending evacuee is involved, the Court shall not proceed to determine that question until notice has been given to the Custodian. It is contended that since no notice was given to the Custodian by the executing Court, the Custodian is not bound by the execution proceedings or by the sale of the property by Court auction and could not have been expected to have taken any steps until his possession was in fact disturbed. It is further contended that delivery of symbolical possession to the auction purchaser would not be disturbance of the Custodian's possession. S. 50 certainly requires the Courts mentioned therein to give notice to the Custodian. But that is only if it appears to such Courts that a question relating to the property of an evacuee or an intending evacuee is involved in the proceedings before that Court. This section cannot arrest the running of time under the Limitation Act if time has already begun to run.

12. The next contention on behalf of the respondent is that symbolical possession, which is delivered under the provisions of Rule 96 of Order 21 Civil Procedure Code may amount to delivery of possession where the tenants are of the

judgment-debtor himself. In this case, it is contended that the tenants were not of the judgment-debtor but of the Custodian and therefore delivery of symbolical possession in this case could not be said to be interference with the possession of the Custodian. It is difficult to accept this argument.

13. The Privy Council has observed in AIR 1949 P.C. 124 in re: Adya Nath v. Krishna Prasad Singh that delivery of symbolical possession of property found to be in occupation of a tenant of the judgment-debtor effectively terminates the possession of both the judgment-debtor and the tenant. Similarly in AIR 1959 Punj. 515 in re: Mst. Mewa v. Amar Singh delivery of symbolical possession has been given the same status as delivery of actual physical possession.

14. In view of the fact (1) that the title of the Custodian cannot be said to be independent of the title of the judgment-debtor and (2) that the Custodian merely steps into the shoes of the judgment-debtor, the law of limitation has to be applied to the Custodian as it would have been applied to the judgment-debtor himself. Lack of notice to or the ignorance of the Custodian cannot be taken into consideration in determining the commencement of the running of the period under Article 181 of the Limitation Act 1908. The time from which the period begins to run is when the right to apply accrues and that right in my opinion definitely accrued to the judgment-debtor and, therefore, to the Custodian on February 28, 1952 when symbolical possession was delivered to the appellant.

15. Under the circumstances, I hold that the application dated October 4, 1956, filed by the Custodian under S. 17 of the Evacuee Act of 1950 was filed beyond the time prescribed by Article 181 of the Limitation Act of 1908. This appeal is, therefore, allowed with costs.

Appeal allowed.

AIR 1970 DELHI 85 (V 57 C 18)

I. D. DUA, C. J.

Washdev Singh Biji, Appellant v. Union of India and another, Respondents.

Second Appeal No. 182 of 1968, D/- 24-4-1969, against order of Addl. Dist. J., Delhi, D/- 13-5-1966.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 36 — Scope — Distinction between Rr. 41 and 42 of Displaced Persons (Compensation and Rehabilitation) Rules (1955) — "Shall" and "may" — Construction — Plaintiff alleging to be claimant, displaced person and lawful tenant of Government-built property — Suit filed for declaration —

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Suit is barred by S. 36 — (Interpretation of Statutes — Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall")—(Civil P. C. (1908), Preamble — Interpretation of Statutes — Operation of Statutes — Mandatory and directory provisions — Use of words "may" and "shall") — (Displaced Persons (Compensation and Rehabilitation) Rules (1955), Rr. 41 and 42).

Where a plaintiff files a suit for declaration alleging to be a claimant, displaced person and lawful tenant of Government-built property, such a suit is barred by S. 36, Displaced Persons (Compensation and Rehabilitation) Act.

(Para 6)

It is obvious that prima facie S. 36 bars such a suit. A bare reading of that section shows how widely it is worded and how clearly it bars the jurisdiction of civil courts in matters specified therein. The statute quite clearly provides a complete machinery for a person claiming compensation or rehabilitation under the Act and there are ample provisions for appeals and revisions if an interested party feels aggrieved. The bar under S. 36 renders such a suit incompetent and it binds the civil courts. (Para 6)

When the plaintiff in such a case is held to be not a displaced person having a verified claim and his allegation that he is a claimant is not accepted, in view of the difference in the language of Rr. 41 and 42 of Displaced Persons (Compensation and Rehabilitation) Rules, it cannot be contended that there is no distinction between the right of a displaced person with a verified claim and one without such a claim. The use of "shall" and "may" in Rr. 41 and 42 of those Rules brings out this distinction. That distinction is also rational. There is no reason why the word "shall" in R. 41 should be given a permissive colour or the word "may" in R. 42 should be construed in a peremptory manner. The word "shall" does not always conclusively convey an imperative mandate and similarly the word "may" is at times intended to mean "must". But to construe "shall" as "may" and "may" as "shall", there must be compelling reasons discernible from the context and the statutory aim, object and purpose. In the absence of such consideration, these words must be given their normal meanings in the English language. Thus such a suit is barred under S. 36 and is incompetent. 1967 D.L.T. 656 & AIR 1952 SC 319 & AIR 1963 SC 507 & AIR 1962 SC 1258 & C. W. No. 400-D of 1960, D/- 5-5-1967 (Delhi), Dist.; L.P.A. No. 43-D of 1966, D/- 21-9-1967 (Delhi), Ref.

(Para 5)

(B) Civil P. C. (1908), S. 100 — Concurrent findings — Suit for declaration filed alleging to be claimant under Displaced Persons (Compensation and Re-

habilitation) Act — Both lower courts not accepting that allegation — Conclusion of both lower courts not shown to be tainted with any illegality — In second appeal that plea is unacceptable and must be repelled under such circumstances. (Para 7)

(C) Civil P. C. (1908), Ss. 100 and 11 — Plea of res judicata — Plea negated by trial Court — Plea not agitated in first appellate Court — Plea not allowed to be raised in second appeal, more particularly when the suit itself is held to be incompetent. (Para 7)

Cases Referred: Chronological Paras
(1967) 1967 D.L.T. 656, Bhuru Mal v. Finance Commr. 5

(1967) L. P. A. No. 43-D of 1966, D/- 21-9-1967 (Delhi), Hafiz-ud-Din v. Union of India 6

(1967) C. W. No. 400-D of 1960, D/- 5-5-1967 (Delhi), Sohan Lal v. Union of India 5

(1963) AIR 1963 S.C. 507 (V 50)= (1962) 2 SCR 711, State of Punjab v. Suraj Parkash Kapur 5

(1962) AIR 1962 S.C. 1258 (V 49)= (1962) 3 SCR 1, Management of Marina Hotel v. The Workmen 5

(1952) AIR 1952 S.C. 319 (V 39)= 1952 SCR 696, Ebrahim Aboobakar v. Custodian General of Evacuee Property 5

D. N. Nijhawan, for Appellant; B. N. Kirpal (for No. 1); S. N. Gupta with G. N. Aggarwal (for No. 2) for Respondents.

JUDGMENT:— This second appeal arises out of a suit for a declaration instituted by the plaintiff-appellant on the allegations that he is a claimant and displaced person and lawful tenant of a Government-built property in question situated in Tilak Nagar, New Delhi. The said property is stated to be an allotable property, its value having been assessed at Rs. 3,200/-. The plaintiff pleaded that he was entitled to the transfer of this property at the assessed value under the provisions of the Displaced Persons (Compensation & Rehabilitation) Act (hereafter called the Act). His claim was denied and the property in dispute was transferred by the Union of India in favour of Smt. Kundan Devi, defendant No. 2. This transfer was described by the plaintiff to have been effected as a result of fraud and misrepresentation practised by the transferee's husband. The matter was taken by the plaintiff to the Settlement Commissioner on appeal, but the same was rejected on 14-3-1962. This order was described by the plaintiff to be without jurisdiction because the Assistant Commissioner, according to him, had not been delegated the powers of the Settlement Commissioner. The matter was further taken on revision to the Chief Settlement Commissioner, but that was also rejected on 11-6-1962. The approach to

the Central Government under Section 33 of the Act was also unsuccessful. It was thereafter that the present suit was instituted.

2. The pleadings of the parties gave rise to several issues, but issue No. 4, which is concerned with the plaintiff's locus standi to institute the present suit, alone concerns me. The trial Court came to the conclusion that the plaintiff had no locus standi to sue. The other issues were also decided on the merits by the trial Court. Issue No. 6 dealing with the plea of *res judicata* was decided in favour of the plaintiff.

3. On appeal, the learned Additional District Judge affirmed the judgment and decree of dismissal of the suit on 13-5-1968. According to the lower Appellate Court, under Rule 42 of the Displaced Persons (Compensation and Rehabilitation) Rules, the authorities concerned had a discretion to transfer or not to transfer an allotable property to a displaced person who did not hold a verified claim and in view of this rule, the plaintiff-appellant had no locus standi to maintain the suit as he had no actionable claim against the Rehabilitation Department of the Government of India. From the judgment of the lower Appellate Court, it seems that no other ground was pressed before that Court. I have made this observation because Shri G. N. Aggarwal, learned counsel for one of the respondents, has tried to re-agitate the question of *res judicata* which was decided by the trial Court, but which was not the subject-matter of argument before the lower Appellate Court.

4. In this Court, Shri Nijhawan, the learned counsel for the appellant, has in very elaborate arguments forcefully pressed the contention that although his client was not absolutely entitled to get the property in question, still as he was one of the persons who might have been given this property, he had a locus standi to institute the suit and that the lower Appellate Court was, for this reason, wrong in law in holding the suit to be incompetent. He has drawn my attention to various provisions of the Act and the Rules framed thereunder, but he has specifically referred to Rules 36, 41 and 42. Rule 36 reads as under:—

“36. Classes of Government-built properties which may be allotted. — The following classes of Government-built properties shall ordinarily be allotable, namely:—

(a) every Government-built residential property valued at rupees fifteen thousand or less and occupied by a displaced person on a rental basis; Provided that the Central Government may in any particular case direct that any such property shall not be allotable;

(b) every Government-built shop valued at rupees fifteen thousand or less.

Explanation. — No such property shall be allotable, if it is in the occupation of two or more persons, whether any or all of them be displaced persons or not.”

5. According to Shri Nijhawan, there is no distinction between the right of a displaced person who holds a verified claim and the one who does not hold such a claim, but this submission seems to me to be misconceived because of the difference in the language of Rules 41 and 42. Rule 41 lays down that a displaced person having a verified claim who is in occupation of a Government-built property which is an allotable property, shall be paid compensation by the transfer of the property to him:

x x x x

Rule 42 on the other hand provides that where a displaced person, who does not hold a verified claim, is in occupation of a Government-built property, which is an allotable property, the property may be transferred to him if he makes the initial payment of:

x x x x

The use of the words “shall” and “may” in the two rules respectively, seems to me to bring out the distinction between the two, which also appears to be rational. No argument has been advanced before me on behalf of the appellant as to why the word “shall” in Rule 41 should be given a permissive colour or the word “may” in Rule 42 should be construed in a peremptory manner. The decisions on which the learned counsel for the appellant has placed reliance do not seem to be of much assistance to him.

Bhiru Mal v. Finance Commr., 1967 D.L.T. 656, is a case of a writ petition in which it was held that if the petitioner had direct individual personal interest in a certain matter, which was being affected prejudicially by a quasi-judicial order in a proceeding to which he was a party, then it could not be said that he had no right to invoke the extraordinary jurisdiction of a High Court under Article 226 of the Constitution merely because no law conferred on him the absolute right to claim the very relief for which he had applied and which had been denied to him. In the reported case, where the impugned order by the Managing Officer showed on its very face that the said officer was prohibited by administrative instructions from exercising his discretion or even from bringing to bear upon the question before him his own independent mind by certain administrative instructions or a circular letter issued by a superior authority, then that order had to be held to be based on extraneous reasons liable to be set aside on that short ground. The ratio of this decision is clearly of no help to the appellant.

Ebrahim Aboobakar v. Custodian General of Evacuee Property, 1952 SCR 696=(AIR 1952 SC 319), was a decision given on appeal from a decision of the Punjab High Court in writ proceedings and it was held that a person claiming to be interested in an enquiry as to whether a person was an evacuee and his property evacuee property, who had filed a written statement and adduced evidence, was a "person aggrieved" by an order that the latter was not an evacuee and had a locus standi to prefer an appeal from that order.

State of Punjab v. Suraj Parkash Kapur, (1962) 2 SCR 711=(AIR 1963 SC 507), was an appeal from an order of the Punjab High Court in writ proceedings and it was held that the respondents' lands had been substituted by lands of less value without paying compensation and that, therefore, the High Court was right in setting aside the order confirming the scheme under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. **Management of Marina Hotel v. The Workmen, (1962) 3 SCR 1**=(AIR 1962 SC 1258), a case dealing with an industrial dispute is equally unhelpful to the appellant. The ratio of the unreported decision of this Court in **Sohan Lal v. Union of India C. W. No. 400-D of 1960, D/- 5-5-1967 (Delhi)** also does not support the appellant's submission that he has in the present case a right which can be enforced by way of suit.

It is indisputable that the word "shall" does not always conclusively convey an imperative mandate and similarly the word "may" is at times intended by the law-giver to mean "must". But to construe "shall" as "may" and "may" as "shall" there must be compelling reasons discernible from the context and the statutory aim, object and purpose. In the absence of such consideration, these words must be given their normal meanings in the English language.

6. Shri Kirpal has drawn my attention to Section 36 of the D. P. (C and R) Act which bars the jurisdiction of Civil Courts in all matters which the Central Government or any officer of the authority appointed under the Act is empowered by the statute to determine except where this Act itself provides otherwise. It is obvious that prima facie this section bars the present suit and on behalf of the appellant, precious little has been said for taking the present case out of this statutory bar. Our attention has also been invited to an unreported Bench decision of this Court in **Hafiz-ud-Din v. Union of India, L. P. A. No. 43-D of 1966, D/- 21-9-1967 (Delhi)** in which challenge by means of a civil suit on the ground of want of consideration to a transfer of property by the Central Government

through the Managing Officer was held to be incompetent by virtue of Section 36.

In my opinion, the respondents are right in their reliance on Section 36. A bare reading of this section shows how widely it is worded and how clearly it bars the jurisdiction of Civil Courts in matters specified therein. The statute quite clearly provides a complete machinery for a person claiming compensation or rehabilitation under this Act and there are ample provisions for appeals and revisions if a party interested feels aggrieved. The bar renders the present suit incompetent and it binds the Civil Courts.

7. Although the learned counsel for the appellant at one stage virtually conceded that he was not a claimant, nevertheless in the fag end of his arguments, he made a half-hearted attempt to urge that he was also a claimant, but this submission is unacceptable on second appeal on the facts and circumstances of this case. The trial Court had observed in express words that there was no evidence on behalf of the appellant to show that he held a verified claim in his favour. His bald submission that he was a claimant was not accepted. The lower Appellate Court also held that the appellant could not be considered to be a displaced person having a verified claim. These conclusions have not been shown to be tainted with any illegality, with the result that this submission must be repelled.

As observed earlier, Shri G. N. Aggarwal tried to raise the question of res judicata but no attempt had apparently been made in the Lower Appellate Court to support the decree of the trial Court on this plea which had been negatived by the first Court. I, therefore, did not consider it proper to allow him to raise this point on second appeal, more particularly as I was not persuaded to hold the suit to be competent.

8. For the foregoing reasons, this appeal fails and is dismissed, but with no order as to costs.

Appeal dismissed.

AIR 1970 DELHI 88 (V 57 C 19)

I. D. DUA, C. J., AND
P. N. KHANNA, J.

Mohan Singh, Petitioner v. Roshan Lal and others, Respondents.

Civil Misc. No. 384 of 1968 in Ex. Petn. No. 5 of 1968, D/- 1-5-1969.

Civil P. C. (1908), S. 151, O. 45, R. 13(2) (d) — Inherent power — Absence of — Abuse of process of Court — Exercise of inherent power not necessary.

Section 151 merely saves by expressly preserving to the Court (which is both a

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Court of equity and law) inherent power to act according to justice, equity and good conscience and make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. It does not confer any additional power not already vesting in it, to entertain a proceeding but applies only to the exercise of power when the matter is before the Court. (Para 5)

Where, pending the appeal and cross appeal in Supreme Court against the judgment and decree of the High Court in a money suit, the decree-holder applied to the High Court under S. 151 to modify its judgment and decree by adding that the judgment-debtor should furnish adequate security for the sum of decree and this relief was sought so that the ultimate realization of the amount be facilitated in case the Supreme Court upholds that part of the decree.

Held that there was neither the question of abuse of the process of the Court nor was it necessary in the ends of justice to make such order in the circumstances disclosed on the record.

Held further that O. 45, R. 13 (2) (d) Civil P. C. was of no help to the decree-holder in such a case, because that rule does not empower the Court to alter, amend or modify the judgment or decree. (Para 5)

Sushil Malhotra, for Petitioner; Chhabildass, for Respondents.

I. D. DUA, C. J.:—The decree-holder has approached this Court under Section 151, Civil Procedure Code. His application so far as material may be reproduced in extenso:—

"The respondent decree-holder respectfully prays as under:

1. That in the aforesaid R.F.A. No. 21 of 1967 this Hon'ble Court consisting of Hon'ble Mr. Justice S. N. Shankar and Hon'ble Mr. Justice Jagjit Singh in its judgment dated 30th August, 1968 was pleased to hold that the respondent decree-holder was entitled to recover the amount of Rs. 5,08,333-5-6 plus interest upto 7th April, 1961. Costs awarded by the Pakistan Court, Costs awarded by the Trial Court at Simla and interest on principal amount from 8th April, 1961 till realization, amounting to a total of Rs. 10,92,318-37 calculated upto 8-9-1968. It was further directed in the judgment and decree that the respondent/Decree-Holder is entitled to take out immediate execution for the recovery of the decretal amount as mentioned above less, deposit amount of Rupees Three Lacs with a proviso that if within three years from the date of this order no payment is received by him out of or from the Deposit amount he will be entitled to sue for execution for the recovery of the unpaid decretal amount then due to him.

2. That the Decree-Holder feels that it would be difficult for him to realise the amount of Rupees three lacs lying in deposit in the High Court of West Pakistan from the legal representatives of Late Rai Bahadur Jodha Mal the original defendant.

3. It is, therefore, fit and proper in the circumstances as mentioned above that the Judgment-Debtor/Appellant be directed to furnish a Cash Security or a Bank Guarantee to the satisfaction of this Hon'ble Court so that there is no difficulty for the respondent/Decree-Holder to realise the aforesaid amount of Rupees Three Lacs if the same is not received by the Decree-Holder within the stipulated period.

4. This is without prejudice to the right of the Decree-Holder respondent to take any other appropriate action arising out of the judgment of this Hon'ble Court.

5. It is, therefore, prayed that your Lordships may be pleased to direct the Judgment-Debtor/Appellant to furnish cash security or a Bank Guarantee for Rs. 3 Lacs to the satisfaction of this Hon'ble Court.

Any other orders or directions that your Lordships may deem fit and proper under the circumstances of this case may be passed."

2. This matter originally came up before learned Single Judges of this Court more than once. On the last occasion my learned brother P. N. Khanna, J. referred the matter to a larger Bench because it was suggested (the suggestion is also repeated before us) that the prayer in this petition virtually amounts to the amendment of the decree. It is for this reason that the matter was placed before a Division Bench.

3. The relevant part of the Judgment of the Division Bench of this Court dated August 30, 1968, which judgment and decree is the subject-matter of appeal in the Supreme Court by both parties on a grant of a certificate, reads as under:—

"We, accordingly, hold that the plaintiff is entitled to recover the aforementioned amounts and future interest out of the assets of the deceased R. B. Jodha Mal and the appellants will be liable to pay the same to that extent only. As stated earlier, he (Rai Bahadur Mohan Singh Oberoi) will be entitled to take out immediate execution only for the recovery of the decretal amount less the deposit amount of rupees three lacs with a proviso that if within three years from the date of this order no payment is received by him out of or from the deposit amount, he will be entitled to sue out execution for the recovery of the unpaid decretal amount then due to him."

4. It is conceded at the Bar that objection to this part of the judgment and

decree has been taken in the memorandum of appeal to the Supreme Court and the matter will have to be ultimately decided by that Court. Indeed, the judgment-debtor is also questioning, on appeal to the Supreme Court the decree to the extent of Rs. 3,00,000/- as granted by this Court.

5. On behalf of the decree-holder now what is prayed in real substance is that we should modify the judgment and decree of this Court against which cross-appeals are already pending in the Supreme Court, by adding a further proviso that the judgment-debtor should furnish adequate security for a sum of Rs. 3,00,000/- and this relief is sought so that the ultimate realization of this amount by the decree-holder is facilitated in case the Supreme Court upholds this part of the decree. We are unable to make this order under Section 151, Civil Procedure Code on the facts and circumstances of this case. Section 151 merely saves by expressly preserving to the Court (which is both a Court of equity and law) inherent power to act according to justice, equity and good conscience and make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. It does not confer any additional power not already vesting in it, to entertain a proceeding but applies only to the exercise of power when the matter is before the Court. There is no question of abuse of the process of the Court in this case and we are also far from satisfied that it is necessary in the ends of justice to make the order sought in the circumstances disclosed on the record. Reference has been made to Order XLV, Rule 13(2)(d), Civil Procedure Code, by Shri S. Malhotra and according to him, even though his application does not purport to be under this provision of law, the prayer in the application is clear and this Court should, despite different label on the application, exercise its power under Clause (d) of this rule and give the directions prayed. In our opinion, this rule does not empower this Court to alter, amend or modify the judgment or decree. The conditions to be placed on any party seeking relief from the Court and directions to be given respecting the subject-matter of the appeal are intended largely for the restricted purpose of interim protection without altering on merits the judgment appealed from. The matter is concededly pending before the Supreme Court and if the parties are so advised, they may approach that Court and seek appropriate directions by way of interim relief for safeguarding their rights.

6. For the reasons given above, this petition fails and is dismissed with costs.
Petition dismissed.

AIR 1970 DELHI 90 (V 57 C 20)

FULL BENCH

I. D. DUA, C. J., H. R. KHANNA AND JAGJIT SINGH, JJ.

Unique Motors and General Insurance Co., Petitioner v. S. K. Vaiyapuri and others, Respondents.

Civil Writ Petn. No. 35 of 1967, D/- 23-7-1969.

(A) Insurance Act (1938), Ss. 3(4)(f), 64-M(3), 110 and 114 — Insurance Rules (1939), R. 17-H — R. 17-H does not confer power of cancellation of registration of insurer independently of S. 3(4)(f) — Right of appeal against cancellation not taken away — (Insurance Rules (1939), R. 17-H) — (Civil P. C. (1908), Preamble— Interpretation of Statutes).

Per Jagjit Singh, J.: R. 17-H of Insurance Rules (1939) does not confer on the Controller of Insurance the power to cancel the registration of an insurer independently of S. 3(4)(f) of the Act. The correct interpretation of Clause (a) of that rule is that the certificate of registration granted to an insurer may be cancelled by the Controller in pursuance of sub-section (3) of S. 64-M under the Act, from which it follows that cancellation of the registration of the insurer is to be effected under the provisions relating to cancellation of registration as embodied in the Act. (Para 20)

The only provision in the Act relating to cancellation of registration are to be found in sub-sections (3) and (4) of S. 3. In sub-section (3) of S. 3 the expression used is "cancel a registration already made" while in sub-section (4) the registration which can be cancelled is not described as "the registration of the insurer under the Act", but merely as "registration of an insurer". Sub-sec. (5) of S. 3 requires that when the Controller withholds or cancels any "registration under sub-sec. (3) or Clause (a), Clause (aa), Clause (e), Clause (ee), Clause (f), Clause (g) or Clause (h) of sub-sec. (4)", a notice in writing shall be given to the insurer of his decision etc. The registration referred to is not granted under sub-sec. (3) or the clauses mentioned after the words "under sub-sec. (3)", but those clauses have reference to the provisions under which registration is cancelled. It appears that in Rule 17-H the same form of construction was used and the words "under the Act" do not qualify the expression "registration of the insurer", but go with the word "cancel". The rule, therefore, does not confer an independent power of cancellation on the Controller. Besides prescribing for certain other matters it seems to provide that the registration of the insurer may be cancelled under the Act, which in the context

should mean the provisions of S. 3(4)(f) of the Act. (Para 17)

The right of appeal to a Court of law is a most valuable right and deprivation of that right is not to be lightly assumed. The Act does not provide for deprivation of right of appeal in case of insurers whose registration is cancelled after their disregard of two warnings by the Controller nor such deprivation can be inferred from the provisions of Act.

(Para 18)

Per I. D. Dua, C. J. (H. R. Khanna, J. Concurring): Sub-section (3) of Section 114 is designed to retain legislative control over the rules framed under S. 114. This provision clearly suggests that the Legislature has been given an opportunity of scrutinising the rules made under S. 114 of the Act and it may be assumed that in the case in hand, the opportunity was utilised as intended. Rule 17-H which must, therefore, be deemed to have the implied sanction of the legislature after it was made, deserves to be read as a part of the Act itself. A rule of this type being a part of the statute, has to be construed along with the other provisions of the statute and every effort should be made to fit it in with the general statutory scheme which is discernible from the Act read as a whole. The language used in Rule 17-H may be capable of two meanings, but if reasonably permissible, the Court should adopt the one which would render it valid rather than invalid. The Court may more readily be inclined to assume — if necessary — a mistake in drafting rather than to impute to the Legislature an intention to place on the statute book or approve under S. 114(3) an invalid or unconstitutional provision. From this point of view, the impugned rule must be so read as to make it lawful, constitutional and consistent with the smooth working of the system which the statute purports to regulate, and there does not seem to be any insurmountable obstacle in so reading it. (Para 24)

(B) Insurance Act (1938), Ss. 64-M(3) and 3 (5-c) — Insurance Rules (1939), R. 17-H — Registration cancelled in pursuance of S. 64-M (3) may be revived in suitable case — (Insurance Rules (1939), R. 17-H). (Para 19)

(C) Insurance Act (1938), S. 64-M(3) — Insurance Rules (1939), R. 17-H — Constitution of India, Art. 14 — S. 64-M(3) and R. 17-H are not violative of Art. 14 — (Insurance Rules (1939), R. 17-H) — (Constitution of India, Art. 14).

As cancellation of the registration in pursuance of S. 64-M(3) read with R. 17-H cannot be made independently of S. 3 (4)(f) of the Act it cannot be said that the Act provides two separate and independent procedures for cancellation of

registration and that one of the procedures is more prejudicial than the other. Hence the question of infringement of Art. 14 of the Constitution does not arise.

(Paras 21 and 25)

Cases Referred: Chronological Paras (1967) AIR 1967 S.C. 1581 (V 54) = (1967) 3 SCR 399, Northern India Caterers (Private) Ltd. v. State of Punjab 14

S. S. Ahuja, for Petitioner; B. R. L. Iyengar with B. N. Kirpal for Attorney-General of India and the Controller of Insurance.

JAGJIT SINGH, J.:— The following questions have been referred to the Full Bench by a Division Bench of this Court:—

"1. Whether Rule 17-H confers power on the Controller of Insurance to cancel the registration of an insurer independently of Section 3(4)(f) of the Act? If so, whether Rule 17-H is ultra vires of Section 110(a) of the Act?

2. Whether Section 64-M(3) of the Act read with Rule 17-H is ultra vires of Article 14 of the Constitution as conferring unbridled, arbitrary and discriminatory powers on the Controller of Insurance?"

2. The facts of the case are given in detail in the reference of the Division Bench. It may, however, be mentioned that Unique Motor and General Insurance Company Limited, Bombay (hereinafter referred to as the petitioner-company), is a public limited Company registered and incorporated under the Indian Companies Act, 1913, and was carrying on the business of general insurance and more particularly of motor insurance. On November 6, 1942, the petitioner-company was registered in respect of miscellaneous insurance business under Section 3(6) of the Insurance Act, 1938 (Act IV of 1938), called hereafter as the Act.

3. The Controller of Insurance, Simla, by an order, dated April 17, 1964, cancelled the certificate of registration of the petitioner-company. The order purported to have been passed under sub-section (3) of Section 64-M of the Act read with Rule 17-H of the Insurance Rules, 1939 (to be referred to for facility of reference as the Rules) and was in the following terms:—

"I have the honour to say that your Company has disregarded two warnings given to it under sub-section (2) of Section 64-M of the Insurance Act, 1938.

2. I, therefore, in pursuance of sub-section (3) of Section 64-M of the said Act read with Rule 17-H of the Insurance Rules, 1939, hereby cancel the certificate of registration bearing the number 339/2 dated the 6th November 1942 in respect of miscellaneous insurance business granted to your company under Sec. 3 of the said Act and the cancellation will take effect on the 27th April, 1964."

4. Under provisions of Section 64-M (2) three warnings were administered to the petitioner-company, for contravention of Section 40-C of the Act, with respect to the expenses of management in miscellaneous insurance business during the years 1957, 1958 and 1959 (vide letters dated 10-12-1959, 22-12-1959 and 11-1-1962 respectively). It was after these warnings had been given that the certificate of registration of the petitioner-company was cancelled.

5. The petitioner-company filed an appeal against the order cancelling its certificate of registration to the High Court of Bombay. On November 23, 1964 R. M. Kantawala, J. dismissed the appeal after holding that Section 110 of the Act, which deals with appeals, does not provide for any appeal from an order made under Section 64-M of the Act read with Rule 17-H of the Rules. The petitioner-company then filed a petition for issuing a writ of certiorari for quashing the order of the Controller, dated April 17, 1964. It was during hearing of that petition that the abovementioned questions were formulated and referred to the Full Bench.

6. At this stage some of the provisions of the Act may be noticed briefly. Sub-section (1) of Section 3 of the Act provides for registration of insurance. Sub-section (2) of that Section mentions the documents which are required to accompany every application for registration. Sub-section (6) authorises the Controller on being satisfied that the application has fulfilled all the requirements of the section and subject to compliance of certain other provisions to register the insurer and grant him a certificate of registration. Sub-section (3) of the same section empowers the Controller to withhold registration or cancel a registration already made if in a country where any insurer has his principal place of business or domicile Indian nationals are debarred from carrying on the business of insurance or where any reciprocal condition imposed on such insurer is not satisfied.

7. Under sub-section (4) of Section 3 of the Act it is obligatory on the Controller to cancel the registration of an insurer either wholly or in so far as it relates to a particular class of insurance business if the case of the insurer falls under any clause of clauses (a) to (ee) thereof. Where, however, the case of an insurer falls under any clause of clauses (f) to (h) of that sub-section cancellation of registration is discretionary. Under clause (f) the Controller may cancel the registration of an insurer if the insurer makes default in complying with, or acts in contravention of, any requirement of the Act or of any rule or order made thereunder. Sub-section (5-C) enables the Controller at his discretion to revive the

Registration cancelled under clause (a), clause (aa), clause (e), clause (f), clause (g) or clause (h) of sub-section (4).

8. Sections 40-A, 40-B and 40-C and Part II-A, containing Sections 64-A to 64-T, were inserted in the Act by the Insurance Amendment Act, 1950 (Act XLVII of 1950). These sections were inserted to provide for the control of overall expenses of all insurers through the medium of statutory association of insurers and the Executive Committee of the Life Insurance Council and the General Insurance Council.

9. Sub-section (1) of Section 40-C of the Act places limitation on expenses of management in general insurance business. It, inter alia, provides that after December 31, 1949, no insurer shall, in respect of any class of general insurance business transacted by him in India, spend in any calendar year as expenses of management including commission or remuneration for procuring business an amount in excess of the prescribed limit. There is, however, a proviso to this sub-section which is to the effect that where an insurer has spent as such expenses in any year an amount in excess of the amount permissible under this sub-section he shall not be deemed to have contravened the provisions of the section, if the excess amount so spent is within such limits as may be fixed in respect of the year by the Controller after consultation with the Executive Committee of the General Insurance Council by which the actual expenses incurred may exceed the expenses permissible under the sub-section.

10. Section 64-M of the Act provides for giving of advice by the Executive Committee of the General Insurance Council to the Controller in the matter of fixing, under the proviso to sub-section (1) of Section 40-C, the limits by which the actual expenses of management incurred by an insurer, carrying on general insurance business, in respect of such business in the preceding year, may exceed the limits prescribed by that sub-section. It also provides for administering of warnings to an insurer guilty of contravention of the provisions with respect to the expenses of management and for the Controller taking such action against an insurer disregarding two warnings as may be prescribed. The section reads:—

"64-M(1). It shall be the duty of the Executive Committee of the General Insurance Council to meet at least once before the 31st day of March every year to advise the Controller in fixing under the proviso to sub-section (1) of Section 40-C the limits by which the actual expenses of management incurred by an insurer carrying on general insurance business in respect of such business in the

preceding year may exceed the limits prescribed under that sub-section, and in fixing any such limits the Controller shall have due regard to the conditions obtaining in general insurance business in the preceding year, and he may fix different limits for different groups of insurers.

Where an insurer is guilty of contravening the provisions of Section 40-C respect to the expenses of management the Controller may, after giving insurer an opportunity of being heard, administer a warning to the insurer.

Where in any case two warnings have been given to an insurer under sub-section (2) and he has disregarded by him, the Controller may take such action against the insurer as may be prescribed."

The expression "prescribed" has been defined in Section 2(14) of the Act to mean as prescribed by rules made under Section 114. Section 114 gives power to the Central Government to make rules to carry out the purposes of the Act, including any matter which is or may be prescribed.

Rule 17-H of the Rules, made under Section 114 of the Act, prescribes the action that may be taken by the Controller under sub-section (3) of Section 64-M. The rule is as follows:—

17-H (1) In pursuance of sub-section (3) of Section 64-M of the Act the Controller may:—

(a) Cancel the registration of the insurer under the Act, and

(b) Request the Executive Committee of the General Insurance Council to consider practical steps for the reconstruction of the insurer concerned or for transferring its business to some other insurer.

(c) When such a request as is referred to in the preceding sub-rule is received by the Executive Committee of the General Insurance Council, it shall meet not more than one month of the receipt of the request to consider the request and within seven days of such meeting shall communicate its decision to the Controller.

(d) The Controller may, after considering the recommendations of the Executive Committee in this behalf apply to the court for winding up of the insurer concerned if he thinks fit."

3. The Act also contains provisions, Section 110, regarding appeal against order under Section 3 refusing to register or cancelling the registration of insurer.

4. Shri S. S. Ahuja, learned counsel for the petitioner-company, was at first inclined to take the stand that Section 64-M(3) of the Act read with R. 17-H of the Rules does not confer any independent power on the Controller of cancelling

the registration of an insurer, who has disregarded two warnings given to him, and that the cancellation of the registration of an insurer in such a case has to be considered to have been made under Section 3(4)(f) of the Act. This line of reasoning was, however, abandoned when it was realised that the judgment of the Bombay High Court, to which reference has been made earlier, was *inter partes*. Shri Ahuja, therefore, on the assumption that the view taken by the learned Judge of the Bombay High Court was correct, contended that clause (a) of Rule 17-H of the Rules confers power on the Controller independently of Section 3(4)(f) to cancel the registration of an insurer in pursuance of sub-section (3) of Section 64-M and the rule to that extent is *ultra vires* of Section 110(a) as there is no right to appeal against such cancellation of the registration of an insurer. It was further urged that Section 64-M(3) read with Rule 17-H is *ultra vires* of Article 14 of the Constitution as these provisions confer unbridled, arbitrary and discriminatory power on the Controller to either proceed under these more prejudicial provisions or to take action under Section 3(4)(f) of the Act. Reliance was placed on the case of *North India Caterers (Private) Ltd. v. State of Punjab*, AIR 1967 SC 1581.

15. Shri B. R. L. Iyengar, who appeared for the Controller of Insurance and the Attorney General of India, submitted that Section 64-M of the Act read with Rule 17-H of the Rules forms a separate scheme which is only applicable to that class of insurers who have been extravagant in the matter of expenses of management and have also disregarded two warnings given to them by the Controller. According to the learned counsel action against such an insurer can only be taken under Section 64-M(3) read with Rule 17-H and as such there is no question of the Controller having arbitrary discretion either to proceed under those provisions or to take action under Section 3(4)(f). It was urged that the Legislature has intentionally withheld the right of appeal from this class of insurers as under the proviso to Section 40-C the Controller has to fix for each year, after considering the advice of the Executive Committee of the General Insurance Council and having regard to the conditions obtaining in general insurance business in the preceding year, the limits within which the expenses of management may exceed the prescribed limits. Eight representatives of the members of the Insurance Association of India also being members of the Executive Committee of the General Insurance Council, it was stated the advice tendered by the said Committee is based on the actual needs and difficulties of insurers carrying

on general insurance business. As action for cancellation of the registration is only taken after two warnings have been disregarded, it was contended the insurer concerned can have, under the circumstances, no grievance that right of appeal has been denied to him.

16. In clause (a) of Rule 17-H of the Rules the words used are "cancel the registration of the insurer under the Act". It is true that the rule is somewhat unhappily worded and possibly a construction can be put on it that in pursuance of sub-section (3) of Section 64-M of the Act the Controller may cancel the registration of the insurer granted under the Act. The other interpretation would be that the registration of an insurer may be cancelled by the Controller under the provisions of the Act relating to cancellation of registration. The learned Judge of the Bombay High Court, on the appeal of the petitioner-company, had adopted the first interpretation.

17. The only provisions in the Act relating to cancellation of registration are to be found in sub-sections (3) and (4) of Section 3. Sub-sections (1) and (6) of that section provide for the registration. In sub-section (3) of Section 3 the expression used is "cancel a registration already made" while in sub-section (4) the registration which can be cancelled is not described as "the registration of the insurer under the Act", but merely as "registration of an insurer". Sub-section (5) of Section 3 requires that when the Controller withholds or cancels any "registration under sub-section (3) or clause (a), clause (aa), clause (e), clause (ee), clause (f), clause (g) or clause (h) of sub-section (4)", a notice in writing shall be given to the insurer of his decision, and the decision shall take effect on such date as may be specified in that behalf in the notice, such date being not less than one month nor more than two months from the date of the receipt of the notice in the ordinary course of transmission. The registration referred to is not granted under sub-section (3) or the clauses mentioned after the words "under sub-section (3)", but those clauses have reference to the provisions under which registration is cancelled. It appears that in Rule 17-H the same form of construction was used and the words "under the Act" do not qualify the expression "registration of the insurer", but go with the word "cancel". The rule, therefore, does not confer an independent power of cancellation on the Controller. Besides prescribing for certain other matters it seems to provide that the registration of the insurer may be cancelled under the Act, which in the context should mean the provisions of Section 3(4)(f) of the Act.

18. It is not possible to accept the contention that the intendment of the Legislature was to treat extravagant insurers carrying on general insurance business, in the matter of cancellation of their registration, differently from the other insurers by depriving them of the right of appeal. Against warnings to be given by the Controller under Section 64-M(3) of the Act no appeal is provided. It cannot, therefore, be said that as action for cancellation of the registration is taken only after two warnings have been disregarded the right to appeal should by necessary implication be deemed to have been taken away. The right of appeal to a Court of law is a most valuable right and deprivation of that right is not to be lightly assumed. If the intention was to take away that right in the case of insurers whose registration is cancelled after their disregard of two warnings by the Controller some specific provision would have been made. No such provision was made and there are no provisions in the Act which may by necessary implication lead to any such inference.

19. Another submission of Shri Iyengar was that if cancellation of registration by the Controller in pursuance of Section 64-M(3) of the Act read with R. 17-H of the Rules was intended to fall under Section 3(4)(f) then all the provisions of Section 3, including sub-section (5-C) relating to reviving of registration within six months from the date on which the cancellation took effect, should have applied to such cancellation of the registration. Elaborating his argument the learned counsel urged that as the excess in expenses of management would already have taken place it would not be possible for an insurer to rectify that defect for the past years and, therefore, the provisions for reviving the registration cannot ever apply to an insurer whose registration has been cancelled under Section 64-M(3) read with R. 17-H. The contention, however, has no force. In many cases of revival of registration covered by sub-section (5-C) of Section 3 it is not possible to undo the past default. The directions to be complied with by the insurer in connection with revival of the registration may be, therefore, for the future. There is no reason why registration of an insurer cancelled in pursuance of Section 64-M(3) of the Act may not in a suitable case be revived at the discretion of the Controller.

20. It, therefore, appears that R. 17-H of the Rules does not confer on the Controller of Insurance the power to cancel the registration of an insurer independently of Section 3(4)(f) of the Act. The correct interpretation of clause (a) of that rule seems to be that the certificate of registration granted to an insurer may be cancelled by the Controller in pursu-

ance of sub-section (3) of Section 64-M under the Act, from which it follows that cancellation of the registration of the insurer is to be effected under the provisions relating to cancellation of registration as embodied in the Act.

21. As cancellation of the registration in pursuance of Section 64-M(3) read with Rule 17-H cannot be made independently of Section 3(4)(f) it cannot be said that the Act provides two separate and independent procedures for cancellation of registration and that one of the procedures is more prejudicial than the other. The question of any discrimination or arbitrary discretion on the part of the Controller does not arise.

22. The questions referred to the Full Bench are, therefore, answered as follows:—

(1) First part: No.

Second Part: The question does not arise.

(2) No.

23. The case shall now be laid before a Division Bench for being disposed of in the light of the above answers.

24. **L. D. DUA, C. J.:**— I have read the judgment prepared by my learned brother Jagjit Singh, J. and I agree with him. I would, however, add a few words on one aspect. Rule 17-H of the Insurance Rules framed under Section 114 of the Insurance Act by the Central Government deals with the action to be taken against Extravagant General Insurers. These Rules were required by Section 114 to be made for carrying out the purposes of the Act. Sub-section (3) of this section is designed to retain legislative control over the rules to be so framed. This seems to be inspired by the recognition of the doctrine of separation of power contained in our Constitution, the problem of delegation of powers being to an extent a refinement of the broader doctrine of separation of powers. The constant increase of social and economic regulation has necessitated as inevitable, for practical reasons, delegation of rule-making power, provided, either the broad guide-lines are stated within which the rule is to be made and is to operate, or legislative control is retained by the Parliament over the rule-making power. This sub-section is an illustration of the latter course of retention of legislative control.

According to it, every rule made under Section 114 is to be laid, as soon as may be, before the Legislature, while it is in session, for the period prescribed therein. If the Legislature agrees in making a modification in the rule, or if it agrees that the rule should not be made, the rule is thereafter to have effect only in such modified form or will have no effect, as the case may be. This provision thus clearly suggests that the Legislature has

been given an opportunity of scrutinising the rules made under Section 114 of the Act and it may be assumed that in the case in hand, the opportunity was utilised as intended. Rule 17-H which must, therefore, be deemed to have the implied sanction of the legislature after it was made, deserves to be read as a part of the Act itself. Considerations which weigh in construing a rule made by the executive wing of the Government, pursuant to validly delegated power, but which has not been laid before the legislature, as envisaged in Section 114 of the Act, may not apply with full rigour to a rule which has been so laid and which may, therefore, appropriately be deemed to have the approval of the Legislature itself. A rule of this type being a part of the statute, has to be construed along with the other provisions of the statute and every effort should be made to fit it in with the general statutory scheme which is discernible from the Act read as a whole. The language used in Rule 17-H may be capable of two meanings, but if reasonably permissible, the Court should adopt the one which would render it valid rather than invalid. The Court may more readily be inclined to assume — if necessary — a mistake in drafting rather than to impute to the Legislature an intention to place on the statute book or approve under Sec. 114(3) an invalid or unconstitutional provision. From this point of view, the impugned rule must be so read as to make it lawful, constitutional and consistent with the smooth working of the system which the statute purports to regulate, and there does not seem to be any insurmountable obstacle in so reading it.

25. Article 14 of the Constitution also does not postulate an absolute equality of men before the law. The view taken by my learned brother Jagjit Singh, J. of the statutory provisions would obviously exclude the challenge on the ground of inequality as well.

26. **H. R. KHANNA, J.:** I agree.

Order accordingly.

AIR 1970 DELHI 95 (V 57 C 21)

HARDAYAL HARDY, J.

B. G. Goswami, Appellant v. State, Respondent.

Criminal Appeal No. 103 of 1967, D/- 29-10-1969, from order of Spl. J., Delhi, D/-24-5-1967.

Prevention of Corruption Act (1947), Ss. 4(1), 5(2), and 5(1)(d) — Offence under S. 5(2) read with S. 5(1)(d) and S. 161 Penal Code — Presumption under S. 4(1) when can be drawn, indicated — Held on facts that presumption under S. 4(1) ap-

LM/AN/G8/69/LGC/B

plied to the case and guilt of the accused had been established beyond reasonable doubt — (Penal Code (1860), S. 161).

The presumption under Section 4(1) of Prevention of Corruption Act (1947) applies only if it is established that the accused had actually accepted the currency notes. On the other hand, if the prosecution evidence falls short of what is required to prove that fact or if it is found that money had either been planted or foisted on him by means of a deception or a trick then the presumption under Section 4(1) can obviously not be pressed into service for the purpose of establishing his guilt. (Para 6)

In a prosecution for offences under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act and S. 161 of the Penal Code the accused contended that he was duped into pocketing the currency notes under the cover of bills and that there was as a matter of fact no acceptance of money at all. He sought to support the contention from the statement of complainant who admitted that the accused refused to have the notes in restaurant in the first instance, but he accepted the same when they were handed over to him along with the bills. But the witnesses who were sitting in the restaurant stated in unequivocal terms that what was passed on by the complainant to the accused was currency notes and the same were clearly visible to them. Recovery of the relevant currency notes by the police from his pocket was not denied by him. It was not the case of the accused that the amount was paid to him by complainant on some other account. The amount could also not be regarded as forming part of the legal remuneration.

Held that the presumption under S. 4 (1) was attracted and the guilt of the accused must therefore be held to have been established beyond reasonable doubt. (Para 9)

The money was evidently being paid by the complainant to the accused in a public restaurant where several other persons were also present. If the accused therefore told the complainant that he would not accept the notes in the restaurant there was nothing unnatural in his conduct. His initial hesitation must have however been overcome when the complainant put those notes inside the folds of the bills. In doing so however the money must have been taken by the complainant from his pocket and put inside the bills and then passed on by him to the accused within the sight of the witnesses. There was thus no escape from the conclusion that the passing of the money by the complainant to the accused was not the result of any deception or trick practised on him and that the currency notes were accepted by the accused

with full knowledge of the fact that what was being passed on to him was money that was not legally due to him.

(Paras 8, 9)

D. R. Kalia, for Appellant; D. R. Sethi, for Respondent.

JUDGMENT:— The appellant B. G. Goswami was employed as a Storekeeper in the Sewa Kendra run by the Delhi Administration for the benefit of destitutes and beggars. He has been convicted by the Special Judge for an offence under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 and has been sentenced to 15 months' R. I. and a fine of Rs. 200/- or in default of payment of fine to further imprisonment for a period of three months. He has also been found guilty under Section 161 Indian Penal Code and has been ordered to suffer 15 months' R. I. for the said offence. The substantive sentences of imprisonment have been ordered to run concurrently. According to the prosecution, Madan Singh complainant (P.W. 1) held a contract for the supply of vegetables to the Sewa Kendra. The accused Goswami told him that if he paid him a bribe of Rs. 50/- all sorts of vegetables supplied by him would be accepted but if he did not do so the vegetables brought by him would be rejected. The complainant promised to pay the bribe after a few days, but he had actually no intention to do so and therefore brought the demand of the accused to the notice of Shri Har Narain Singh, D.S.P., Anti-Corruption, on 7-1-1960.

A raiding party was thereupon organised by the D.S.P. who invited Kewal Ram and Ram Rikh two officials belonging to the Sales-tax Department and some policemen to join the raiding party. Madan Singh produced five currency notes of Rs. 10/- each of the numbers were duly recorded by the D.S.P. in his proceedings. The complainant was then deputed by the D.S.P. to pay the aforesaid amount to Goswami. Kewal Ram and Ram Rikh were instructed to remain close to the spot where the complainant was asked to make payment of the money to the accused and hear the talk which was to take place between him and the accused and to observe the payment of the bribe. They were also instructed to give a signal immediately after the payment was made. A direction was also given to the complainant that he should make payment of the bribe within the sight of the witnesses and to convince them by his conversation that the money was changing hands as illegal gratification.

2. The raiding party then went to Anand Parbat where the Sewa Kendra is situated while the witnesses took their seats in Kiran Restaurant nearby. The complainant went to fetch the accused and brought him to the same restaurant.

dence was over. The defence evidence led by him is also on the point that he had not taken extra passengers.

4. Section 537 (a) of the Code can be relied upon in case of failure to examine the respondent second time in this case, assuming Section 342 is attracted. This section, to the extent it is material for the present purpose, provides that no sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of — (a) any error, omission or irregularity in the order, judgment or other proceeding before or during trial. Mr. Kakodkar is asked to explain how failure to examine the respondent second time caused prejudice to him. He states that if the respondent had been examined second time, after the defence evidence was over, he might have said that the prosecution witnesses had enmity against him and this may have enabled the learned Magistrate to discard the prosecution evidence. This is a hypothetical assumption with which we are really not concerned, apart from the fact that no such enmity was alleged against these witnesses either in cross-examination or in the examination under Section 342. The learned Magistrate would have referred to this allegation in his order. The Court takes no notice of imaginary situations or academic issues.

The provisions of Section 342 were examined by this Court at some length in 'Leofred Lobo v. State', AIR 1967 Goa 60 at p. 76 and the following decisions of the Supreme Court were cited therein:— 'Moseb Kaka Chowdhry v. State of West Bengal', AIR 1956 SC 536; 'Chikkaranga Gowda v. State of Mysore', AIR 1956 SC 731; 'Rama Shankar Singh v. State of West Bengal', AIR 1962 SC 1239 and 'Jaidev v. State of Punjab', AIR 1963 SC 612 at p. 620. The substance of these decisions is that under Section 537 (a) the conviction and sentence are not reversible on account of any error, omission or irregularity in any proceedings during the trial, unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination is not a ground for interference unless prejudice is established. The respondent knew what the prosecution case against him was. He denied he had carried extra passengers. Mr. Kakodkar is unable to satisfy the Court that any prejudice was caused to the respondent because of failure to examine him second time after the defence evidence was over. Real and not fanciful or imaginary prejudice is what is contemplated.

5. Mr. Kakodkar next submits that under Section 112 of the Act the maximum fine for the offence for which the respondent is convicted is Rs. 100/-. In 1970 Goa, Daman & Diu/4 IV G-27

his reference, it appears, through inadvertence, the learned Sessions Judge said that the maximum fine is Rs. 50/-. Mr. G. V. Tamba, holding a brief on behalf of Government Pleader, concedes that the maximum fine is Rs. 100/-. It is common ground that the respondent is not a previous convict. In this view of the matter, the order passed by the learned Magistrate imposing a fine of Rs. 150/- cannot be sustained. The conviction of the respondent is maintained and the sentence of fine imposed by the learned Magistrate is altered from Rs. 150/- to Rs. 100/- and, in default of payment of this fine, the respondent should undergo simple imprisonment for 15 days, as directed by the learned Magistrate. The reference accordingly is accepted. The record and proceedings may be sent back to the learned Sessions Judge for further appropriate action as he deems fit. Order accordingly.

Reference accepted.

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(V 57 C 9)

V. S. JETLEY, J. C.

State, Applicant v. Naguesh G. Shet Govenkar and another, Respondents.

Criminal Revn. Appln. No. 27 of 1969 and Criminal Appeal No. 18 of 1969, D/- 28-7-1969.

(A) Penal Code (1860), Ss. 339, 390 — Wrongful restraint— Obstruction to truck from proceeding in direction in which it wanted to proceed — No obstruction to its occupants from proceeding anywhere — No wrongful restraint. (Para 3)

(B) Probation of Offenders Act (1958), S. 4(1) and (2) — Release of accused on probation of good conduct — Consideration of report in terms of S. 4(2) is condition precedent — Word "shall" in S. 4(2) is mandatory.

Before releasing the accused on probation of good conduct under S. 4 (1), it is obligatory on the Court to call for and consider the report of the Probation Officer in terms of S. 4(2). It is a condition precedent to the legality or validity of the order passed under sub-section (1) of S. 4. Nullification of this order is a normal consequence of disobedience of the mandatory requirement in sub-section (2). (Para 9)

It is true that the word "shall" in a statute does not necessarily mean that in every case it will have mandatory effect and not directory. Its meaning will vary in colour and content according to its context. It would involve injustice or inconvenience to offenders governed by sub-section (1) of Section 4 if sub-section

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(2) of Section 4 is regarded as directory and not mandatory. (Para 7)

The consideration of the report of the probation officer is of the essence of the thing required under S. 4(1). It is a matter of substance and not a matter of mere form. The probation officer is in a better position to know the character and antecedents of the offenders and his report is to be considered before making an order under sub-section (1) of S. 4. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

- (1967) AIR 1967 S.C. 276 (V 54)=
1967 Cri. L. J. 285, State of M.P.
v. Azad Bharat Finance Co. 7
- (1967) AIR 1967 Goa 95 (V 54)=
1967 Cri. L. J. 1005, Raghunath
v. Mrs. T. P. Faria 6
- (1966) AIR 1966 All. 291 (V 53)=
Jagdish Gandhi v. Legislative
Council, U.P. 7
- (1965) AIR 1965 S.C. 444 (V 52)=
1965 (1) Cri. L. J. 360, Rattan Lal
v. State of Punjab 6. 7
- (1964) 1964 (1) Cri. L. J. 460=ILR
(1963) Mys. 929, State of Mysore
v. Saib Gunda 8
- (1963) AIR 1963 S.C. 1088 (V 50)=
1963 (2) Cri. L. J. 173, Ramji
Missar v. State of Bihar 6
- (1955) AIR 1955 S.C. 233 (V 42)=
1955 SCR 1104, Hari Vishnu v.
Ahmad Ishaque 7
- (1954) AIR 1954 S.C. 210 (V 41)=
1954 SCR 892, Jagan Nath v. Jas-
want Singh 7
- (1880) 5 A.C. 214=49 L.J. Q. B. 577,
Julius v. Bishop of Oxford 7

S. Tamba, Govt. Pleader, for the State (In both the Appeals); Y. H. Kadam, for Respondents (In both the Appeals).

ORDER:— This is an appeal under Section 417(1) of the Code of Criminal Procedure directed against the judgment passed by the learned Sessions Judge, whereby he acquitted respondents Nos. (3) to (7) of the offence with which they were charged under Section 395 of the Penal Code. The respondents Nos. (1) and (2) were convicted by him under Section 392 of the Penal Code. They were, however, released on probation of good conduct under Section 4 of the Probation of Offenders Act, 1958. The State felt aggrieved by this action and also by the decision directing acquittal of the respondents Nos. (3) to (7). A revision petition under Section 439 of the Code of Criminal Procedure accordingly is filed by the State, objecting to the order releasing respondents Nos. (1) and (2) on probation of good conduct under the Probation of Offenders Act, 1958.

2. The prosecution case, briefly stated, is that on 14th June, 1967 at about 6.30 a.m. respondents Nos. (1) to (7) stopped the truck carrying 60 gallons of liquor

for distribution to various persons. The truck was prevented from proceeding in the direction intended and liquor was removed from the truck and kept in the balcony of the house of a washerman residing nearby. The Police were informed by complainant Atmaram Revodker about this illegal action on the part of these respondents. The Police after necessary investigation challaned them. They were charged by the learned Sessions Judge, Panjim, under Section 395 of the Penal Code. (Dacoity).

3. I shall first consider the appeal filed by the State against acquittal of respondents Nos. (3) to (7). It is conceded by learned Government Pleader at the Bar that on the evidence led by the prosecution the charge was not established against them either under Section 395 or Section 392. I have carefully gone through the record and I agree with him that as far as these respondents are concerned the ingredients of the offences under Sections 392 and 395 are not proved. It is extremely doubtful whether they participated in the crime. The learned Sessions Judge carefully considered the prosecution evidence and his conclusion that they are not guilty is supported by evidence. The evidence on identity of these accused is unconvincing, apart from the fact that it is vague. Section 390 of the Penal Code states that theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. It was the prosecution case in the Sessions Court that when these respondents prevented the truck carrying liquor from proceeding in the direction in which it wanted to proceed there was wrongful restraint to the complainant and some other occupants who were in the truck at the time of the incident. It is in evidence that the complainant and other occupants were not prevented from contacting the members of the Panchayat or the Police. What is 'wrongful restraint' is defined in Section 339 of the Penal Code. Under that section, "whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person". The admitted position is that the complainant and others were not obstructed from proceeding in any direction in which they wanted to proceed and, therefore, there was no wrongful restraint within the meaning of this section, apart from the fact that participation of these respondents as stated already is not proved.

The word "person" in this section and also in Section 390, where theft is 'robbery', would not seem to include obstruction of a truck when its occupants are not obstructed. This word is to be understood in its ordinary sense. There is a presumption of innocence in favour of these respondents and this presumption is reinforced by an order of acquittal. The appeal fails and is accordingly rejected.

4. There remains the case of respondents Nos. (1) and (2) to be considered. The learned Government Pleader submits that the learned Sessions Judge should have called for the report of the probation officer as required by sub-section (2) of Section 4 of the Probation of Offenders Act, 1958 before releasing them on probation of good conduct. It is not his contention that the prosecution established the charge against them under S. 395 of the Penal Code. He concedes fairly that in their case also this charge is not pressed. Mr. Y. H. Kadam, learned counsel appearing for these respondents and the respondents acquitted, submits that it was not obligatory on the part of the learned Sessions Judge to have called for the report of the probation officer before releasing the respondents Nos. (1) and (2) on probation of good conduct. He has not been able to support this submission by any reported decision. Be that as it may, I would discuss the scheme of the Probation of Offenders Act, 1958 (hereinafter referred to as 'the Act') and endeavour to show that it was obligatory on the part of the learned Sessions Judge to have called for the report of the probation officer before releasing these respondents on probation of good conduct.

5. As will appear from its preamble, the Act was enacted to provide for the release of offenders on probation or after due admonition and for matters connected therewith. Section 2 is a definition provision on usual lines. Clause (b) defines "probation officer" as meaning an officer appointed to be a probation officer or recognized as such under Section 13. Section 3 contemplates release, after due admonition, of any person found guilty of having committed the offences specified thereunder. Sub-section (1) of Section 4 envisages release on probation of good conduct, of any person found guilty of having committed an offence not punishable with death or imprisonment for life. Sub-section (2) of Section 4 provides that before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case. Sub-section (1) of Section 6 imposes restrictions on imprisonment of offenders under twenty-one years of age. Under this sub-section, when any person under

twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which he is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. Sub-section (2) of this section lays down that for the purposes of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-section (1), the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

Section 8 speaks of variation of conditions of probation. Under that provision if, on the application of the probation officer, any court which passes an order under Section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by an offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of original order or by altering the conditions thereof or by inserting additional conditions therein. The proviso says that no such variation shall be made without giving the offender and the surety an opportunity of being heard. The proviso conforms to the principles of natural justice. Sub-section (3) provides that notwithstanding anything hereinbefore contained, the court which passes an order under Section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer, that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

Sub-section (1) of Section 9 relates to procedure in case of offender failing to observe conditions of bond. It provides that if the court which passes an order under Section 4 in respect of an offender or any court which could have dealt with the offender in respect of his original offence has reason to believe, on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue

a warrant for his arrest. Section 13 contemplates appointment of a probation officer by the State Government. Section 14 speaks of duties of probation officers. Section 15 regards probation officer as a public servant by employing a deeming fiction. The other sections are not relevant for the present purpose. As will appear from sub-section (2) of Sections 4 and 6 and Sections 8 and 9, the probation officer plays an important role under the scheme of the Act.

6. In 'Ramji Missar v. State of Bihar', AIR 1963 SC 1088 (1089), their Lordships of the Supreme Court explained the object of the Act in the following words:—

"The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime."

It was also stated by their Lordships that this Act is a beneficial statute and, therefore, it is to be given wider interpretation. This decision is not directly to the point, but the above observations on the object of the Act, with respect, are apposite. In 'Rattan Lal v. State of Punjab', AIR 1965 SC 444, the scheme of the Act was considered in the context of Sections 3, 4 and 11 of the Act and it was held in that case that the calling for a report from the Probation Officer is a condition precedent for the exercise of the power under Section 6(1) of the Act by the Court.

The following observations of the Supreme Court are apposite:—

"A court cannot impose a sentence of imprisonment on a person under 21 years of age found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under S. 3 or S. 4 of the Act. For the purpose of satisfying itself in regard to the said action, under sub-s. (2) of S. 6 of the Act the Court shall call for a report from the probation officer and consider the report, if any, and any other information relating to the character and physical and mental condition of the offender. After considering the said material the Court shall satisfy itself whether it is desirable to deal with the offender under S. 3 or S. 4 of the Act. If it is not satisfied that the offender should be dealt with under either of the said two sections, it can pass the sentence of imprisonment on the offender after recording the reasons for doing so. It is suggested that the expression "if any" in

sub-s. (2) of S. 6 indicates that it is open to the Court to call for a report or not; but the word "shall" makes it a mandatory condition and the expression "if any" can in the context only cover a case where notwithstanding such requisition the Probation Officer for one reason or other has not submitted a report. Briefly stated the calling for a report from the Probation Officer is a condition precedent for the exercise of the power under S. 6(1) of the Act by the Court."

It was also observed by the Supreme Court that:—

"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him."

In 'Raghunath v. Mrs. T. P. Faria', AIR 1967 Goa 95, this Court also had the occasion to consider the scheme of Sections 3, 4 and 11 of the Act and, in that connection, the following observations are not out of place:—

"The Probation of Offenders Act, 1958, was enacted by Parliament to provide for the release of offenders on probation after due admonition and for matters connected therewith. The Act shifts emphasis from deterrence to reformation and from the crime to the criminal in accordance with the modern outlook on punishment. The emphasis is not on the individualization of acts but on the individualization of human beings. Reformation and rehabilitation of the offenders are the key notes of the Act."

7. The criminal law is concerned with wrongs and not with rights. It regards not the person but society. It results not in a benefit to the party injured but in its satisfaction to the community. The scheme of the Act, however, is an exception where the criminal law regards the offenders governed by the scheme of the Act and also society and not only society. It will appear from the decision of their Lordships of the Supreme Court in Ratan Lal's case, AIR 1965 S.C. 444, that the requirement of sub-section (2) of Section 6 is mandatory; in fact, the calling for a report from the probation officer was regarded as a condition precedent for the exercise of the jurisdiction under sub-section (1) of Section 6. As, stated earlier, the probation officer plays an important role under the scheme of the Act. A comparison of the phraseology used in sub-section (2) of Sections 4 and 6 would seem to show that the requirement of sub-section (2) of Section 4 also is mandatory, or imperative. There is an injunction under this sub-section that before making any order under sub-section (1) the Court shall take into consideration the report, if any, of the probation offi-

cer concerned in relation to the case. There is a duty imposed on the Court to which relates to a benefit in favour of the offenders governed by Section 4, and sub-section (2) thereof is to be taken as requiring and not authorizing the performance of this duty, which is not intended to be at the discretion of the Court in so far as consideration of the report is concerned. It would involve injustice or inconvenience to offenders governed by sub-section (1) of Section 4 if sub-section (2) of Section 4 is regarded as directory and not mandatory.

Mr. Kadam submits that the words "if any" in sub-section (2) of Section 4 seem to show that it is not mandatory in its nature. This submission is without force. The observations of the Supreme Court in regard to the expression "if any" in the context of sub-section (2) of Section 6 will also seem to apply to the passing of the order under sub-section (2) of Section 4. The legislative command, in effect and substance, is that the Court shall take into consideration the report of the probation officer. For my part, as I see this matter, the word "shall" used in this sub-section is a word of command which is to be taken as mandatory, and not directory. It is true that the word "shall" in a statute does not necessarily mean that in every case it will have mandatory effect and not directory. Its meaning will vary in colour and content according to its context.

In 'Jagan Nath v. Jaswant Singh', AIR 1954 S.C. 210 (214), the provisions of Section 82 of the Representation of the People Act, 1951 relating to impleading of parties, were regarded as directory in spite of the word "shall" used therein. This was on the analogy of Order XXXIV, Rule 1, C.P.C. This section was not regarded as mandatory because non-compliance was not made penal. In 'Hari Vishnu v. Ahmad Ishaque', AIR 1955 SC 233 (245), relying on a famous case 'Julius v. Bishop of Oxford', (1880) 5 AC 214, where various rules were laid down for determining when a statute might be construed as mandatory and when as directory, the Supreme Court concluded that Rule 47(1) (a) to (c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules (1951) relating to ballot papers was mandatory. The word "shall" in this rule was not construed as meaning "may". In 'State of M.P. v. Azad Bharat Finance Co.', AIR 1967 SC 276 the provisions of Section 11(d) of the Opium Act, 1878 were regarded by the Supreme Court as directory or permissible and not mandatory or obligatory, notwithstanding the use of the word "shall". In 'Jagdish Gandhi v. Legislative Council, U.P.', AIR 1966 All. 291 (299) the learned Judges of the Allahabad High

Court observed that the provision regarding the specification of time in Rule 75(1) (b) of the U.P. Legislative Council Rules of Procedure and Conduct of Business was directory in spite of the use of the word "shall" therein.

8. As will appear from sub-section (2) of Section 4, the consideration of the report of the probation officer is of the essence of the thing required. It is a matter of substance and not a matter of mere form. The probation officer is in a better position to know the character and antecedents of the offenders and his report is to be considered before making an order under sub-section (1) of Section 4. Mr. S. Tamba cites 'State of Mysore v. Saib Gunda', 1964(1) Cr. L.J. 460 (Mys), in support of his contention that the requirement of sub-section (2) of Section 4 is mandatory. It was held in this case that in the absence of a report from the probation officer under sub-section (1) of Section 4, the Magistrate had no authority to release the accused on probation of good conduct. This decision does not discuss the scheme of the Act in detail but the obiter dicta is relevant for our purpose. This opinion was really not necessary to the decision given, for Section 4 of the Act under which the learned Magistrate convicted the accused and thereafter released them on probation of good conduct was inapplicable in terms. The conviction of the accused was for the offence punishable under Section 326 of the Penal Code. The maximum punishment thereunder being imprisonment for life this section was not attracted.

9. It is common ground that the probation officer was not asked to give his report before directing release of respondents Nos. (1) and (2) on probation of good conduct under Section 4 of the Act. It is thus clear that there was no compliance with the mandatory provision under sub-section (2) of Section 4. It appears consideration of report, in terms of sub-section (2) of Section 4, is a condition precedent to the legality or validity of the order passed under sub-section (1) of Section 4. Nullification of this order is a normal consequence of disobedience of the mandatory requirement in sub-section (2). In this view of the matter the order passed by the learned Sessions Judge is set aside and the revision petition filed on behalf of the State allowed. The learned Sessions Judge is directed to take into consideration the report of the probation officer before deciding the case on its merits.

Petition allowed.

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V. S. JETLEY, J. C.

State, Appellant v. Jagdish B. Rau and others, Respondents.

Criminal Appeals Nos. 23 and 24 of 1969, D/- 28-7-1969.

Police Act (1861), S. 34 — Scope and applicability — Notification of State Government extending provisions of S. 34 to whole of territory is not in conformity with requirements of S. 34 — Expression 'whole of territory' would not take within its sweep a town for purpose of S. 34 — "Town", meaning of — In absence of notification specially extending scheme of S. 34 to a town, prosecution for offences under S. 34 committed in that town is not maintainable.

What Section 34 of the Police Act expressly requires is that it should be specially extended by the State Government to "any town" and when such extension takes place, then the enumerated offences committed within the limits of any town can be investigated and tried. Hence a notification of the State Government extending the provisions of S. 34 to the whole of the territory is not in conformity with the requirements of S. 34.

(Paras 5, 6)

The expression "whole of the territory" in the notification would not take within its sweep a town for the purpose of S. 34. The whole of the territory may be one unit for other purposes but for the purpose of S. 34, it cannot be equated to "any town". The two expressions are different in meaning and content. The word "town" is not the same thing as "territory" for the purposes of this section. It is not defined in the Act. It is not a term of art, and, therefore, it is to be understood in its ordinary sense. The dictionary meaning of "town" is an assemblage of buildings, public or private larger than a village, and having more complete and independent Local Government. AIR 1952 Cal. 753, Rel. on.

(Paras 5, 6)

Hence in absence of a notification specially extending the scheme of S. 34 to a town, the prosecution for the offences under S. 34 committed in that town is not maintainable. (Paras 5, 6)

Cases Referred: Chronological Paras
(1952) AIR 1952 Cal. 753 (V. 39),
Belait Sheikh v. State of West Bengal 5

In Cri. Appeal No. 23/69

S. Tamba, Govt. Pleader, for the State;
Respondents Nos. 1, 3 and 6 in person.

In Cri. Appeal No. 24/69

S. Tamba, Govt. Pleader, for the State;
G. D. Kamat, for Respondent.

HM/HM/D573/69/LGC/B

JUDGMENT:— The short question for consideration in criminal appeals Nos. 23 and 24 of 1969 is whether the notification dated 3rd August, 1964, published in the local Government Gazette dated 13th August, 1964, is in conformity with the requirements of Section 34 of the Police Act 1861 (hereinafter referred to as 'the Act').

2. The material facts may be stated before the question formulated is answered. In criminal appeal No. 23 of 1969, the broad facts are that Jagdish Rau and 6 others were seen in Panjim at 3 a.m. on 31st March, 1967, throwing burning crackers near the Gomantak Press Office and near some residential premises thereby causing annoyance to the occupants. They were moving about in a bus. They were stopped near the office of the Bank of Baroda, when, according to the prosecution, they started behaving in a disorderly and riotous manner under the influence of liquor. This incident took place following the declaration of the election results of the Assembly constituency of Panjim. The police, after necessary investigation, challaned them under Section 34 of the Act. In support of the prosecution were examined Sub-Inspector Prabhu Desai, Assistant Sub-Inspector Hugo Nazare and some other witnesses. The learned Magistrate tried this case summarily. He came to the conclusion that as Section 34 had not been specially extended to Panjim as required, therefore the prosecution was not maintainable. In this view of the matter he directed their acquittal. In criminal appeal No. 24 of 1969, the respondent was also tried under Section 34 of the Act. The prosecution case against him is that on 3rd December, 1968 at about 22.00 hrs. at Azad Maidan near Theatre Hall, Panjim, he was found misbehaving at the main gate of this theatre. He was sent to the hospital where it was certified that he was under the influence of liquor. He was also seen abusing Assistant Sub-Inspector Noberto Gonsalves. He was arrested. He was thereafter challaned under Section 34 of the Act. This case was also tried summarily. The learned Magistrate after examining the prosecution evidence directed his acquittal on the same ground as in the case against Jagdish Rau and 6 others. The State felt aggrieved by these two decisions dated 25th March 1969 and 26th March, 1969, and filed the present appeals against their acquittal under subsection (1) of Section 417 of the Code of Criminal Procedure.

3. The scheme of the Act may be broadly explained. As will appear from the short title and the preamble, the Act was enacted for the regulation and reorganization of the police, in order to make it a more efficient instrument for the prevention and detection of crime.

Section 1 is an interpretation clause on the usual lines. Sections 2 to 29 relate to regulation and reorganization of the police and other allied matters. Sections 30 to 33 deal with regulation of public assemblies and processions etc. Section 34, to the extent it is material for the present purpose, reads as under:—

"Any person who, on any road or in any open place or street or thoroughfare within the limits of any town to which this section shall be specially extended by the State Government, commits any of the following offences, to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or to imprisonment with or without hard labour not exceeding eight days; and it shall be lawful for any police-officer to take into custody, without a warrant, any person who within his view commits any of such offences, namely:—

Sixth — Any person who is found drunk or riotous or who is incapable of taking care of himself."

Sections 35 to 45 relate to matters such as recovery of penalties, fines, etc. Sub-section (1) of Section 46 provides that the Act shall not, by its own operation, take effect in any State or place, but the State Government by an order to be published in the official gazette, may extend the whole or any part of the Act to any State or place, and the whole or such portion of the Act as shall be specified in such order shall thereupon take effect in such State or place. Sub-section (2) provides for rule-making power vested in the State Government for regulating the procedure etc., to be followed by Magistrates and police officers in the discharge of their duties imposed upon them by or under the Act. Section 47 provides for exercise of authority of District Superintendent of Police over village police.

4. The Act as a whole, was extended to the territory under sub-section (1) of Section 3 of the Goa, Daman and Diu (Laws) Regulation, 1962, promulgated by the President on 22nd November, 1962. The Act was brought into force in pursuance of sub-section (2) of Section 3 of this Regulation on 15th December, 1963, by notification dated 31st December, 1963, published in the local Government Gazette, dated 9th January, 1964. By notification dated 3rd August, 1964, published in the local Government Gazette, dated 13th August, 1964, in exercise of the powers conferred by Section 34 of the Act, the Lt. Governor extended the provisions of this Section to the whole of the territory, with effect from 13th August, 1964. This notification was relied upon in support of the prosecution against the respondents under Section 34.

5. Section 34 enumerates different kinds of offences which are committed by any person on any road or in any open place or street or thoroughfare within the limits of "any town", to which it is specially extended by the State Government. It is true that this section has been extended to "the whole of the territory" but what it expressly envisages is its extension to "any town" and not to any territory. It is not in dispute that the alleged offences for which the respondents were tried took place within the limits of Panjim. In the memo of appeal it was submitted that the whole territory has been regarded as one unit and therefore the offences committed under Section 34 in Panjim would also be covered by the notification dated 3rd August, 1964. In other words, the extension of the Act to the entire territory would also include extension to the town of Panjim as contemplated by this section. This submission does not seem to be sound. The word "town" is not the same thing as "territory" for the purposes of this section. It is not defined in the Act. It is not a term of art, and, therefore, it is to be understood in its ordinary sense. The primary duty of a Court is to find its natural meaning in its context. The dictionary meaning of "town" is "an assemblage of buildings, public or private larger than a village, and having more complete and independent local Government" (Shorter Oxford Dictionary Vol. II p. 2221). In *Belait Sheikh v. State of West Bengal*, AIR 1952 Cal. 753 the meaning of the word 'town' was considered by the learned Judges of the Calcutta High Court for the purposes of Section 6 of the Bengal Municipal Act, 1932. Under Section 6 of this Act, the State Government has the power to declare by notification its intention to constitute into a municipality, a town with or without a local area or a village, subject to the proviso which is not relevant for the present purpose. Section 8 enables the Government to constitute a municipality by notification. The first requirement was that there must be a town, to be constituted into a municipality. The learned Judges of the Calcutta High Court observed:—

"The word has however a fairly definite connotation to the ordinary man — the main attributes of a town being the existence of houses in clear proximity, concentration of a large number of people in a comparatively small area, engagement of the bulk of the population in non-agricultural pursuits. We are bound to hold, in the absence of any statutory definition of the word, that the legislature used it in the sense in which ordinary people understand it."

The aforesaid observations are apposite. The notification dated 3rd August,

1964, specially extending Section 34 of the Act to the whole of the territory is not likely to be viewed by ordinary people as an act of extension of this section to Panjim, which is a town in the territory. A general cross-section of the community — the butcher, the baker and the candlestick maker — will not regard the town of Panjim as a territory for the purposes of this notification. What Section 34 expressly requires is that it should be specially extended by the State Government to "any town", and when such extension takes place, then the enumerated offences committed within the limits of any town can be investigated and tried. These offences are minor offences for which a fine not exceeding Rs. 50/- or imprisonment not exceeding 8 days is provided. It enables any police officer to take into custody without warrant any person who within his view commits any of these offences. The regulatory powers in Sections 30 to 33 are not confined to towns but they are applied generally to towns and other places. The offences under Section 34 are different in nature and character from the offences under these sections. They seem to be peculiar to towns. Section 34 has to be specially extended to any town before any person committing these offences could be tried and convicted. The words "district", "place" and "territories" employed in Sections 26, 46 and 47 of the Act have a different meaning in their context. These words are not helpful for the purposes of ascertaining the true meaning and ambit of the word 'town'.

6. Mr. G. D. Kamat, learned counsel for the respondent, in criminal appeal No. 24 of 1969, contends that in absence of a notification extending the scheme of Section 34 to the town of Panjim, the prosecutions are not maintainable. This contention is sound. It seems the expression "whole of the territory" in the notification dated 3rd August, 1964, would not take within its sweep the town of Panjim for the purpose of Section 34. The whole of the territory may be one unit for other purposes but for the purpose of Section 34, it cannot be equated to "any town". The two expressions are different in meaning and content. In view of the scheme of the Act in general and Section 34 in particular, the learned Government Pleader concedes that, in absence of a notification specially extending the scheme of Section 34 to the town of Panjim, the prosecution for the offences enumerated therein is not maintainable. The learned Magistrate acted correctly when he directed acquittal of the respondents in both cases under Section 247 of the Code of Criminal Procedure on the ground of failure to comply with the provisions of Section 34. The appeals filed on behalf of the State must fail because of this legal

flaw. In this view of the matter it is not necessary to express any opinion on the merits of the prosecution evidence. The appeals are accordingly dismissed. Order accordingly.

Appeals dismissed.

**AIR 1970 GOA, DAMAN & DIU 56
(V 57 C 11)**

V. S. JETLEY, J. C.

Registrar, Judicial Commissioner's Court, Applicant v. Fr. Sebastiao Francisco Xavier dos Remedios Monteiro and State, Respondents.

Criminal Revn. Appln. 30 of 1969, D/- 16-6-1969.

(A) Foreigners Act (1946), Ss. 14 and 3(2)(c) — Sentence — Accused though born and brought up in Goa choosing to retain his Portuguese nationality after Goa became part of India — Accused deliberately disobeying order under S. 3(2)(c) for second time — Accused contending that in spite of de facto occupation of Government of India, Goa continued de jure as Portuguese territory and by exercising option to continue as Portuguese national he did not become foreigner — Held sentence of simple imprisonment for three months and fine of Rs. 100/- or, in default further imprisonment for 20 days was unduly lenient and manifestly inadequate when accused had been wilfully disregarding law and challenging territorial integrity of India; sufficiently deterrent sentence was called for in the ends of justice — Sentence enhanced in exercise of powers under S. 439(2) of Criminal P. C. (1898) to 12 months simple imprisonment and fine of Rs. 1,000 and in default, further imprisonment for six months. (Paras 6, 7)

(B) Criminal P. C. (1898), Ss. 439(1) and 32 — Principles of punishment — Duty of Court — Enhancement of sentence — Penal Code (1860), S. 53.

There should be an end of all temporal things and that end cannot be achieved with soft-peddling with the question of the sentence. A judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case; but, at the same time, he is not expected to act ostrich-like and close his eyes to deliberate disregard or defiance of the law of the land. Judicial detachment is a virtue; but not judicial passivity. (Para 6)

Cases Referred: Chronological Paras (1968) Cri. Appeal No. 173 of 1968, D/- 4-12-1968=1969-1 S.C. W. R.

87, Shivajirao v. State of Maharashtra
(1968) AIR 1968 Goa 17 (V 55)=
1968 Cri. L. J. 316, Sebastiao
Francisco v. State
(1967) Cri. Appeal No. 62 of 1965,
D/- 20-11-1967=1968 M.P. L. J.
371 (SC), Bhalchandra Waman
Pathe v. State of Maharashtra
(1967) AIR 1967 Goa 95 (V 54)=
1967 Cri. L. J. 1005, Raghunath
Naik v. Mrs. Terezinha Pacheco
Faria
(1959) AIR 1959 S.C. 436 (V 46)=
1959 Cri. L. J. 527, Alamgir v.
State of Bihar
S. Tamba, Govt. Pleader, for the State;
Respondent in person.

ORDER:— This is one of those exceptional cases where exercise of revisional jurisdiction suo motu under Section 439 (1) of the Code of Criminal Procedure, is considered necessary in the ends of justice.

2. The respondent — Fr. Sebastiao Francisco Xavier dos Remedios Monteiro — was served with an order under Section 3(2)(c) of the Foreigner's Act, 1946, requiring him not to remain in India after the expiry of the date of its service. This order, dated 11th April, 1969, was issued by the Lt. Governor of this territory. He did not leave India. He was accordingly prosecuted in the Court of the First Class Magistrate, Mapusa, on 28th April, 1969. The charge was framed against him by the learned Magistrate under Section 14 of the Foreigner's Act. He pleaded not guilty. In support of the prosecution were examined prosecution witnesses Domingos Fernandes (P.W. 1), Shivaji K. Zamaoli (P.W. 2), Cruz D'Souza (P.W. 3), and Vishwanat G. Dessai (P.W. 4). Out of these witnesses three are inspectors of police, while Cruz D'Souza is a Head Constable. The respondent led no defence evidence. In his statement under Section 342 of the Code of Criminal Procedure, he admitted that he had been served with an order requiring him to leave India. The reason why he did not leave India was that he was born in Goa where he and his ancestors had lived for centuries; that as Goa was a part of Portugal as its overseas province he was a Portuguese national; that the Government of India had occupied this territory forcibly and that in spite of de facto occupation by the Government of India it continued de jure as Portuguese territory; and that he did not become a foreigner when he declared in 1962 that he wanted to retain the Portuguese nationality. The learned Magistrate, after considering the prosecution evidence and this statement of the respondent, convicted him under Section 14 of the Foreigners Act for breach of the order under Section 3(2) (c) issued thereunder. The sentence imposed

by the learned Magistrate on 13th May, 1969, was simple imprisonment for three months and a fine of Rs. 100/- or, in default of its payment, to undergo further imprisonment for 20 days. The respondent had previously been convicted in 1965 for contravention of a similar order dated 19th June, 1965, under Section 3(2) (c), by another Magistrate, and was sentenced to undergo simple imprisonment for 30 days and a fine of Rs. 50/-, and, in default, to undergo simple imprisonment for 5 days. The appellant appealed against that decision to the learned Sessions Judge but that appeal was rejected. He then moved this Court in revision, but without success. He felt aggrieved and later sought special leave to appeal against the decision of this Court. This leave was granted by their Lordships of the Supreme Court and after hearing the parties their Lordships dismissed the said appeal by order dated 26th March, 1969. The sentence imposed on 13th May, 1969, was considered grossly inadequate and, therefore, a notice was issued on 27th May, 1969, under Section 439(2) of the Code of Criminal Procedure, requiring him to show cause why this sentence should not be enhanced, and also why the imprisonment should not be rigorous. This action was taken suo motu for the purpose of satisfying myself about the correctness or propriety of the sentence imposed, after calling for the record of the criminal proceeding. This, in short, is the background of this case.

3. The respondent, in response to the notice issued to him, reaffirmed that he is innocent. In his own words:—

"I wish to stress that I have love for justice and I am an observer of order and discipline. My attitude was dictated by an effort of love for truth and honesty. It comforts me exceedingly to firmly believe that justice is being done simultaneously outside the human forum as unfaillingly as God exists. I pray to our Lord Jesus Christ that He in the meantime may help me as in the past to overcome the human frailties which usually appear in the disputes of this nature, such as the weakness of hatred and weakness of cowardice. I once again affirm that I am innocent. I believe that my punishment will not be enhanced but on the contrary it will be set aside."

4. The respondent last time was represented in this Court by Mr. Edward Gardner, Q.C., from England, assisted by Mr. Antonio Anastasio Bruto da Costa, local counsel. This time he is not represented by any counsel. He states that no appeal has been preferred by him in the Court of Session, Panjim, and that he has not even applied for a certified copy of the judgment of the learned Magistrate. The learned counsel appearing on behalf of the respondent in the lower

court raised the following three objections to the maintainability of the prosecution launched against the respondent: (1) The accused, although a Portuguese citizen, is not a foreigner for the purposes of the Foreigner's Act, since he was born and always lived in Goa; (2) the order of the Lt. Governor is illegal, for the prosecution did not produce in the Court the notification under which the powers to deport foreigners are vested in him; and (3) that the prosecution did not prove, as it should have done, that the signature on the order requiring him to leave India is of the Lt. Governor. The learned Magistrate considered these technical objections carefully and in the light of the previous decisions of the superior courts on similar objections, he came to the conclusion that they were devoid of substance. I shall very briefly deal with these objections. As regards the first objection the respondent is undoubtedly a "foreigner" within the meaning of Section 2(a) (iii) of the Foreigner's Act. It is stated by him in this Court that because he was born and brought up in Goa before liberation therefore he cannot be treated as a foreigner. By way of an analogy he cites the example of a French man who, according to him, if he had been staying here for some time, could have been treated as a foreigner, but his own case is distinguishable. This analogy is not relevant to the point. It was on the basis of the status of the respondent as a foreigner that this Court as well as the Supreme Court maintained the conviction and the sentence imposed on him for contravention of a similar order in 1965. The second objection also is without substance. Mr. S. Tamba, learned Government Pleader, appearing on behalf of the State, produces the notification dated 12th March, 1965, in this Court delegating powers in favour of the Lt. Governor in support of his submission that the Lt. Governor acted under the powers conferred by this notification. In para 2 of my previous decision reported in AIR 1968 Goa 17 this aspect of the matter had been considered and a similar objection raised by the respondent was overruled. At page 17 of the paper book the respondent admitted the legality of the order requiring him to leave India. The delegation in favour of the Lt. Governor was in pursuance of Clause (1) of Article 239 of the Constitution. The notification issued is a "law" within the meaning of Clause (1) of Article 13 of the Constitution. The provisions of definition Section 3(29) of the General Clauses Act 1897, relied upon by the learned Magistrate, do not seem to be applicable, for the simple reason that this Act applies to all Central Acts enacted after it came into force. The Indian Evidence Act of 1872, a Central law, was in existence before this Act and

therefore it will not apply. As regards the third objection it is also devoid of substance. The learned Magistrate has carefully considered this objection. It will be seen from the judgment of the learned Magistrate that the respondent is repeating the same objections which had been urged on his behalf earlier in a criminal prosecution arising out of the contravention of a similar order in 1965. I am satisfied that the conviction in this case was properly recorded by the learned Magistrate and the respondent has not been able to satisfy me to the contrary. The respondent has had an adequate opportunity of being heard both as to the correctness of his conviction and also the propriety of the sentence.

5. In 'Bhalchandra Waman Pethe v. State of Maharashtra', Criminal Appeal by special leave No. (62 of 1955) decided on 20-11-1957 (SC), the Supreme Court observed:—

"What sentence should be imposed in a given case is essentially within the discretion of the trial Court. The High Court would not be justified in interfering with that discretion unless it is satisfied that the sentence imposed by the trial Court is unduly lenient or in other words grossly inadequate."

In making these observations reliance was placed by the Supreme Court on the following passage from 'Alamgir v. State of Bihar', AIR 1959 SC 436:—

"It is unnecessary to emphasize that the question of sentence is normally in the discretion of the trial Judge. It is for the trial Judge to take into account all relevant circumstances and decide what sentence would meet the ends of justice in a given case. The High Court undoubtedly has jurisdiction to enhance such sentence under Section 439 of the Code of Criminal Procedure, but this jurisdiction can be properly exercised only if the High Court is satisfied that the sentence imposed by the trial Judge is unduly lenient or, that, in passing the order of sentence, the trial Judge had manifestly failed to consider the relevant facts"

In 'Shivajirao v. State of Maharashtra', Criminal Appeal by special leave No. 173 of 1968 (SC) the Supreme Court said:—

"In a matter of enhancement there should not be interference when the sentence of the trial Court imposes substantial punishment. Interference is only called for when it is manifestly inadequate."

6. As stated by me in the opening paragraph, this is an exceptional case where interference in revision is considered necessary by this Court. There is a deliberate disobedience of the law and this is to be seriously reviewed. This is the second instance of such a disobedience. There should be an end of all tem-

poral things and that end cannot be achieved with soft-peddling with the question of the sentence. A judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case; but, at the same time, he is not expected to act ostrich-like and close his eyes to deliberate disregard or defiance of the law of the land. Judicial detachment is a virtue, but not judicial passivity. The respondent is not a citizen of India. He is a Portuguese national and thus a "foreigner" within the meaning of Section 2(a) (iii) of the Foreigners Act. As a foreigner, he has no right to remain in this territory. It is true that he was born and brought up in Goa, but after this territory became part of India, he got an option to become a citizen of India but he chose to retain his Portuguese nationality. The law requiring a foreigner to leave India is not an unjust law so that it could be disobeyed by men of conscience on ethical grounds. One of the earliest examples of disobedience of an unjust law is contained in Sophocles' tragedy 'Antigone'. In this Greek play, Creon, a King, proclaims that no one may bury the corpse of Polynices, a warrior who died attacking the city-state of Thebes. But, according to Greek religion, an absolute duty lay on the family of a dead man to see that his body received burial rites, as without them he might be prejudiced in the next world. Antigone, a sister of the dead man, deliberately disobeys the King's law, so that she may obey the divine law. It is not the case of the respondent that he is disregarding the order of the Lt. Governor requiring him to leave India so that he may obey the divine law. Far from it. The other priests in this territory similarly situated opted for Citizenship of India and they have not been disregarding or disobeying the laws of the land. The traditions of Christianity, both Catholic and Reformed on which Christian culture is based, place due stress on obedience to the laws of the land. They respect the established order. If the respondent had really "love for justice" and further wished to observe "Order and discipline" he should have complied with the order requiring him to leave India, but instead of doing so he has wilfully disregarded it. I have a feeling that he is deliberately disobeying the law of the land at the instance of a certain section of the people who seem to be misleading him. They seem to be pulling strings behind the screen. There is nothing ethical about his stand in wilfully disregarding the order passed by the Lt. Governor requiring him to leave India. His parrot-like 'perform-

ance' that Portugal is a de jure sovereign of this territory gives us some insight into his mind. This does not advance his cause nor of others. As a foreigner living here he has no right to question the territorial integrity of this country. He has prayed for blessings of "Our Lord Jesus Christ" to "overcome human frailties", but I wish he had done so for a better cause. Political robe does not befit a priest.

7. The sentence imposed by the learned Magistrate is unduly lenient and manifestly inadequate. This is also the contention of the learned Government Pleader. A sufficiently deterrent sentence therefore is called for in the ends of justice. Crime is contagious. As stated in 'Raghunath Naik v. Mrs. Terezinha Pacheco Faria', AIR 1967 Goa 95, the object of punishment is prevention of crime and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act and also to prevent others from committing similar crimes. The law is no respecter of persons, be they rich or poor, priests or peasants. In the view taken by me of this case, the conviction of the respondent is maintained but the sentence under Section 14 of the Foreigners Act is enhanced to 12 months simple imprisonment and a fine of Rs. 1000/- or, in default of payment, additional simple imprisonment for 6 months. The maximum sentence under Section 14 is 5 years and also fine.

8. It is a matter of common knowledge that if such wilful disregard of the law had taken place during the Portuguese regime the respondent would have received a very heavy sentence, but every system of law has its own good or bad points. The respondent's case is not concluded by this judgment. If he is aggrieved by the conviction and the sentence now imposed he has the Supreme Court to which he can resort and, for this purpose, he is not without constitutional remedies. Speaking for myself, it would be a matter of comfort to me that if I have erred in enhancing the sentence, my error would be rectified by the Supreme Court. Let me, meanwhile, discharge my duty as I see it. Order accordingly.

Order accordingly.

AIR 1970 GOA, DAMAN & DIU 59
(V 57 C 12)

V. S. JETLEY, J. C.

Gulabbhai Vallabbhai Desai and others, Petitioners v. H. A. Khan, Collector of Daman and others, Respondents.

Writ Petns. Nos. 11 and 39 of 1967.
D/- 17-10-1969.

KM/LM/F305/69/KSB/M

(A) Evidence Act (1872), S. 115 — Civil P. C. (1908), S. 11 — Doctrine of approbate and reprobate and principle of constructive res judicata — Applicable to writ proceedings.

In a previous writ petition under Article 32 before the Supreme Court, the case of the petitioner was that he had purchased at auction the whole village R for cultivation under a sale deed which clearly stated that a small area of land had already been sold to another. The Supreme Court held that the village R fell within the inclusive part of the definition of 'an estate' under Art. 31-A(2)(a) (iii) of the Constitution and therefore the validity of the Daman Regulation of 1962 was protected from challenge under Articles 14, 19 and 31 of the Constitution. In a subsequent writ petition before the High Court, between the same parties the petitioner's contention was that he was not the holder of the whole village R and as such was not a proprietor as defined in S. 2(h) of the Regulation.

Held (i) that the doctrine of approbate and reprobate which is a species of estoppel applied to the conduct of the petitioner and he should not be permitted to depart from the unequivocal stand taken by him in the Supreme Court and contend that he is not the proprietor of the whole village. AIR 1933 P.C. 167, Rel. on. (Para 3)

(ii) that apart from the doctrine of approbate and reprobate the principle of constructive res judicata would also apply. The petitioner might and ought to have raised the plea before the Supreme Court but having failed to do so he could not be permitted to raise the plea again. AIR 1965 S.C. 1150, Applied. (Para 3)

(B) Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (1962), Pre, Ss. 2(h), 3, 10(2) proviso & 12 — Reading these provisions prior to Amendment of 1968 a proprietor of a part of village was covered by definition of proprietor in S. 2(h).

The scheme of the Regulation prior to its Amendment in 1968 as appears from Preamble, Ss. 2(h), 3, 10(2) Proviso and 12 shows that a proprietor of a part of village is covered by the definition of 'proprietor' in S. 2(h). It is possible to take the view that when the Regulation speaks of a village as a unit, it also includes a part thereof. The principle that the greater includes the less can be applied to the Regulation, particularly when it does not say in express terms that a village will not include a part thereof. (1954) 1 All. E. R. 408, Rel. on. (Para 4)

The Regulation is a piece of beneficent legislation and is to be liberally construed so as to advance its objects and suppress the mischief aimed at by the law-making authority. A literal construction has only a prima facie preference. (Para 4)

(C) Civil P. C. (1908), Pre. — Interpretation of statutes — Statement of objects and reasons — Can be properly looked into for limited purpose of ascertaining the circumstances prevailing at the time of enactment of Act. (Para 5)

(D) Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (1962), S. 2 (d) — Definition of village as inserted by Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act (1968) — S. 2(d) is not ultra vires the State Legislature and is constitutionally valid — Its validity cannot be challenged under Arts. 14, 19(1)(f) and 31 as it is protected by Art. 31-A of the Constitution. (Constitution of India, Arts. 31-A, 245, Sch. 7, List II, Entry 18) — (Government of Union Territories Act (1963), S. 18).

S. 2(d) of the Regulation defining 'village' as including a part of village is not ultra vires the legislative competence of the State legislature in view of Sch. 7, List II, Entry 18 of the Constitution read with S. 18 of the Government of Union Territories Act, 1963. (Conceded).

(Para 7)

The Regulation of 1962 is no doubt protected by Art. 31-A. The Amendment Act of 1968 was enacted to further the object of the Regulation and cannot be considered in isolation. The amendments brought about by the Act are for carrying out the agrarian reforms contemplated by the Regulation, as would be clear from its tenor and intent. The omission to mention that it was enacted to carry out agrarian reforms is not decisive. The law is well settled that the Legislature has power in proper cases to pass even retrospective legislation. AIR 1959 S.C. 475, Rel. on. The Legislature can legislate prospectively and retrospectively unless there is a constitutional bar. The Act conforms to the pattern followed in other parts of India for giving effect to agrarian reforms, and the argument against its validity on the ground that Section 2(d) is a colourable piece of legislation must fail. The Act including this section is protected by Article 31-A. This section is not a fraud on the Constitution. Far from it, the Act does not attempt indirectly what it cannot do directly. The retrospective effect given to the word "village" by Section 2(d) is not invalid. If the Regulation has the protection of Article 31-A when it applies to a proprietor of a whole village, with equal force, the Act including S. 2(d) will also have the same protection when it applies to a part of a village. AIR 1955 S.C. 41, Rel. on. (Para 7)

(E) Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regulation (1962), Ss. 4(b) and 12-A — Grass or pasture land of proprietor — Vesting

of, in Central Government — Classification of such lands has to be made under authority of law — Under S. 12-A Mamlatdar and Collector have to make a quasi-judicial inquiry after following rules of natural justice — Classification of grass lands on basis of executive inquiry made behind back of proprietor violates Art. 31(1) of the Constitution and principles of natural justice — Writ of Mandamus issued directing authorities to make fresh inquiry according to law — (Constitution of India, Arts. 31(1) and 226) — (Words and Phrases — Grass or pasture lands).

Section 4(b) of the Regulation, does not permit a proprietor to retain pasture or grasslands. He could retain lands under his personal cultivation, not being pasture or grassland. "Land for pasture" has the protection of Art. 31-A(2) (a)(iii) of the Constitution. The inclusive definition of "estate" takes in this category of land expressly but there is no reference in terms to "land for grass" in this provision. In the absence of any definition of 'pasture or grasslands' in the Act these words are to be understood in their ordinary sense. The dictionary meaning of grasslands is 'pasture or grazing land' and pasture land is a piece of land covered with grass. (Para 8)

The law is well settled that even in an administrative inquiry, where the rights of persons are affected resulting in serious consequences the principles of natural justice are to be observed and that no decision can be given against a party without giving him reasonable hearing. AIR 1967 Goa 102 (112) & AIR 1969 NSC 108, Rel. on. (Para 8)

The Regulation and the Rules made thereunder do not provide for an inquiry on the lines of Section 12-A of the Amending Act, which contemplates a quasi-judicial inquiry.

Classification of grasslands has to be by an authority of law before these lands could vest in the Central Government. Art. 31(1) of the Constitution makes this position clear. A party cannot be deprived of these lands on the basis of an executive inquiry. The Mamlatdar and the Collector are not constituted under the Regulation as the final authorities to decide whether particular lands are really grasslands or pasture lands. Whether they are so is primarily a question of fact. The view taken by the authorities that they are grasslands on the basis of an executive inquiry viz., survey inquiry, without conforming to the principles of natural justice and also in contravention of Article 31(1) of the Constitution, has not the support of law. It is not binding on the petitioner. This question now has to be decided by the Mamlatdar and the Collector according to law. (Para 8)

(F) Tenancy Laws — Daman (Abolition of Proprietorship of Villages) Regu-

lation (1962), S. 12F — Section though excludes jurisdiction of Civil Court does not bar writ jurisdiction of High Court.

Section 12-F does not bar the writ jurisdiction of the High Court, but as far as other civil courts are concerned they will have no jurisdiction if the question under consideration is by or under the Regulation required to be settled, decided or dealt with by the Mamlatdar or the Collector. The writ jurisdiction of the High Court is also to be exercised according to well-settled principles. (Para 8)

(G) Evidence Act (1872), Ss. 31 and 115 — Estoppel by admission — Admission in writ petition before Supreme Court that certain lands in possession of petitioner were pasture lands and that they were used by him for grazing his cattle — It is not open to petitioner in subsequent writ petition before High Court to turn round and say that admission is not correct — He has to abide by that admission. (Para 8)

(H) Constitution of India, Arts. 31-A (2)(a)(iii), 14, 19 and 31 — 'Pasture lands' — Included in definition of estate under Art. 31-A (2)(a)(iii) irrespective of whether they are privately owned or are public pasture lands — Their taking over by Government cannot be questioned on ground of violation of Arts. 14, 19 and 31 in view of protection under Art. 31-A. (Para 8)

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R. J. Joshi and B. S. Ramani, for Petitioners (in both Appeals); S. K. Bhabha and S. Tamba, for Respondents (in both Appeals).

ORDER:— The following questions arise for consideration in petition No. 11 of 1967 filed on behalf of the petitioner — Gulabbhai Vallabbhai Desai — under Article 226 of the Constitution:— (1) whether the petitioner is the proprietor of the village 'Regunwada', within the meaning of Section 2(h) of the Daman (Abolition of Proprietorship of Villages) Regulation, 1962; (2) if the petitioner is not the proprietor as defined under the said Section 2(h), whether the Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act, 1968, in so far as it retrospectively defines the word "village" in Section 2(d) as including a part of a village, is invalid, Article 31-A of the Constitution being inapplicable; (3) if the petitioner is the proprietor, as defined under the said Section 2(h), whether the 90 acres of the land classified as the grassland and the 20 acres of the land classified as the pasture land, on behalf of the respondents, are really the grass and pasture lands as understood under the Regulation; (4) whether the view taken by the Respondents 1 and 2 that they are the grass and pasture lands is in violation of the principles of natural justice; and (5) whether the proposed action of taking over the said lands is in violation of Article 14 of the Constitution, as similar action is not contemplated by

these respondents against other persons similarly situated. Some of these questions also arise in petition No. 39 of 1967 filed on behalf of the petitioners Sunderlall Uttamchand and four others, under Article 226 of the Constitution. They relate to the lands other than the grass and pasture lands. It would be convenient to deal first with the case set out by the parties in petition No. 11 of 1967. The case of the petitioners Sunderlall Uttamchand and 4 others will not take long to dispose of in the light of the conclusions reached in this petition.

2. The scheme of the Daman (Abolition of Proprietorship of Villages) Regulation, 1962, may be broadly explained before considering the questions formulated in their order, (hereinafter referred to as 'the Regulation'). The Regulation was promulgated by the President of India under Article 240 of the Constitution, and it came into force on the 13th of July, 1962. This is "the appointed date" within the meaning of Section 2(b) of the Regulation. Section 2(d) defines the words "to cultivate personally", as meaning to cultivate on one's own account— (i) by one's own labour, or (ii) by the labour of any member of one's family, or (iii) by servant on wages payable in cash or kind but not in crop share or by hired labour under one's personal supervision or the personal supervision of any member of one's family. The explanation to this section is not relevant for the present purpose. "Cultivation" under Section 2(e), means the use of lands for the purpose of agriculture or horticulture. Section 2(f) defines "cultivating tenant" to mean a person who cultivates personally any land belonging to another under an agreement, express or implied, and pays rent therefor in cash or kind or delivers a share of the produce. "Land" under Section 2(d) means every class or category of land and includes— (i) benefits to arise out of such land, and (ii) things attached to earth or permanently fixed to anything attached to earth. "Proprietor", under Section 2(h), means a person who holds any village or villages granted to him or any of his predecessors-in-interest by the former Portuguese Government by way of gift, sale or otherwise and includes his co-sharers.

Section 3 provides for abolition of proprietary rights on and from the appointed date; it says that notwithstanding anything contained in any contract, grant, or other document or in any law for the time being in force, on and from the appointed date; Clause (i) all rights, title and interest of every proprietor in or in respect of all lands in his village or villages shall be deemed to have been extinguished; Clause (ii) all such rights, title and interest shall stand transferred to—

and vest in the Central Government free from all encumbrances etc. Clause (iii) is not relevant for the present purpose. Section 4 states that notwithstanding anything contained in Section 3, a proprietor shall, subject to the provisions of Sections 6 to 8, be entitled to retain with effect from the appointed date— (a) homesteads, buildings and structures together with lands appurtenant thereto in the occupation of the proprietor; and (b) lands under the personal cultivation of the proprietor, not being pasture or grass lands. This section is an exception to the vesting provision in Section 3. Sub-section (1) of Section 5 enables the Collector to take charge of all lands and of all rights, title and interest therein of a proprietor vested in the Government under Section 3, and for this purpose, the Collector or any officer authorized by him may take such steps or use such force as may be necessary. Sub-section (2) provides that nothing in sub-section (1) shall be deemed to authorize the Collector to take possession of any land, or of any right of proprietor which may be retained by him under Section 4. This sub-section is a check on the exercise of arbitrary power by the Collector. Section 6 refers to liability of lands for payment of land revenue from the appointed date. Section 7 provides for restoration of possession of any land from which any cultivating tenant had been evicted after the dates mentioned therein. Section 8 deals with the rights of proprietors and cultivating tenants to hold lands as occupants. Sections 9 to 11 provide for the extent of compensation to the proprietors, method of payment of compensation, and payment of compensation. Sections 12 to 14 are ancillary provisions. Section 15 empowers the Administrator to make rules to carry out the purposes of the Regulation. This, in substance, is the scheme of the Regulation.

3. The case of the petitioner Gulabbhai Vallabhbhai Desai in the petition before this Court duly supported by affidavits is that in order to satisfy the definition of the expression "proprietor" under Section 2(h), he should be holding the whole village of Regunwada and not a part thereof and, consequently, the Regulation is inapplicable. The argument of Mr. R. J. Joshi, learned counsel for the petitioner, based on this part of the case of the petitioner, is that what was granted to the petitioner by the former Government of Portugal by way of sale in terms of the sale deed dated 12th February, 1930, was five plots of the land in village Regunwada and that they did not include 15 acres of the land comprised therein belonging to the Parsee community of Daman and, accordingly, the petitioner is not the holder of the whole vil-

lage of Regunwada. The case of the respondents duly supported by affidavits is that these 15 acres of land had already been sold to the Parsee community of Daman, as will be apparent from this sale deed, and that at the time of the sale to the petitioner, what was granted by way of sale was the whole village of Regunwada consisting of the five plots minus these 15 acres, and, therefore, the petitioner is the "proprietor" as defined. This also is the contention of Mr. S. K. Bhabha, learned counsel for the respondents, assuming the Regulation applies to the whole village and not to a part thereof. Mr. Bhabha also contends that it was the case of the petitioner in November, 1962, in the Supreme Court, in Writ Petition No. 148/1960, that he was the proprietor of the whole village Regunwada and not a part thereof and, therefore, he should not be permitted to set up a different case in this Court, when the parties are the same. The case of the petitioner before the Supreme Court as will appear from the above petition filed by him under Article 32 of the Constitution, was that he had purchased at auction the whole village Regunwada for Rs. 50,051/- in February, 1930. The sale deed stated that this village was sold to him for purpose of cultivation. It contained, on the date appointed under the Regulation, 320 acres of land used for cultivation (180 acres cultivated by the petitioner personally and the remaining 140 acres cultivated by his tenants) and 14 acres covered by roads etc. The Supreme Court observed that this village sold for cultivation to the petitioner, had been put to agricultural use, as is evident from the fact that out of the 334 acres 320 acres are cultivated. The remaining 14 acres represented roads etc. In this state of affairs, the Supreme Court concluded, that this village (as a whole) fell within the inclusive part of the definition of an 'estate' under Article 31-A (2)(a)(iii) of the Constitution and, therefore, the validity of the Regulation is beyond challenge on the ground that it is inconsistent with, or takes away, or abridges any of the rights conferred by Articles 14, 19 and 31 of the Constitution. "Gulabbhai Vallabhbhai Desai v. Union of India", AIR 1967 S.C. 1110. It is argued by Mr. R. J. Joshi that the petitioner was not aware when he filed the petition in the Supreme Court that the 15 acres of land comprised in this village belonged to the Parsee community. The petitioner was under the impression that this village, as a whole, belonged to him and, therefore, the plea now taken could not be taken earlier before the Supreme Court. According to Mr. Bhabha the petitioner knew at the time of the sale in February, 1930 that apart from the 5 plots sold to him, the remaining plot in this village had al-

ready been sold to the Parsee community, and that this plea is an afterthought. In this connection Mr. Bhabha invites my attention to the notice of auction dated 13th December, 1929 and the sale deed dated 12th February, 1930 in favour of the petitioner. The said notice refers to the sale of this village "either in lots or as a whole". The sale deed following this notice refers to the sale of 5 plots to the petitioner, and it also mentions that another plot in the vicinity belonged to the Parsee community of Daman. This village did not contain any other plot. This sale deed was within the special knowledge of the petitioner. In view of these documents and the unequivocal stand taken by the petitioner in the Supreme Court that he had purchased this village as a whole — submits Mr. Bhabha — the petitioner should not be allowed to approbate and reprobate. This submission, it seems, is not without force.

In this connection Mr. Bhabha cites 'Ambu Nair v. Kelu Nair', AIR 1933 P.C. 167. The facts of this case are that a suit on the mortgage was compromised and a decree dated 2nd January 1899, was passed in accordance with the compromise. The mortgagors were to pay to the mortgagee within three years a sum of Rs. 31,000/- together with a yearly rent in kind; in default of payment of Rs. 31,000/- or of rent, the mortgagee was to be entitled to obtain, by process of execution, possession of the property and to retain the same as usufructuary mortgagee, the mortgagors having the right to redeem in any year thereafter on payment of Rs. 31,000/- and to obtain delivery of the property "by taking out execution." No rent was paid and in March of the following year possession was taken by the mortgagee under the decree. The mortgagee remained in possession as mortgagee. It was contended that the only remedy of the mortgagor was by execution of the compromise decree, and that remedy was long barred. This contention was regarded as untenable. In the words of Sir George Lowndes, speaking on behalf of the Privy Council:—

"On the terms of the compromise decree of 1899 they think that it was not the intention of the parties that the remedy by execution should alone be open to the mortgagors. Seeing that it would, as the Courts have held, be barred after three years, such a construction would manifestly defeat the main object of the compromise which was to leave the mortgagors in possession for three years and if after the expiry of that period the mortgage debt was not paid to allow the appellant to take possession, and again if and after he had so done to entitle the mortgagors to redeem. That the appellant understood

this to be the intention is clear from the proceedings in the suit on the simple mortgage, which was based upon the right of redemption being still alive; the prayer of the plaint would on the face of it have allowed both mortgages to be paid off on a sale. It is, their Lordships think, equally clear that it was upon the same understanding that the respondent came in and paid off the decree in this suit, and that the appellant accepted the payment. On no other view of the facts could he have realized the decretal amount. Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, their Lordships think, cannot now turn round and say that the redemption under the usufructuary mortgage had been barred nearly 17 years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honeyman, J., in *Smith v. Baker*, 8 C.P. 350:

"at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage."

Applying the principle underlying this decision I agree with Mr. Bhabha, that the petitioner should not be permitted to depart from the unequivocal stand taken by him in the Supreme Court on the basis of the above documents. Having taken that stand he cannot now turn round and say that he is not the proprietor of the whole village. I cannot help saying that the plea now taken is not fair to this Court. It has the attraction of legal ingenuity but not the support of true facts. The pleadings are not to be deliberately inconsistent, relying on the theory that the end justifies the means. The doctrine of approbate and reprobate is a species of estoppel and it applies to the conduct of the petitioner in this case. It is also submitted by Mr. Bhabha that the principle of constructive *res judicata* would also apply in this case, and in support of this submission, he relies on *Devilal v. Sales Tax Officer*, AIR 1965 S.C. 1150 (1152). Gajendragadkar C. J., speaking on behalf of the Supreme Court, observed:—

"The general principle underlying the doctrine of *res judicata* is ultimately based on consideration of public policy. One important consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would

"In the circumstances, I hereby serve you with six calendar months' notice of determination of the above mentioned agreement to be computed from the 1st day of October, 1955, and if you do not convey your acceptance of the above said charges and take steps to execute a tripartite agreement on the standard form within one month, then on the expiry of the notice period the said sidings shall be cut off and dismantled which please note and acknowledge."

This para 5 of the letter Ex. 21 makes it quite clear that this plaintiff was given an option to accept the revised charges otherwise, after the expiry of the period of the notice, the sidings shall be cut off and dismantled. This was six months' notice given as per the old agreement. It is thus evident that by that notice he was not asked to pay the revised charges from 5-11-1951 as has been done in the other suit.

21. Ex. 22 is another important document which is material for our purposes in this appeal. It is a letter written by the Divisional Railway Superintendent, Baroda, dated 24-1-1957, to the plaintiff. It has been specifically mentioned therein that these revised charges will have effect from 3rd September, 1955, the date of the General Manager's letter quoted above. The letter quoted is the letter, dated 3rd September, 1955, Ex. 21. It is thus abundantly clear that by this letter it was made clear that the plaintiff had to pay the revised charges from 3rd September, 1955. It is further mentioned therein:—

"As the charges at the old rate have been paid by you for the period ending 30-9-1956, due credit for them will be given to you in the revised bill for the various charges indicated above which will be furnished to you on your approval of these revised charges."

Copies of the standard form of agreement were also sent along with this letter. Two copies duly signed were to be sent to the Railway in token of approval. It is significant to note that the plaintiff was also asked to pay Rs. 75/- to meet with the stamping charges. It was also recited in para 7 of this letter that in case those instructions were not complied with, within 15 days, Permanent Way Inspector, Petlad was ordered to disconnect the siding on the expiry of the period. Ex. 23 was a reminder, dated 21st February, 1957, stating that no extension of time limit can be allowed. The plaintiff was again asked to signify its approval or face the disconnection of the siding from 1-3-1957. The plaintiff ultimately signified its approval and duly signed the copies of the standard form of agreement and sent them along with the stamping fees of Rs. 75/- by its letter Ex. 24, dated 25th February, 1957. It is, therefore, evident that the plaintiff accepted this offer made

by the Railway and signed the agreement on 25th February, 1957 and sent the copies duly signed to the Railway authorities as instructed. It is, therefore, evident that a valid agreement came into force on that day. That agreement is Ex. 34. In that agreement, there is a clause 13 which runs as under:—

"Notwithstanding anything herein or in the said conditions contained this agreement is entered into on the express understanding that either party hereto shall be at liberty to terminate this agreement by giving to the either of them at any time six calendar months' previous notice in writing of their intention so to do without assigning any reason therefor and giving of such notice by the Administration shall not entitle the licensee to any claim for compensation for or by way of damages by reason of the termination of this agreement. On the expiry of such notice, it shall be lawful for the Administration to remove the permanent-way materials....."

It is thus evident that if the Railway Administration felt that it had committed some mistake in not demanding the revised rates from 5th November, 1951, as was done in the case of other plaintiff who was given siding facilities and uniform policy was thereby not pursued, the course open to the Railway Administration was to give such a notice terminating this agreement and give an alternative offer to the plaintiff that if it wants to continue to have the facility of assisted railway siding, it should pay the revised rates from 5-11-1951 or it may decide not to have this facility and the facility will be eventually withdrawn. That is not the course that has been followed by the Railway Administration. What the Railway authority did was that it had given a notice Ex. 26, dated 22-1-1958, stating that the revised charges advised to the plaintiff, vide letter, dated 3-9-1955 Ex. 21, had come into vogue from 5-11-1951, the date of integration of Ex. B.B. & C.I. Railway into the Western Railway and, there being a uniformity applied in all the cases including the facility allowed to the plaintiff, it was not possible to make an exception in this case. As such the plaintiff was requested to pay the revised charges with retrospective effect, i.e., from 5-11-1951. The plaintiff was accordingly given a revised bill. It is significant to note that in para 2, it has been specifically mentioned that the plaintiff had conveyed its approval to the railway terms and conditions by its letter dated 25-2-1957. It is further recited therein that this railway is ready to continue the facility, provided the plaintiff agrees to the payment of arrears indicated in para 1. By para 3, it was mentioned that a substitution be made in previous letter, dated 24-1-1957, i.e.,

charges will have effect from 5-11-1951, i.e., the date of integration of Exs-B.B. & C.I. Railway into the Western Railway. This letter also does indicate that the plaintiff had already accepted the offer made by its letter, dated 25-2-1957 and that was as per the terms and conditions suggested in the letter of the Railway, dated 24-1-1957. It was only after some-time, that this letter was written by the Railway asking the plaintiff to signify its approval to pay the revised rates from 5th November, 1951. This letter was written after a valid agreement had come into force between the parties. The plaintiff paid this amount under protest, stating clearly that the defendants were not entitled to make such demands and were not entitled to recover it legally. It is, therefore, evident that the plaintiff paid this amount under compulsion. If the plaintiff did not pay, the plaintiff would have lost the facility of siding, to which it was entitled as per agreement Ex. 34 till that agreement was terminated by giving a legal notice as contemplated by clause 13 of the Agreement. That having been not done, it could be said without any doubt that the amount was not legally payable and the plaintiff was required to pay it under compulsion and the defendants were not in a position to show that they had a right to recover this amount from the plaintiff under law. It is, therefore, evident that so far as this appeal is concerned, the plaintiff is entitled to repayment of this amount. The learned Extra Assistant Judge had committed a mistake in regard to this case as probably, he disposed of both the appeals together by a common judgment and did not notice this difference in the facts of the two cases.

22. The learned Extra Assistant Judge has referred to the decision in the case of *Hardie and Lane Ltd. v. Chilton*, (1923) 2 K. B. D. 306. Scrutton Lord Justice, in his judgment at pages 313 and 314, made the following observations which are relevant for our purposes:—

"If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultra-neously to injure the trade of another." And he refers to certain authorities. Lord Dunedin in the same case says, 1925 A. C. 700 at p. 730:—

'Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no

ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established.'

If we judge the facts of these two cases from the aforesaid test, we find that so far as the facts of Appeal No. 452 of 1961 are concerned, the case would fall within the first category. No doubt, a threat was given by a letter, dated 21st June, 1957 that in case the plaintiff is not agreeable to the payment of revised rates from 5-11-1951, agreement would be terminated after the expiry of the period of the notice. The Railway authority had under the old agreement such power to terminate the agreement after giving a requisite six months' notice without assigning any reasons. No doubt, a threat was used to effect some purpose. But it was the purpose of the first kind. It was a lawful act. The plaintiff of that case, therefore, has no ground for a legal proceeding and the plaintiff is not entitled to repayment of the amount paid.

23. So far as the facts of appeal No. 463 of 1961 are concerned, the case falls under the second category. At the time when the notice, dated 3-9-1955 was given, it was not stated that the plaintiff has to pay the revised rates from 5-11-1951 and in case he is not agreeable to those terms and conditions, the agreement will be terminated after the expiry of the period of notice. Even in the letter, dated 21st April, 1957, the plaintiff was asked to pay the revised rates from 3-9-1955. In case it was not agreeable to it, the agreement was to be terminated after the expiry of the period of notice. The plaintiff ultimately agreed to those terms and conditions and duly signed the copies of the standard form and sent them on 25-2-1957 and sent the stamping charges also as demanded. It means that a new agreement came into force between the parties. No doubt, that agreement, the Railway could have terminated by giving a notice of six months' as required by clause 13 of that agreement. No such notice was given. The plaintiff had shown its approval. That fact has been also acknowledged in the letter Ex. 26, dated 22-1-1958 by the Railway. The Railway had, therefore, no authority in law to make such a demand of payment of the revised rates from 5-11-1951 and in the event of the plaintiff's failure to do so, to withdraw the facility of railway siding. That action of the railway was illegal. The Railway could have resorted to the action contemplated by clause 13. That having been not done, it is clear that this amount was received by the Railway by illegal means. The plaintiff had paid that amount under compulsion. The defendants have not been able to show that they had a right to recover it from the plaintiff in law. It is, therefore, evident that the plaintiff in

that appeal is entitled to repayment of that amount.

24. At pages 317 and 318 in the aforesaid judgment, the relevant observations have been made:—

“(1) Where the money is not legally due without an agreement, but is due under an agreement obtained by the threat to do an act which may be lawfully done, if the agreement is not made, both the agreement and the threat are lawful; the direction would make them unlawful. If the agreement is unlawful, or the threat inducing it is to do an unlawful act, the case would be different. In the present case it was unlawful to put a member who broke the rules on the stop list; it was lawful to say one was going to do it; it was lawful or not unlawful, to agree not to exercise the legal right to put a man who broke the rules on the stop list, if a more lenient alternative in the shape of a payment of money was exercised; (2) which is a minor form of the same point, in my opinion, the direction is wrong if it assumes that to threaten to do what you have a legal right to do can ever be a ground for obtaining back money alleged to be paid under duress. A man lawfully claims a lien on property of which you are in urgent need; because of your urgent necessity you pay, the necessity disturbing your power of judgment. Is it suggested you can recover the money back? To do so, you must prove the lien unlawful.”

Relying upon these observations, the learned Extra Assistant Judge has disposed of these two appeals. But as said above, he missed one important fact so far as second appeal No. 463 of 1961 is concerned. That was probably the reason why he came to an erroneous decision in that appeal, though he had made a correct statement of law. The result is that the appeal in Second Appeal No. 463 of 1961 succeeds. The appeal in Second Appeal No. 452 of 1961 fails.

25. Second Appeal No. 463 of 1961 is allowed. The decree passed in Civil Appeal No. 232 of 1960 is reversed and the decree passed by the trial Court in Civil Suit No. 213 of 1959 is restored. The respondents-defendants are ordered to bear the costs of the appellant in this second appeal as well as in the District Court Civil Appeal No. 232 of 1960. Second Appeal No. 452 of 1961 is dismissed with costs.

Order accordingly.

AIR 1970 GUJARAT 67 (V 57 C 11)

MEHTA, J.

Chitranjan Manilal Shah, Applicant v. Mane Patil, Collector of Ahmedabad and others, Opponents.

Spl. Civil Appln. No. 1061 of 1963, D/- 11-12-1968.

Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Cls. 2(a) and 3 — Petitioner authorised dealer under Cl. 2(a) — Authorisation cancelled on ground of misconduct of petitioner — Contractual power of termination of authorisation not exercised — Cancellation order is penal and can be passed only in accordance with principles of natural justice — Writ petition filed against cancellation order — Petition clearly competent — No statutory rule or standing order available requiring elaborate inquiry by recording evidence — Petitioner not demanding copies of statements of witnesses recorded at preliminary inquiry — Gist of such statements however given in show cause notice — No attempt made by petitioner to rebut materials sought to be relied upon against him — Petitioner heard in appeal against cancellation order — Principles of natural justice are satisfied in such a case — Writ petition hence not maintainable— (Essential Commodities Act (1955), S. 3)—(Constitution of India, Art. 226 — Grounds of Certiorari).

Where the petitioner is an authorised dealer under Cl. 2(a) of the Imported Foodgrains (Prohibition of Unauthorised Sale) Order and the authorisation is cancelled on ground of misconduct of the petitioner and not in exercise of the contractual power of termination of the authorisation, the cancellation order is penal and it can be passed only in accordance with the principles of natural justice. A writ petition filed against such a cancellation order is clearly competent. When no statutory rule or standing order is available requiring an elaborate enquiry by recording evidence and the petitioner does not demand copies of the statements of witnesses recorded at the preliminary enquiry but a gist of those statements had been given in the show cause notice and no attempt is made by the petitioner to rebut the materials sought to be relied upon against him and he is heard in appeal against the cancellation order, the principles of natural justice are satisfied in such a case. Hence the writ petition is not maintainable. (Paras 4 and 6)

The authorisation issued to the petitioner has its source in the statutory Imported Foodgrains (Prohibition of Unauthorised Sale) Order. This authorisation is not a mere contractual one but it enures for the purpose of that Order.

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Once this authorisation is cancelled, the petitioner's fundamental right to trade in imported foodgrains will come to an end and he will be hit by the prohibition under Cl. 3 of that Order. When the cancellation of the authorisation is not in exercise of the contractual power of termination but is under the disciplinary jurisdiction on ground of misconduct of the petitioner, the cancellation order is a penal one. If the rule of law is to prevail, it is implicit that the State Executive cannot act in such matters arbitrarily or on mere humour or caprice. Such a penal order can only be passed in accordance with the principles of natural justice. In the matter of licence and allotment of quota in pursuance of executive schemes under the relevant control legislation, the orders of the authorities are subject to judicial review when those orders result in serious consequences. Those authorities must act judicially in deciding such serious questions affecting the rights of the persons concerned. When such a cancellation order is challenged by a writ petition, it cannot be said that the petitioner is enforcing contractual rights. Such a petition is thus clearly competent.

(Para 4)

Further, in such cases, a refusal to record oral evidence will not necessarily mean a contravention of the principles of natural justice. In the absence of relevant statutory rules all that is necessary is that the person must be given an opportunity to be heard and no material should be used against him unless he is given an opportunity to explain or controvert that material. Therefore, when there are no statutory rules or standing orders requiring any elaborate oral inquiry by recording evidence and the petitioner does not demand copies of the statements of witnesses recorded at the preliminary enquiry but a gist of those statements had been given to him in the show cause notice and no attempt is made by him to rebut the materials sought to be relied upon against him and he is heard in the appeal against the cancellation order, the principles of natural justice are satisfied in such a case. If he does not demand any copies the authorities are not bound to supply them. In any event, when he has been given due opportunity to tender all his explanation and he had actually submitted his reply, the cancellation order cannot be said to be in contravention of the elementary principles of natural justice. Therefore, the writ petition against such cancellation order is not maintainable. AIR 1967 SC 1269 & AIR 1968 SC 718 & AIR 1967 SC 361 Distinguishing AIR 1957 SC 882, Foll.; AIR 1966 SC 334 & AIR 1968 SC 292, (1962) 3 All. E. R. 633 & (1958) 1 All. E. R. 322, (1964) 3 All. E. R. 865 & 1964 AC 40, Dist.

(Para 6)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 292 (V 55)=	1968 Lab. I. C. 232, Dr. Bool Chand v. Chancellor, Kurukshetra University	3, 5
(1968) AIR 1968 SC 718 (V 55)=	1968-2 SCR 366, Union of India v. Anglo Afghan Agency	4
(1967) AIR 1967 SC 361 (V 54)=	1967-1 SCR 739, Bharat Barrel & Drum Mfg. Co. v. L. K. Bose	4, 5
(1967) AIR 1967 SC 1269 (V 54)=	1967-2 SCJ 339, State of Orissa v. Binapani Dei	3, 4
(1966) AIR 1966 SC 334 (V 53)=	1966-1 SCR 120, Lekhraj v. Dy. Custodian, Bombay	3
(1964) AIR 1964 SC 708 (V 51)=	1964-2 SCR 809, Keshavram Cotton Mills Ltd. v. Gangadhar	5
(1964) 1964 A.C. 40=1963-2 All. E. R. 66, Ridge v. Baldwin		3
(1964) 1964-3 All. E. R. 865=1965 C.L.J. 3 (PC), Vidyodaya University of Ceylon v. Silva		3
(1963) AIR 1963 SC 375 (V 50)=	1963-2 SCR 943, State of Mysore v. Shiv Basappa	5
(1962) 1962-3 All. E. R. 633=1962-1 WLR 1411 (PC), Francis v. Municipal Councillors of Kuala Lumpur		3
(1958) 1958-1 All. E. R. 322=1958-1 W.L.R. 181, Barber v. Manchester Regional Hospital Board		:
(1957) AIR 1957 SC 882 (V 54)=	1958 SCJ 142, Union of India v. T. R. Varma	4, :
(1911) 1911 A.C. 179, Board of Education v. Rice		:

V. J. Desai, for Applicant; G. T. Nana-vati, Asstt. Govt. Pleader, with M. G. Doshit, Addl. Govt. Pleader, for Opponents.

ORDER:— The petitioner Chitranjan Manilal Shah challenges in this petition the appellate order passed by respondent No. 2, Director of Civil Supplies, on 29th November 1963, who confirmed the order passed by the Collector on 6th August 1963 cancelling the fair price shop authorisation of the petitioner and forfeiting the full amount of his deposit on the ground that he had illegally disposed of rice from the approved shop and this act amounted to serious misconduct.

2. The petitioner's case is that the Gujarat Foodgrains Dealers Licensing Order, 1963, issued under Section 3 of the Essential Commodities Act, 1955, he is a licensed dealer. Under a subsequent order known as the Imported Foodgrains (Prohibition of Unauthorised Sale) Order, 1958, issued on 1st November 1958 by reason of clause 3 thereof, no person other than the authorised dealer could sell or store or offer for sale imported foodgrains in any quantity. Authorised dealer was also

defined under clause 2(a) as a dealer authorised by the Central Government or a State Government or by a duly authorised officer of the Central Government or the State Government, to run a fair price shop or ration shop at which imported foodgrains are or may be sold. The petitioner's fair price shop was accordingly authorised by an authorisation which was issued to the petitioner. In 1958 on his executing agreement, Ex. 13, dated 6-10-1968 and it was from time to time renewed every year. His licence under the Licensing Order, 1963, and the authorisation under the aforesaid order were valid at the relevant time. On 30th November 1962 a notice was issued to the petitioner as after taking delivery of American long rice on his permit through his broker Hemaji, the said rice had not been sold from the fair price shop on cards to the card-holders but was directly sold and delivered to private merchant Jayantilal Shah in breach of the orders of the authority issued in this connection. In the said notice a reference was made to the statements made by the broker Hemaji Navaji, the other broker Bhutaji Premaji and other labourers to the effect that said rice was delivered in a truck to the shop of Jayantilal. Such rice was found from Jayantilal's shop on search in a huge quantity and as a result of which a criminal complaint was filed against him. Even the huge sale of American rice on 13th and 14th in the stock register convinced the authority that the petitioner had misused the authorisation licence and had illegally sold the said rice given to him by the Government. The petitioner was, therefore, called upon why his authorisation should not be cancelled and the deposit forfeited. The petitioner gave an explanation denying the charge that he had illegally sold away the American rice to Jayantilal Shah and not to the card-holders. His explanation was that he did not know broker Bhutaji and had no relation with him and the statements made by those persons must be under threats of the police. The erasures in the stock register were explained as by way of mistakes and the heavy sale on those days was explained on the ground that there was great rush of customers on those days. The Collector refused to accept this explanation and he accordingly cancelled the authorisation and forfeited the deposit by the order, dated 6th August 1963. In appeal the respondent No. 2 having confirmed the order, the petitioner has filed this petition to challenge these two orders.

3. At the outset the learned Assistant Government Pleader Mr. G. T. Nanavati raised a preliminary objection that such a petition was not legally competent. The scheme of fair price shops is a distribution scheme undertaken by the State Govern-

ment which is not a statutory scheme. The petitioner was merely holding authorisation as per the terms of the agreement and for enforcement of this contractual agreement or contractual rights therein no such writ petition is competent. The learned Assistant Government Pleader in this connection relied upon the decision of the Supreme Court in *Lekhraj v. Dy. Custodian, Bombay*, AIR 1966 S.C. 334 at page 336. The Supreme Court in terms pointed out that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. In that case the Supreme Court found that the appointment of the appellant as a manager by the Custodian by virtue of his power under Sec. 10(2) (b) of the Administration of the Evacuee Property Act, 1950, was contractual in its nature and there was no statutory obligation as between him and the appellant. The Supreme Court further observed that any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Art. 226 of the Constitution. The learned Asstt. Govt. Pleader also relied upon the decision of the Supreme Court in *Dr. Bool Chand v. Chancellor, Kurukshetra University*, AIR 1968 S.C. 292 at page 296. The Supreme Court in terms approved the view taken by the Judicial Committee of the Privy Council in *Francis v. Municipal Councillors of Kuala Lumpur* (1962) 3 All E. R. 633, and in *Barber v. Manchester Regional Hospital Board*, 1958 (1) All. E. R. 322 and in *Vidhyodaya University of Ceylon v. Silva*, 1964-3 All. E. R. 865. In these cases the authority appointing a servant was acting in exercise of statutory authority but the relation between the person appointed and the employer was contractual and it was held that the relation between the employer and the person appointed being that of master and servant, termination of relationship will not entitle the servant to a declaration that his employment had not been validly determined. This is no doubt a normal principle that unless there is a right to an office the contract of employment could not be specifically enforced and, therefore, no such petition for a declaration that the employment had not been validly determined and the person continued in office could be filed. In *Dr. Bool Chand's case*, AIR 1968 S.C. 292, however, the Supreme Court pointed out that the power to appoint Vice-Chan-

cellor had its source in the University Act. At page 297 it was, therefore, held that once the appointment is made in pursuance of a Statute, though the appointing authority is not precluded from determining the appointment, the decision of the appointed authority to terminate the appointment may be based only upon the result of an inquiry held in a manner consistent with the basic concept of justice and fairplay. The Supreme Court followed the decision in Binapani Dei's case, AIR 1967 S.C. 1269 where it was observed:

"It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

In those circumstances it is held that the power to appoint a Vice-Chancellor has its source in the University Act; investment of that power carries with it the power to determine the employment but the power is coupled with duty. The power may not be exercised arbitrarily, it can be only exercised for good cause, i.e., in the interests of the University and only when it is found after due inquiry held in manner consistent with the rules of natural justice, that the holder of the office is unfit to continue as Vice-Chancellor. The nature of the inquiry even in such cases of termination of office of the Vice-Chancellor has been therefore, held to be quasi-judicial. The case falling in the third category of cases considered by the House of Lords in *Ridge v. Baldwin*, 1964 A.C. 40 and the tenure of the office of the Vice-Chancellor could not be interrupted without first informing him of what was alleged against him and without giving an opportunity to make his defence or explanation. The Supreme Court confirmed the order on the ground that while making an inquiry all the relevant material was disclosed and the Vice-Chancellor was given an opportunity to controvert the material used against him. Therefore, the nature of the inquiry is as per the test adopted by Lord Loreburn L. C. in *Board of Education v. Rice*, 1911 A.C. 179 and not an elaborate inquiry by way of oral hearing by examining witnesses.

4. These decisions would not help the learned Assistant Government Pleader in this case to contend that the petitioner had only a contractual right which cannot be protected under the Essential Commodities Act, 1955. Under S. 3 the Central Government had issued the Imported Foodgrains (Prohibition of Unauthorised Sale) Order, 1958. Clause 3 provided for prohibition of unauthorised sale of imported foodgrains or storing or offering it for sale in any quantity except by authorised dealers who were authorised to run a fair price shop at which imported foodgrains could be sold under Clause 2 (a). Therefore, the authorisation which was issued to the petitioner for giving him imported foodgrains had its source in this statutory order. This authorisation was not a mere contractual authorisation but it enured for the purpose of the Imported Foodgrains (Prohibition of Unauthorised Sale) Order, 1958. Once this authorisation is cancelled, the petitioner's fundamental rights to trade in the imported foodgrains would come to an end and he would be hit by the prohibition under cl. 3 of that Order. Under the scheme of authorisation which is issued to the petitioner Ex. A, the authorities have a right under clause 3 to cancel it in accordance with the terms of the agreement, Annexure 'B', or at the discretion of the Collector. This contractual power has not been exercised and so it is not necessary to go into that question. In the present case the authorities acted upon clause 8 of this authorisation at Ex. A which provides that the holder of the authorisation shall be liable for departmental action, prosecution or both, as the case may be, for any contravention of the terms of the agreement or directions or orders issued by the Collector or any officer duly authorised by the Collector, Ahmedabad. Therefore this is a penal order passed against the authorised dealer in terms of clause 8 which entails such serious penal consequences in case of such a cancellation of the authorisation which is issued to the petitioner in pursuance of the aforesaid Control Order, 1958. If rule of law is to prevail it is implicit that the State executive cannot act on such matters arbitrarily or on mere humour or caprice. The order passed against the petitioner which visits with such serious consequences and which is a penal order can only be passed in accordance with the principles of natural justice as laid down by the Supreme Court in *Binapani Dei's case*, AIR 1967 S.C. 1269. This position is now well settled by some of the recent decisions of the Supreme Court in this connection. In *Union of India v. Anglo Afghan Agency*, AIR 1968 S.C. 718, the question arose as to whether the authorities could reduce the import licence entitlement which the petitioner

earned on making the exports under the Export Promotion Scheme as per the promises held out by the Government. At page 725 the Supreme Court pointed out that the effect of the decision in various cases discussed was that the Court was competent to give relief in appropriate cases if contrary to the scheme, the authority declined to grant a licence or import certificate or the authority acted arbitrarily. The Supreme Court even assumed that the scheme was not legislative but only executive in nature, even so the Government and its officers were not entitled at their whim to ignore the promises made by the Government. The Textile Commissioner could not be deemed to be the sole judge of the quantum of import licence to be granted to an exporter, and that the Courts were not powerless to grant relief, if the promised import licence is not given to an exporter who has acted to his prejudice relying upon the representation. To concede to the departmental authorities that power would be to strike at the very root of the rule of law. At page 726 the Supreme Court in terms pointed out that what the petitioners were doing was not to enforce any contractual right but they were really seeking to enforce compliance with the obligation which was laid upon the Textile Commissioner by the terms of that scheme and even if the scheme was executive in character, the persons aggrieved by the failure to carry out the terms of the scheme were entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the scheme be ordered to be carried out. The claim was sought to be raised only on equitable grounds and even in such case when the order was passed without any inquiry it was held to have been rightly quashed. Again, in *Bharat Barrel & Drum Mfg. Co. v. L. K. Bose*, AIR 1967 S.C. 361 a question arose before the Supreme Court as regards the order of the Iron and Steel Controller cancelling the allotment orders in favour of the petitioner. When the matter was questioned in a writ petition at an earlier stage, a consent order had been arrived at under which the Controller was to hear the parties and ascertain as to whether the petitioner was at fault. At page 365 the Supreme Court observed that it was well settled that while considering the question of breach of the principles of natural justice, the Court should not proceed as if there were any inflexible rules of natural justice of universal application. The Court, therefore has to consider in each case whether in the light of the facts and circumstances of the case, the nature of the issues involved in the inquiry, the nature of the order passed and the interests affected thereby a fair and reasonable opportunity

of being heard was furnished to the person affected. The Supreme Court considered a number of earlier decisions at page 366 and pointed out that mere refusal to record oral evidence did not necessarily mean contravention of the rules of natural justice. The Supreme Court in this connection distinguished the decision in *Union of India v. T. R. Varma*, AIR 1957 S.C. 882 on the ground that the Court in that case was concerned with an inquiry held under Art. 311 of the Constitution and the observations made in that case, therefore, would bear no analogy to the inquiry held by the Controller in the aforesaid case. Further proceeding at page 367 the Supreme Court observed that the Controller was not a judicial tribunal in the sense of a Court of law and though inquiry held by him was a quasi-judicial inquiry it certainly was not a trial. The inquiry was confined to one question only viz. whether he should reconsider the order made by him in favour of the petitioner by determining as to whether he was at fault. The consent order even provided for hearing, but it did not contemplate that the Controller should follow any elaborate procedure. It did not lay down any such procedure or any procedure at all with the consequence that the Controller was left to devise his own procedure. So long as the procedure devised by him gave a fair and adequate opportunity to the parties to put forward and explain their respective cases such procedure would be sufficient and could not be challenged on the ground of any contravention of natural justice. Therefore, according to these decisions in the matter of such licence and allotment of quota in pursuance of the executive schemes under the relevant Control Legislation, the orders of the authorities which affect are held to be subject to judicial review when such orders result in such serious consequences. Even the principles of natural justice are held to be applicable and the authorities must act judicially in deciding such serious questions affecting the rights of the persons concerned. The Supreme Court has also clarified the nature of such inquiry when there is a duty to act judicially by pointing out that a refusal to record oral evidence would not necessarily mean a contravention of principles of natural justice. In the absence of the relevant statutory rules all that is necessary is that the person must be given an opportunity to be heard by making his representation and no material should be used against him unless he is given an opportunity to explain or controvert that material. Therefore, the learned Assistant Government Pleader's contention cannot be accepted that in this matter the petitioner was enforcing any contractual right. What the petitioner is challenging is that

his authorisation which is issued to him in pursuance of the Control Order, 1958, is purported to be terminated by the void order which is in contravention of all principles of natural justice and, therefore, he continues to hold such authorisation. Such a petition is clearly competent, especially when the authorities have also not exercised the contractual power of termination of the authorisation licence but have chosen to exercise disciplinary jurisdiction against the petitioner by cancelling his authorisation on the ground of misconduct committed by him. The order being a penal order, it can be passed only in accordance with the principles of natural justice.

5. The controversy, however, centres on the question as to whether the principles of natural justice would require any elaborate procedure taking the oral evidence or the inquiry fulfilling Lord Loreburn's test would be sufficient. This question also stands concluded after the decision of the Supreme Court in AIR 1967 S.C. 361. Even in Dr. Bool Chand's case, AIR 1968 S.C. 292, where the office of the Vice-Chancellor was terminated, the principles of natural justice were held not to have been contravened if the inquiry satisfied Lord Loreburn's test. Mr. Desai, however, relied upon the decision of the Supreme Court in AIR 1957 S.C. 882. That decision is distinguished by the Supreme Court in Bharat Barrel & Drum Mfg. Co.'s case, AIR 1961 S.C. 361 at page 367 by, in terms, observing that in that case the inquiry was one under Article 311 of the Constitution and it could not bear analogy to the inquiry held by the Controller in that case. Mr. Desai next relied upon the decision of the Supreme Court in State of Mysore v. Shiv Basappa, AIR 1963 S.C. 375 which is also the case of a Government servant. Finally, Mr. Desai relied upon the decision under the Industrial law in Keshavram Cotton Mills Ltd. v. Gangadhar, AIR 1964 S.C. 708 at page 716. Just like Art. 311 even the Industrial law makes a departure from the ordinary law and the principles evolved in industrial adjudication for a just inquiry in case of industrial employees could not be invoked in the present case. The disciplinary control in the present case was sought to be exercised against the authorised dealer. There were no statutory rules or standing orders which required any elaborate oral inquiry by recording evidence. In the absence of any such elaborate procedure laid down by the statutory rules or standing orders, the requirements of natural justice would be fulfilled if the inquiry is held as per Lord Loreburn's test.

6. Mr. Desai argued that even in this view of the matter the present inquiry has contravened principles of natural justice, in that (1) the copies of the ex

parte statements relied upon against the petitioner had not been supplied and, (2) no witness was examined in the presence of the petitioner. The petitioner has in terms pleaded these two infirmities and even in the reply filed by the authorities these allegations are not disputed. It must, however, be kept in mind that the petitioner had not demanded copies of the statements of the witnesses recorded at the preliminary inquiry. He was given the gist of the statements even in the show cause notice, dated 30-11-1962. The statements of the brokers and the labourer has been specifically mentioned but the petitioner in his explanation merely denied having any relation with the broker Bhutaji Premaji. As regards the other broker Hemaji Navaji who had actually under the petitioner's instructions delivered these goods to the merchant Jayantilal has not disowned. There was only the bare allegation that these statements were under pressure of the police which theory was discarded in view of the fact that the statements were taken in the preliminary investigation by the authorities themselves. No attempt was made by the petitioner to rebut the materials sought to be relied against him. Even as regards huge rise in the sales on those two days 13th and 14th and the erasures in the stock register the petitioner's explanation could not be relied upon by the authorities. The authorities are, therefore, right in stating in their affidavit that the petitioner never insisted on examining a witness and had not even asked for any opportunity to lead any evidence. In fact, after the order of the Collector, the petitioner was heard even in the appeal. Therefore, the relevant material used against him has been disclosed to the petitioner. If the petitioner never asked for any copies the authorities were not bound to supply those copies. In any event when the petitioner was given due opportunity to tender all his explanation and he had actually submitted his reply and when he had not led any evidence to rebut this serious charge against him for which prima facie material was disclosed to him, the order cannot be said to be one in contravention of the elementary principles of natural justice even if the inquiry were to comply with Lord Loreburn's test. Therefore, on this ground the petitioner has failed to make out any case. No other ground is urged in this petition.

7. In the result this petition fails. Rule is discharged with costs.

Petition dismissed.

AIR 1970 GUJARAT 73 (V 57 C 12)*

N. G. SHELAT & B. G. THAKORE, JJ.

Laxmidas Ramji, Appellant v. Smt. Lohana Bai Savita Tulsidas and others, Respondents.

First Appeal No. 669 of 1960, D/- 17-9-1968.

(A) T. P. Act (1882), S. 92—Person seeking to get benefit of para (1) of S. 92 must show that he had pre-existing interest or charge on property, that he redeemed same in full and that he paid amount from his own pocket and his own money for protection of his interest — P having charge on mortgaged property getting transfer from mortgagor and out of consideration money paying off mortgagee towards discharge of mortgage debt — Held, as money paid belonged to mortgagor, case did not fall under para (1) of S. 92 — Case would fall under para (3) of S. 92 and P would get right of subrogation, in place of mortgagee, only if he had obtained writing registered from mortgagor as contemplated by para (3): Case law discussed. (Paras 17 and 20)

(B) Civil P. C. (1908), O. 23, R. 1 — Withdrawal for suit and filing of fresh suit — Plaintiff applying for withdrawal of suit without prejudice to his lawful rights and remedies — Permission granted — Permission held was for withdrawal of suit only — There should be a specific prayer to file a fresh suit — Absence of specific prayer would bar fresh suit. AIR 1918 Mad. 126, Dist. (Para 24)

Cases Referred: Chronological Paras

- (1963) AIR 1963 SC 1607 (V 50)=
1964-2 SCR 324, Braham Prakash
v. Manbir Singh 20
- (1960) AIR 1960 Mys. 289 (V 47),
Champalal v. Y. Nabi Khan 18
- (1950) AIR 1950 All. 682 (V 37)=
1950 All. L. J. 970 (FB), Sita Ram
v. Sharda Narain Singh 17
- (1950) AIR 1950 Mad. 186 (V 37)=
1949-2 Mad. L. J. 520, Dadi Appala
Naidu v. Kolluru Bhimalingam 17
- (1942) AIR 1942 Bom. 98 (V 29)=
44 Bom. L. R. 20, Narayan Diva-
karappa Hubli v. Parmeshvarappa
Bhimappa Yarcad 17
- (1941) AIR 1941 Bom. 153 (V 28)=
43 Bom. L. R. 225, Vithaldas
Bhagwandas Darbar v. Tukaram
Vithoba Khatri 17
- (1939) AIR 1939 Mad. 949 (V 26)=
1939-2 Mad. L. J. 533, Subba-
rayudu v. Lakshminarasamma 17
- (1938) AIR 1938 Mad. 779 (V 25)=
1938 Mad. W. N. 708, Srinivasulu
v. Damodaraswami Naidu 17
- (1938) AIR 1938 Pat. 532 (V 25)=
ILR 17 Pat. 666, Bansidhar Dhan-
dania v. Kaloo Mandar 17

- (1937) AIR 1937 All. 588 (V 24)=
ILR (1937) All. 880 (FB), Hira
Singh v. Jai Singh 17
- (1936) AIR 1936 Cal. 42 (V 23)=
ILR 62 Cal. 677, Mukaram Mar-
wari v. Muhammad Hossain 17
- (1936) AIR 1936 Mad. 171 (V 23)=
ILR 59 Mad. 359 (FB), Lakshmi-
ammal v. Sankaranarayana Menon 17
- (1932) AIR 1932 All. 489 (V 19)=
ILR 54 All. 987 (FB), Tota Ram
v. Ram Lal 17
- (1926) AIR 1926 Pat. 259 (V 13)=
ILR 5 Pat. 23, Khudi Rai v. Lalo
Rai 24
- (1918) AIR 1918 Mad. 126 (V 5)=
34 Mad. L. J. 515, Narayana Tantri
v. Nagappa 24
- J. R. Nanavaty, for Appellant; N. C.
Shah, for Respondent No. 1; G. N. Desai,
and M. D. Pandya, for H. C. Shah and
A. B. Parekh, for Respondent No. 2.

SHELAT, J.:— x x x

9. Two points arise to be considered in this appeal. The first is whether the trial Court was in error in holding that the plaintiff-appellant was not entitled to claim the rights of the first mortgagee-defendant No. 1-respondent No. 1 in respect of the suit property having regard to the provisions contained in Section 92 of the Transfer of Property Act. The other point is whether the suit is barred by reason of the withdrawal of Civil Suit No. 15 of 1953 by the plaintiff having regard to the provisions contained in Order 23, Rule 1, or under the provisions contained in Order 2, Rule 2, clause (3) of the Civil Procedure Code as urged by the learned advocate for the respondents. In respect of other points on which findings have been recorded by the learned Judge, it is conceded that they do not affect or bar the remedy sought for by the plaintiff in the suit and they do not, therefore, require to be considered.

10. The contention in respect of the first point made out by Mr. Nanavaty, the learned advocate for the plaintiff-appellant, is that the plaintiff is one of the persons referred to in Section 91(a) of the Transfer of Property Act — he having pre-existing charge on the property and since he has paid off Rs. 21,500/- in all in full satisfaction of the claim of the defendant No. 1 under his first mortgage-deed Ex. 10 dated 12-2-1946 in respect of the suit property, he acquires the right to subrogate and gets all the rights of the first mortgagee-defendant No. 1 under Section 92, paragraph (1) of the Transfer of Property Act (hereinafter referred to as 'the Act'). According to him, the learned Judge has not taken into account his having a pre-existing charge on the suit property arising out of his claims under the deeds Exs. 11 and 12, and that way his finding that his case was governed by paragraph (3) of Section 92 of the Act

* Only portions approved for reporting by High Court are reported here.

was erroneous. This right is said to have been acquired on 12-8-1952 when he paid off the balance of Rs. 8000/- due to defendant No. 1. His alternative contention is that by reason of his having advanced the amount to defendant No. 3 under the deed Ex. 15 dated 12-5-1952, out of which amount he paid off the dues of defendant No. 1, and later on even his having passed on his equity of redemption in his favour under a deed Ex. 16 dated 12-6-1952, and possession of the property delivered to him, it has to be assumed, though no specific recital is there in any of these deeds, that he agreed to his being entitled to claim benefits of the first mortgagee-defendant No. 1 on redeeming the property which he has done on 12-8-1962. He therefore subrogates to the claim under paragraph (3) of Section 92 of the Act and gets the right of defendant No. 1 against the property in possession of defendant No. 2. In other words, either under the first paragraph, or third paragraph of Section 92 of the Act, he becomes entitled to be reimbursed by defendant No. 2 before he can validly become owner thereof by purchasing the same in Court auction. He takes subject to his claim which he is entitled to enforce against that property in his possession. On the other hand, it was urged by Mr. Desai, the learned advocate for defendant No. 2, that it is not enough that by merely having a pre-existing interest or charge on that property and his having paid up the dues of the first mortgagee in full that he is entitled to claim subrogation under paragraph (1) of Section 92 of the Act. He has further to show that not only he must have paid his own money for the protection of his right, but that the payment was not made under any covenant with the mortgagor so as to say that he paid up the amount out of the mortgagor's money. The test, according to him, was as to whose money he paid for redemption of the first mortgage. If it was mortgagor's money, in no case he can claim the right to subrogate under paragraph (1) of Section 92 of the Transfer of Property Act. If it was out of mortgagor's money that he paid under the covenant in the deed Ex. 15, he cannot be said to have redeemed it, and in that event, a specific registered agreement giving such a person a right to subrogate in place of the first mortgagee must be shown to have been passed by the mortgagor-defendant No. 3 in the case. There is no such agreement alleged at any time before and none proved so as to claim that right under paragraph (3) of Section 92 of the Act.

11. In order to consider the rival contentions of the parties, it would be necessary to set out the relevant provisions contained in Sections 91 and 92 of the Act. Section 91 reads thus:—

"91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

xx xx xx"

Then comes Section 92 which was inserted by the Amending Act 20 of 1929. The equitable principle which prevailed before, came to be incorporated in Section 92 by the Amending Act 20 of 1929, at the same time repealing the old Section 74 of the Act. Section 92 reads thus:—

"92. Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

On a plain perusal of these two provisions, one thing becomes clear that Section 91 recognises also persons other than the mortgagor having a right to redeem or institute a suit for redemption. The right to redeem a property by a mortgagor is specifically provided in Sec. 60 of the Act. The right of subrogation in Section 92 is, however, given to other persons referred to in Section 91, and that excludes the mortgagor. That is very significant and a vital distinction in regard to a right of redemption when a claim by principle of subrogation is made, for such a right is denied and cannot be had to the mortgagor to set at naught his own deeds passed and defeat their claims of priority. In other words, it is clear that the first paragraph of Section 92 allows persons referred to in Section 91 and co-mortgagors to get that right of subrogation, and in no case to a mortgagor. The words in brackets 'other than a mortgagor' therefore restrict such a right or benefit to such persons or co-mortgagors. The expression in that paragraph is that

'he redeems', and not as 'has been redeemed' in paragraph (3) of Section 92 of the Act. That emphasizes the fact that 'that person' must redeem and that person shall be such a person referred to in the section but he shall be other than a mortgagor. In paragraph (3) also redemption is required to be by a person other than a mortgagor and he may be any person having advanced money to the mortgagor and not necessarily a person falling under Section 91 of the Act and that way coming under paragraph (1) of Section 92 of the Act. That is so provided as he gets the right by virtue of a clear agreement under a registered instrument by the mortgagor. Now it is easy to think that when a mortgagor is excluded from that section, any person on his account or on his behalf or who acts in terms of agreement with him would also be excluded. The intention of the Legislature could not be otherwise. If a mortgagor is excluded, all such persons getting right through him or acting on his account either as an agent or representative, or under any such covenant remain also excluded. Otherwise the mortgagor can creep in by such a method and defeat the rights of mortgagees created by him which in law he cannot be allowed to do unless the case is covered by the clear position arising out of Section 92.

12. Now, the claim of the plaintiff-appellant in the first instance is that he falls under paragraph (1) of Section 92 of the Act by reason of his being one of those persons referred to in Section 91(a) and since he has redeemed in full the first mortgage in respect of the suit property by paying off the dues of defendant No. 1, he becomes entitled to the same right as defendant No. 1 had in respect of that property. According to Mr. Nanavati, all that he is required to show is that he had a pre-existing interest or charge on the property and that way falls under Section 91(a) of the Act, and secondly that he has paid off the dues of the first mortgagee-defendant No. 1 and has thus redeemed the same in full, and not as to how and whose money was paid. On the other hand Mr. Desai for the respondent No. 2 urged that he must further show that he redeemed it not only for his own benefit or protection of his interest, but that the money paid by him for redemption was not that of the mortgagor. In other words, according to him, the payment for the purpose of redeeming the property must be purely on his account and that it cannot be on account of the mortgagor or by way of paying off the amount under a covenant entered into between them from the mortgagor's money in his hands.

13. Before we turn to the authorities cited at the Bar, it may be stated that

for the purpose of showing that he had pre-existing interest or charge, reliance was placed by Mr. Nanavaty on his claim arising under the two mortgage-deeds Exs. 11 and 12 in the case. Both the deeds are of the same date as of 29-7-'48. The properties specifically mortgaged therein are other than the suit property. The claim is on the basis of a certain recital in both the deeds whereby the defendant No. 3 had created a general charge over his properties in Junagadh, other than those given in mortgage thereunder for the amounts remaining due under those deeds. In a suit filed by the defendant No. 2 for recovering his mortgage dues under his mortgage, this plaintiff had put up his claims arising under Exs. 11 and 12 dated 29-7-1948, and as would appear from the judgment Ex. 13 dated 13-12-1951 recorded in that suit No. 152 of 1949 a charge in respect of Rs. 7000/- arising only under the deed Ex. 12 was recognized. Since that charge was prior to that of defendant No. 2, the amount was required to be paid before he can realise his amount by sale of the suit property. So far as the claim of Rs. 9000/- under the other deed Ex. 11 is concerned, it appears clear from that judgment that it was negatived by the Court. Obviously therefore, it would not be open to the plaintiff to re-agitate any such claim of Rs. 9000/- against defendant No. 2, who along with defendant No. 3, were parties to that suit. It can, therefore, be taken that before the plaintiff can be said to have redeemed the suit property he had a pre-existing interest or charge in that property by reason of the judgment and decree passed in Civil Suit No. 152 of 1949 for a sum of Rs. 7000/- and interest thereon. Thus, on that basis, he has to be taken as a person falling under Section 91(a) of the Act, and that way fulfilling the first condition contemplated in the first paragraph of Section 92 of the Act.

14. The other condition required to be fulfilled relates to his having redeemed that property which was subject to the mortgage of defendant No. 1 and that redemption must have been in full. Now it appears that in the first instance the defendant No. 1 did resist the claim of the plaintiff in that regard by saying that he was not paid in full and that the property was not redeemed by him with the result that he had no right to claim any subrogation under paragraph (1) of Section 92 of the Act. The case of the plaintiff was that he had paid in full and that way he can be said to have redeemed the property in full. It is now no longer in dispute that Rs. 13,500/- were paid by him to defendant No. 1 on 9-6-1950 and Rs. 8000/- on 11-8-1952. During the course of the hearing of the suit, however, the defendant No. 1 gave up that

challenge by saying that he has been paid in full and that no other amount has been due from him under his mortgage. In those circumstances, as found by the trial Court, he can be taken to have paid up the amount due to defendant No. 1 in full on 11-8-1952. It is the payment in full of the mortgagee's dues that matters and when that is made, he can be said to have redeemed his mortgage. An attempt was made by Mr. Desai to urge that the plaintiff has not redeemed the property in full inasmuch as it is not shown that the other property called "Jayendra Theatre" comprised in the mortgage deed Ex. 10 is redeemed by paying off the dues of the defendant No. 1 in that regard. That right is one and indivisible and he cannot therefore claim to have satisfied that condition required under Section 92 of the Act. Now apart from any such contention not having been raised in the written statement or his having sought for an issue in the matter, even if such a point is allowed to be raised being one of law arising on the material that stands on record, it cannot be said that the plaintiff who has purchased the mortgagor's right under the deed Ex. 16 is not entitled to redeem a part of it, and more so, when a specific agreement has been provided in that regard. Now the right to redeem any of the two properties by the mortgagor remained with the defendant No. 3 by an express term in the mortgage-deed Ex. 10. Thereby he was given a right to redeem this particular suit property by payment of Rs. 20,000/- to defendant No. 1. It was, therefore, not necessary for him to also redeem the other property before he can be said to have redeemed in full the property in question. The second condition can, therefore, be said to have been fulfilled by him.

15. The dispute, therefore, centres round the third condition referred to above while setting out the contentions of the learned advocates for the parties. While Mr. Nanavati says that no such condition is further required to be established by the plaintiff and that in fact it should be presumed that he paid off to redeem the property for himself and for protection of his own interest. The question thus is whether any such condition is required to be gone into viz. as to whose money was paid by the plaintiff viz. of himself or that of the mortgagor before claiming benefit under para (1) of Section 92 of the Act. We have already pointed out hereabove, on an analysis of Section 92 that the redemption of the property of the mortgagee claiming a right of subrogation under the first paragraph of Section 92 must not be on behalf of or on account of the mortgagor as the mortgagor and that way his agent or a representative has been excluded from any such persons referred to there-

in. If, therefore, the plaintiff pays off the money for redemption of any mortgagee's right, he must do so, and redeem it with his own money and not out of the money retained by him under an agreement with the mortgagor for paying off the same i.e., out of the consideration of the amount to be paid to him. Thus apart from authority, it appears clear that the Court has to be satisfied on the evidence on record that he did not pay for the mortgagor in redeeming the property or out of his money to claim a right of subrogation under paragraph (1) of Sec. 92 of the Act.

16. Mr. Nanavaty for the appellant, however, urged that while paragraph (1) of Section 92 of the Act relates to the character of a person who redeems, paragraph (3) relates to the character of money. While considering the applicability of paragraph (1) of Section 92, according to him, once he is a person referred to in Section 91 i.e., when the character of a person entitled to redeem is not in question, the question as to how and from where the money was paid becomes irrelevant. As to how and wherefrom the amount for redeeming the property came would be a matter only falling under paragraph (3) of Section 92 of the Act. In other words, according to him, once it is shown that he had a pre-existing interest or charge on the property and had redeemed the property in full, he would fall under Section 92 paragraph (1) of the Act. Both the paragraphs, he urged, are mutually exclusive. He took support for that proposition by a reference to the notes on Section 92 from Mulla's Transfer of Property Act, Fifth Edition, at page 595, which flow from various decisions on the point. They read thus:—

"The right of authority clearly seems to be in favour of the view that the two paragraphs are mutually exclusive and that the first paragraph deals with persons who having a pre-existing interest in the property redeems a prior mortgage to protect his own interest, and that a person who acquires interest only by advancing money with which the prior mortgage is satisfied does not come within the first paragraph even though he secures his advance by a mortgage or becomes a purchaser. Such a person comes within the third paragraph and can only claim subrogation if there be an agreement between him and the mortgagor in writing registered. The right of subrogation is denied to such a person on a variety of grounds, e.g., that such a person when he pays over the retained money either himself or through the mortgagor does not pay his own money and cannot be said to redeem the prior mortgage himself or that he only performs his own obligation under his cove-

nant, and covenant includes subrogation, or that he pays the mortgagor's money as his agent and the redemption is by the mortgagor. But the real reason seems to be that such a person having no pre-existing interest does not come within the first paragraph and that although he is a person who comes within the third paragraph he cannot claim subrogation because there is no registered agreement giving him that right as required by that section. Prior to the amendment such a person could only claim not legal but only conventional subrogation, i.e., subrogation based on agreement express or implied and after the amendment he cannot claim legal subrogation as laid down in the first paragraph but can only claim conventional subrogation as modified by the third paragraph if he satisfies the requirements of that paragraph. The third paragraph has by requiring the agreement to be in writing registered has restricted the application of the doctrine of equitable or conventional subrogation."

17. Mr. Desai for the respondents has referred to a decision in which the distinction has been brought out by a reference to the decisions of the Madras and Allahabad High Courts by Subba Rao, J. in AIR 1950 Mad. 186, Dadi Appala Naidu v. Kolluru Shivalingam. While considering the effect of the previous decisions of the Madras High Court, he has first referred to the observations of Varadachariar, J. in Lakshmiammal v. Sankaranarayana Menon, AIR 1936 Mad. 171 (F.B.) in the following passage:

"There is a well established distinction between cases in which a person who has a pre-existing interest in property pays off a prior charge on that property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. It seems to me that clause (1), S. 92 must be held to relate to the first type of cases above referred to and clause 3 to the second type." Venkataramana Rao, J. states the law to the same effect but in different terms. He says:

"The first clause enunciates no new principle (Vide S. 74, Transfer of Property Act, since repealed). It applies to all persons who have an interest in the equity of redemption and are under no personal obligation to discharge prior incumbrances. Clause 3 has been enacted to confer a benefit on persons who advance money to discharge an incumbrance only 'if the mortgagee has by a registered instrument agreed that such persons shall be subrogated'. The clause is intended to apply to all persons who acquire an interest in the mortgaged property by

advancing moneys to discharge prior incumbrances and there is no warrant for restricting the scope of that clause to persons other than purchasers or mortgagees."

Then as observed in that case, in view of certain observations in Srinivasulu v. Damodaraswami Naidu, AIR 1938 Mad. 779, some doubt on the correctness of those observations was thrown. They came to be, therefore, considered by Venkataramana Rao, J. in greater detail in his judgment reported in Subbarayudu v. Lakshminarasamma, AIR 1939 Mad. 949. After exhaustively considering the case-law on the subject, he adhered to the view expressed by him in the Full Bench judgment in AIR 1936 Mad. 171 (F.B.). The Madras view came to be followed in Hira Singh v. Jai Singh, AIR 1937 All. 588 (FB). Before that in Tota Ram v. Ram Lal, ILR 54 All. 987 = (AIR 1932 All. 489), the view taken was that puisne mortgagee was entitled to subrogation viz. by his coming under the persons referred to in Section 91. This is precisely what Mr. Nanavati wants us to go by. But this decision was disapproved by the Bench of five Judges of the same Court by holding that a puisne mortgagee if he was using mortgagor's money and not his own, he acquires no right by himself by his payment. That decision is contained in AIR 1937 All. 588 (FB). Sulaiman, C. J. after accepting the law as enunciated in the Madras decisions has set out the broad propositions. They are as under—:

"Now it is well known that subrogation can arise in two ways, (1) by agreement and (2) by operation of law. Paragraph 1 deals with subrogation arising by operation of law and paragraph 3 deals with subrogation by agreement. It is necessary that there should be an agreement for subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two paragraphs overlap each other, for, paragraph 3 requires certain stringent conditions which are not found in paragraph 1. They must therefore be mutually exclusive. The basic difference underlying these two paragraphs consists in this that paragraph 1 refers to a person redeeming property and the paragraph 3 to a person who advances money with which a mortgage is redeemed." Then come the material observations and they are:—

"Where a person himself redeems a mortgage, that is to say, pays the mortgage money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the rights of subrogation under paragraph 1 if he is one of the persons enumerated in S. 91. But where the person does not

himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee, the latter acquires the right of subrogation only if the mortgagor has by a registered instrument agreed that he shall be so subrogated He is really not himself redeeming the mortgage but redeeming it as the agent of the mortgagor."

Similar view has been expressed by the Patna High Court in *Bansidhar Dhandania v. Kaloo Mandar*, AIR 1938 Pat. 532. The material observations are:—

"The first paragraph of S. 92 would undoubtedly have entitled the appellant as purchaser of the equity of redemption to subrogation if he had redeemed the prior mortgages on his own account and independently of any agreement with the mortgagor who is specifically excluded in this paragraph; but, the appellant paid off the prior mortgagees with moneys that were left with him for the purpose by the vendors-mortgagors."

The same view was also expressed by the Calcutta High Court in *Mukaram Marwari v. Muhammad Hossain*, AIR 1936 Cal. 42. The observations therein are to the effect that it is well settled on authorities, that, if the debt is the debt of the person who paid, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his own obligation or covenant. It would thus appear that apart from these authorities, even Mulla's Commentary does say that the person falling under Section 91 must be redeeming a prior mortgage to protect his own interest and that excludes a case where he does it not for his benefit or interest but for the mortgagor or on his account. That distinction has to be there, for, by express words in Section 92 paragraph (1) the person excluded from getting a right of subrogation is the mortgagor. Thus not only he must be a person falling under Section 91(a) having pre-existing interest or charge, he must not be redeeming the property as a nominee or agent of the mortgagor as the mortgagor cannot have a right to subrogate. The decisions referred to by different High Courts amply support that proposition. Reverting back to the decision in AIR 1950 Mad. 186 (supra), a similar argument was advanced, as done by Mr. Nanavati before this Court, and that was negatived. The argument advanced was that when defendants Nos. 2 and 3 purchased the property under Ex. D-11 on 7th October 1933, they had a pre-existing interest in the property being the puisne

mortgagees under Ex. D-2 dated 29th June 1930, and therefore they would be entitled to the right of subrogation under the first paragraph of Section 92. Learned counsel said that the existence of an interest in the property on the date of the sale-deed was sufficient and it did not matter whether a prior mortgage was discharged not to protect his interest but only pursuant to an agreement entered into with the vendor. If this argument was accepted, as observed by Subba Rao, J., it would be destructive of the principles on which he purported to rely upon. Then he has observed as under:—

"The distinction between legal subrogation and conventional subrogation is that in the case of the former the person having the pre-existing interest discharges the prior mortgage to protect his interest and by meeting an obligation in excess of his liability; whereas in the latter case he would be discharging only an obligation he had undertaken under a specific agreement."

This view has been also accepted by the High Court of Bombay in *Vithaldas Bhagvandas Darbar v. Tukaram Vithoba Khatri*, 43 Bom. L. R. 225=(AIR 1941 Bom. 153). The pertinent observations are that "inasmuch as part of the consideration for sale of land 5/2 was retained by the plaintiff for the discharge of incumbrances on the land, that money should be regarded as the money of R and there the plaintiff was not entitled to subrogation under the first part of the section." That was followed in another case of *Narayan Divakarappa Hubli v. Parameshvarappa Bhimappa Yarcad*, 44 Bom. L. R. 20=(AIR 1942 Bom. 98), wherein it was observed that as the plaintiff used the mortgagor's money when he paid off the first mortgage, he got no right, by his payment, to subrogate to the first mortgagee. In other words, the view taken in the earlier decision of the Full Bench of the Allahabad High Court in ILR 54 All. 897=(AIR 1932 All. 489) (FB) was no good law and was not followed by the Allahabad High Court in certain circumstances. In fact a contrary view was taken in AIR 1937 All. 588, by a Bench of five Judges and it was held that if towards the part of the consideration a puisne mortgagee was using the mortgagor's money and not his own, he acquires no right by himself. In view of all these decisions, it can be easily held that a redemption of the mortgaged property must have been made by the plaintiff so as to fall under paragraph (1) of Section 92 of the Act by his own money and not that of the mortgagor. He has to pay out of his own pocket with a view to protect his own interest and not merely by having to discharge the contractual liability to make that payment on behalf of the mort-

gagor. What matters, therefore, is, with whose money the payment was made and the property redeemed? If it is clearly and purely the money of the plaintiff and that has nothing to do with the mortgagor, he would fall under paragraph (1) of Section 92 of the Act. If that is not so, he can be said to be acting for and as an agent or a representative of the mortgagor. Since the mortgagor is excluded from having any such right of subrogation under Section 92(1), any such redemption made on behalf of and on account of the mortgagor would be tantamount to saying that the mortgagor had himself redeemed it. In the case of *Sita Ram v. Sharda Narain Singh*, AIR 1950 All. 682, the Full Bench of seven Judges held as under:—

"A vendee from mortgagor who pays off the prior mortgage out of the money left with him by the vendor mortgagor, and is bound to pay it under the terms of the contract, cannot claim to be subrogated to the rights of the mortgagee whom he pays off without a registered instrument expressly creating such rights of subrogation being executed by the mortgagor-vendor."

In paragraph (47) of the judgment which has been delivered by Lal, J. the position that we made clear at the outset by referring to the provisions contained in Section 92 itself is well brought out. The observations are:—

"The respondent is certainly a person enumerated in S. 91. He can claim subrogation provided he is not the mortgagor or his agent. But one finds that the money with which he paid off the prior encumbrance had been left with him by the mortgagor. It is that money which he paid in satisfaction of the mortgage. Nothing was paid by him out of his own funds. In the circumstances I am of the opinion that the view taken by the Full Bench case of 1937 All. L. J. 659=ILR (1937) All. 880=AIR 1937 All. 588 (FB), which says that in a case like the present, the person paying off the mortgage debt is the agent of the mortgagor, is correct. Since the respondent has made the payment as the agent of the mortgagor, he is in a position no better than that of a mortgagor. As such he cannot claim subrogation."

The real position of law, therefore, is that in addition to the two requisite conditions about the plaintiff having a pre-existing interest or charge on the property and about his having redeemed the same in full, he has further to show that he was paying the amount from his own pocket and his own money for the protection of his own interest and not out of the amount retained by him — as of the mortgagor — for that purpose under a covenant so as to be said that he acted

and redeemed the property as an agent or a representative of the mortgagor. That is an essential condition to be fulfilled before falling under paragraph (1) of Section 92 of the Act. While therefore the distinction pointed out between the two paragraphs is true, before one can fall under Section 92(1) of the Act, he has to show that he was not redeeming it on account of the mortgagor.

18. A reference was made by Mr. Nanavati to a decision in the case of *Champalal v. Y. Nabi Khan*, reported in AIR 1960 Mys. 289. In that case, the appellant had purchased the suit property in execution of a money decree subject to prior encumbrances. The respondent had purchased the same property prior to the Court auction from the judgment-debtor and had discharged a prior usufructuary mortgage on the property out of his own funds. The respondent obstructed delivery of possession to the appellant. On those facts it was held that the respondent as the purchaser of the mortgaged property had sufficient interest therein within the meaning of Section 91 (a) and on redemption of the prior mortgage was entitled to subrogation. His case fell within the first part of Section 92. The head-note appears to be rather misleading. If we peruse that judgment, we find that the finding of the Court below was that "the money which has been paid to Adiramaiah, the mortgagee, belonged to the first respondent himself and not to the mortgagor. As such, it cannot be said that first respondent is the representative of the mortgagor". In other words, it was found that the money with which the property was redeemed was of that person himself and in no way he was the representative of the mortgagor. It is that which is said to be the essential condition before one can claim to get any right of subrogation under para (1) of Section 92 of the Act.

19. x x x x x

20. It was urged by Mr. Nanavati that redemption of the mortgage property by paying off the dues of defendant No. 1 must be presumed to have been made for the protection of his right or interest in that property and there has been no positive material on record to negative or rebut the same. He invited a reference to a decision in the case of *Braham Prakash v. Manbir Singh*, AIR 1963 SC 1607, where it was observed that the ordinary rule is that "a man having a right to act in either of two ways, shall be assumed to have acted according to his interest". In other words, it was said that his paying off the dues of the defendant No. 1 can well be taken to have been for the protection of his interest which already existed under the general charge created as per the deed Ex. 12, which later on merged in the decree passed in Suit No.

152 of 1949. Normally speaking, that would no doubt be so. But any such presumption is always rebuttable. In the present case apart from the fact that there is nothing to show about his having paid defendant No. 1 for the protection of any such pre-existing interest, his own deed Ex. 15 dated 13-5-1952 read with the agreement of sale Ex. 14 shows otherwise viz. by saying that he shall pay defendant No. 1 out of the consideration amount which otherwise he would have received. Instead, the plaintiff retained that amount and paid off the dues of defendant No. 1. It was thus the mortgagor's money which he paid, and it does not matter through whose hands the money was paid. He thus acted for and on behalf of the mortgagor. The person who thus redeemed the property by paying off defendant No. 1's dues under his first mortgage was no other than the mortgagor. His case, therefore, would not fall under paragraph (1) of Section 92 of the Act — any such mortgagor is excluded from persons getting a right of subrogation thereunder. His case would fall under paragraph (3) of Section 92 — as person having advanced money to the mortgagor for paying off the dues of the first mortgagee-defendant No. 1 and when that is so, the necessary requirements contemplated in that paragraph have to be fulfilled viz. of having obtained a writing duly registered from defendant No. 3 for getting any such right of subrogation in place of defendant No. 1 on his redeeming the same.

21.-23. x x x

24. The contention made out by Mr. Desai, the learned advocate for the defendant No. 2, was that this very plaintiff had filed a Civil Suit No. 15 of 1953 in the Court of the Civil Judge (J.D.) at Junagadh, wherein it was prayed that the property in suit was not liable to sale in pursuance of a decree passed in favour of defendant No. 2 on the allegations that the property was purchased by him and that he was in possession thereof by virtue of his ownership in pursuance of an agreement dated 6-10-1948. This suit was filed against defendant No. 2 and defendant No. 3 of the present suit. The suit was required to be filed as his application given in Darkhast No. 270 of 1952 filed by defendant No. 2 for sale of the suit property had come to be dismissed by the Court on 7-10-1952. The suit was then filed on 28-1-53. In the meantime, it appears that the suit property was sold in a Court auction and it came to be purchased by defendant No. 2. That led the plaintiff to withdraw the suit — it being, in his view infructuous — by giving an application Ex. 81 on 29-1-54 wherein he stated that the right, title and interest of the suit property has been sold away and that, therefore, he does not think it

proper to prosecute his suit. He has then stated that he may be permitted to withdraw his suit without prejudice to his lawful rights and remedies in the suit. The Court permitted him to withdraw the suit directing him to pay the costs of defendant No. 2. It was urged by Mr. Desai that this was a withdrawal pure and simple and the order passed thereon did not give him any permission to file a fresh suit on the same cause of action or in respect of the same subject-matter in the suit. Such a suit, according to him, will be hit by the provisions contained in Order 23, Rule 1(3) of the Civil Procedure Code. Rule 1 of Order 23 provides as under:—

"1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(a) that a suit must fall by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

xx xx xx"

It was, thus, urged that the plaintiff was precluded from instituting the present suit which, according to him, was in respect of the same subject-matter since he had not obtained any such permission as required under Order 23, Rule 1, clause (2) of the Civil Procedure Code. This contention was resisted by Mr. Nanavati on various grounds. He tried to urge in the first instance that both the application and the order passed thereon must be read together and that when the permission for withdrawal from the suit was granted by the Court, it should be taken or deemed to have been in view of the prayer made in the application itself. In support thereof, he invited a reference to the case of Khudi Rai v. Lalo Rai, AIR 1926 Pat. 259, where it was held as follows:—

"Where an application is made by a plaintiff to withdraw from a suit with liberty to bring a fresh suit on which an order is passed giving the permission to withdraw from the suit, although nothing

tioners were not well advised in taking up such extreme positions." Their Lordships had something to say about reservation for sportsmen and other classes of citizens, but as this point does not arise for decision in this case, we would refrain from dealing with it.

12. The aforesaid judgment was noticed in a decision of the Andhra Pradesh High Court in AIR 1968 Andh. Pra. 165 and the Mysore decision was cited with approval. The same view has been taken by Jaswant Singh J. in Writ Petns. 99 and 120 of '68—(AIR 1969 J. & K. 136), *Kushma Joshi v. Pro Vice-Chancellor, J. & K. University*, wherein the learned Judge observed as under:—

"It would thus be clear that besides the reservations which are specifically provided for in Arts. 15(3) and (4) and 16(4) of the Constitution of India reservations on the basis of reasonable classification under Art. 14 of the Constitution can be made. I am fortified in this view by a direct authority of the Mysore High Court in AIR 1966 Mys. 40 where a Division Bench of the Court upheld the reservations of seats in the Medical Colleges under the management of the Government for the children or wards of the men in armed services, and ex-servicemen including those who were in the armed services during the second World War."

13. We find ourselves in complete agreement with these observations.

14. No decision taking a contrary view has been cited by the Counsel for the petitioners.

15. Our attention was also drawn to a decision of the Patna High Court in AIR 1968 Pat. 3 (FB) where reservation made for employees of the University was struck down. This decision, however, is clearly distinguishable and we are not in a position to equate children of the army personnel with the children of the University employees for the reasons that we have already given.

16. Thus the reservation made by the Government for the children of the army personnel was valid and they were entitled to a preferential treatment by being selected for admission to the Medical College even though they had secured lesser marks than some of the petitioners. It is, however, not suggested that there has been discrimination inter se between the children of the army personnel.

17. It was next contended that reservation for persons belonging to Ladakh or to the Scheduled Castes was also not proper. This argument, however, is to be stated only to be rejected, because Art. 15(4) specifically authorizes the State to make special provisions for the advancement of socially and educationally backward classes of citizens or members

of the Scheduled Castes. In the instant case the Government has indicated the data on the basis of which it reached the conclusion that members belonging to the district of Ladakh and those belonging to the Scheduled Castes were backward classes of citizens. The materials on the basis of which the Notification of the Government was passed have not been challenged before us, nor has it been shown to our satisfaction that persons coming from Ladakh are not backward. In AIR 1968 SC 1012 (*P. Rajendran v. State of Madras*) reservation on the ground that certain candidates belonged to a particular district which was backward was upheld, provided the reservation was not made purely on the basis of the place of birth. In this connection their Lordships observed as follows:—

"Even though there may be some substance in the charge that all this complicated and confusing method has been provided in order to get over the prohibition in Art. 15(1) by a camouflage we cannot say that there is a clear violation of Art. 15(1) for the district which the candidate may claim does not depend upon the place of his birth. We cannot therefore, strike down R. 8 on the ground that it discriminates on the basis of the place of birth of the candidate concerned."

18. In this case, no doubt, their Lordships did not approve of the allocation or distribution of seats districtwise, but that has not been done in the present case. Ladakh happens to be only one of the districts of the State and the citizens belonging to this area have been declared by the Government to be socially and educationally backward so as to come within the protection given by Art. 15(4) of the Constitution of India. Thus the reservation made by the Government for candidates from the Ladakh district and members of the Scheduled Castes is perfectly valid and cannot be struck down as being violative of Arts. 14, 15 or 29 of the Constitution of India.

19. Barring the cases of persons for whom reservation has been made, it is conceded that there has been no discrimination between the candidates who have been selected for admission to the Medical College and the petitioners. In view of our clear finding that reservation made for various classes of citizens was good and valid, there does not seem to be any good ground for our interference with the admission of the respondent candidates to the Medical College at Srinagar.

20. It was faintly suggested by the counsel for some of the petitioners that even though they had fetched higher marks they were not even interviewed and were selected to Medical Colleges situate outside the State instead of being given a chance in the Medical College of the State. The case of Amina Akhtar was

cited as glaring instance of such an arbitrary selection. We have already pointed out that regarding candidates who have been selected to Colleges outside the State, no relief can be given by us because they having been admitted by colleges which fall beyond the territorial jurisdiction of this court, their admission cannot be touched by any order passed by us. Unlike Art. 226 of the Constitution of India, S. 103 of the State Constitution is couched in the same language as that of the unamended provisions of Art. 226 which had not given extra-territorial jurisdiction to the High Courts. For these reasons we are unable to interfere with the selections made by the Government of candidates to Colleges outside the State. Lastly when it seems to us that the data laid down by the Government by setting up the Selection Committee consisting of responsible persons and the guidelines indicated by the Government for selection to the Medical College contains the quality of objectivity, the selection of the respondent candidates to the Medical College cannot be assailed on the ground that the selection was not objective. In fact we are satisfied that the selection of the respondent candidates was made in accordance with the tests laid down by us in AIR 1967 J. & K. 106 (Supra).

21. For the reasons given above, the writ petitions fail and are dismissed, but in the circumstances without any order as to costs.

22. ANANT SINGH, J.:— I fully agree with Hon'ble the Chief Justice.

23. I may only add that, in future, selection of the candidates for admission into the Colleges outside the State, should also be made on merits inter se only among those candidates who opt for outside the State so as to provide a safeguard against any hostile discrimination between such candidates.

24. As for the reservation for the children or wards of service or ex-servicemen of the Defence Personnel, I wholly associate myself with all the reasons of Hon'ble the Chief Justice. These men fully deserve as a class a special treatment in the matter of admission of their children, and wards into educational institution, and I would add, similar institutions, regard being had to the difficult conditions of their services. They are all doing yeoman's National service, always at the personal risk of their lives, and any one who grudge them this small concession is only betraying his selfish end, and unpatriotic feelings. Any favour shown to these people will always be small. During the British days, the sons and blood relations of Army men were given special preference even in the matter of appointments to public service.

The concession extended to their children by making the reservations is fully protected under the Constitution as has been elaborately dealt with, if I may say so with respect by Ali, C. J.

Petitions dismissed.

AIR 1970 JAMMU & KASHMIR 50 (V 57 C 13)

FULL BENCH

J. N. BHAT, MIAN JALAL-UD-DIN
AND ANANT SINGH, JJ.

Bakshi Rughnath, Appellant v. Custodian General and others, Respondents.

Letters Patent Appeal No. 7 of 1966, D/- 4-6-1969 against order of S. M. Fazl Ali, J., D/- 29-8-1966.

(A) J. & K. State Evacuees' (Administration of Property) Act (6 of 2006), S. 30(5) — Order of Custodian General — Review of — Successor in office can review — (Civil P. C. (1908), O. 47, R. 1).

The words "his own order" in S. 30(5) do not refer to a particular person who is holding the office but to a particular office which the officer concerned is holding. In other words, what this section contemplates is that an order passed by the Custodian can be reviewed only by the Custodian and not by any other authority. The word "own" does not refer to a particular person who is holding the office for the time being and is wide enough to include the successor of the officer concerned. AIR 1966 J. & K. 12 & AIR 1952 Pepsu 82 & AIR 1963 Bom. 110, Rel. on.

(Para 5)

(B) J. & K. State Evacuees' (Administration of Property) Act (6 of 2006), S. 30 and R. 27(6) of the Rules under the Act — Review application — Limitation — Application has to be filed within 30 days.

The period of limitation for a review of an order by the Custodian General on the basis of Rule 27 (6) of the Rules under the Act is 30 days from the impugned order as the time within which ordinarily an application for review should be presented before the Custodian General.

(Para 20)

(C) J. & K. State Evacuees' (Administration of Property) Act (6 of 2006), S. 30 — Civil P. C. (1908), O. 47, R. 1 — Power of review — It is analogous with O. 47, R. 1.

The three terms 'appeal, review and revision' have received more or less a definite and precise meaning which on the face of it suggests itself to anybody conversant with the functioning of Courts of Law. In Section 30 the three remedies 'appeal, revision and review', are put in together and the hierarchy of the officers competent to hear appeals from orders of

subordinate officers are clearly indicated. Similarly under sub-sec. (4), the Custodian General, Custodian, Addl. Custodian etc., have been given the power to revise orders passed by their subordinates and under sub-section (5) the same officers have been given powers to review their orders which shows that this word 'review' has been used more or less in a well recognized legal sense and is lumped together in the same section which pertains to appeal and revision. Therefore, the power to review should be analogous to those given by the Code of Civil Procedure. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

- (1967) AIR 1967 J. & K. 8 (V 54)=
1966 Kash. L. J. 310, Tej Ram v. Custodian General 6, 8
- (1966) AIR 1966 J & K 12 (V 53)=
1965 Kash. L. J. 258, Bansi Lal v. Deputy Custodian General 5
- (1963) AIR 1963 Bom. 110 (V 50)=
ILR (1963) Bom. 158, Union of India v. Dr. Maqsood Ahmed 5, 6, 9
- (1960) AIR 1960 J & K 125 (V 47),
Mahomed Sultan Zargar v. Custodian General E.P. 6, 8
- (1954) AIR 1954 Pat. 43 (V 41)=ILR
32 Pat. 630, Bibi Nazma v. R. P. Sinha 6, 8
- (1953) AIR 1953 S.C. 298 (V 40)=
1953 SCR 691, Ebrahim Aboobaker v. Tekchand 6
- (1952) AIR 1952 Pepsu 82 (V 39),
Kartar Singh v. Custodian Muslim Evacuee Property 5, 6, 9
- (1938) AIR 1938 Bom. 484 (V 25)=
178 Ind. Cas. 588=40 Cri. L. J. 97 (FB), Emperor v. Somabhai Govindbhai 7
- (1938) 1938-2 All. E. R. 79=1938
A.C. 321, Robinson Bros. Ltd. v. Houghton and Chester-Le-Street Assessment Committee 8
- (1927) AIR 1927 Cal. 415 (V 14)=
45 Cal. L. J. 185, Secy. of State v. Fakir Mahomed Mandal 7
- (1893) 1893-1 Q.B. 25, Jay v. Johnstone 8
- (1885) 15 QBD 403=54 LJQB 400,
Barlow v. Teal 8
- D. N. Mahajan, for Appellant; Addl. Advocate General, for Respondent (No. 1); S. Joginder Singh, for Respondents (Nos. 2 and 3).

BHAT, J. (with Mian Jalal-ud-Din, J.)

— This is a Letters Patent appeal against the judgment of Justice Ali (as his Lordship then was) dated 29-8-1966 whereby he has dismissed the writ petition of the present appellant. When this appeal was argued before two of us, we thought it desirable that the appeal should be heard by Full Bench of the court because the points raised in this appeal may be of common recurrence and an authoritative pronouncement was necessary from this Court on points raised.

2. We need not discuss the facts of this case because in the first place that is unnecessary and secondly because this appeal can be disposed of only on some points of law. But however to appreciate the points of law raised, some relevant facts may be mentioned.

3. 9 kanals and 5 marlas of land in village Sai Ralewalan belonged to one Bakshi Yugraj. He executed an agreement to sell this land on 25-11-1995 in favour of one Siraj-ud-din. This Bakshi Yograj brought a suit for possession of this land in the Court of Munsiff Jammu on 5-1-2003 and an ex parte decree was passed therein on 25-10-2004. This property was declared to be evacuee property by the Custodian. Yograj died some time before 2008 and his son Rughnath, the present appellant, took possession of this land. This land was however allotted by the Custodian to the Respondents Bir Singh and Man Singh in the year 1951. An application under Section 8 of the Evacuee Administration of Property Act (hereinafter referred in this judgment as 'the Act') filed by the appellant Bakshi Rughnath was rejected by the Custodian on 20-11-1960. A revision was filed to the Custodian General who set aside the order of the Custodian by his order dated 15-4-1961. An application for review was presented by the Respondents 2 and 3 before the successor of the previous Custodian General on 18-4-1962 which was accepted by the present Custodian General by his order dated 22-4-1965. It may be mentioned that against the order of the Custodian General dated 15-4-1961 a writ petition was presented in this Court, which was dismissed as not pressed on 20-6-1962. Against the last order of the Custodian General dated 22-4-1965 a writ petition was presented in the High Court which was heard by the learned Hon'ble Chief Justice (Ali J.) who dismissed the writ petition by his order under appeal.

4. As we said earlier we need not go into the factual aspects of this case. May be the present Custodian General by means of his order 22-4-1965 may have done substantial justice to the parties, as remarked by the learned Single Judge but the important point for determination is what was the nature of the proceedings before the learned Custodian General, which were started with the application of the respondents 2 and 3 dated 18-4-1962 and what were the powers of the Custodian General in disposing of that petition. The petition has been described by the respondents 2 and 3 as a review petition. The Custodian General who had decided the revision on 15-4-1961 was no more the Custodian General on 18-4-1962. The present Custodian General states in the body of the judgment that:

"..... I feel that the present application does not fulfil the conditions of a re-

view. It can at best be treated as a miscellaneous application seeking relief from a gross injustice done to the applicants

After recording this finding towards the end of his judgment, he says that:—

"..... I accept the contention raised in the application which I treat as miscellaneous application in the shape of a review. Therefore the order issued by my learned predecessor-in-office on 16-4-1961 is superseded by this order of today"

From this it is quite clear that the learned Custodian General treated this application of 18-4-1962, which was in fact an application for review, as a miscellaneous review application. In the first place we have not been able to understand the significance of the word 'miscellaneous'. Either it can be a review application pure and simple or a miscellaneous application for which we do not find any provision in the Act. The Act lays down specifically the various applications that can be made under the Act and we need not go into the various categories of applications mentioned in the Act; but apart from certain specific classes of applications, there is no provision for a miscellaneous application. So the only name that could be given to the application of the respondents 2 and 3 dated 18-4-1962 would be a review application and it has been substantially treated as such by the learned Custodian General. The short question, therefore, for determination in this appeal, which is of some importance and may crop up in many other cases, is what are the powers of the Custodian General to review an order, more so passed by some other gentleman holding the same office. The relevant section of the Act is Section 30 which pertains to appeal, revision and review. It lays down that an appeal from an order of the Deputy or an Assistant Custodian shall lie to the Custodian; from that of the Custodian, an Addl. Custodian or an Authorised Deputy Custodian to the Custodian General; and from the order of the Custodian General to the High Court if there is judgment of variance. Under sub-sec. (4) the Custodian General, Addl. Custodian, or Authorised Dy. Custodian has been given power of revising any orders passed by an officer subordinate to him. Sub-section (5) of this Section 30 is the relevant section which comes for consideration in this appeal and it reads like this:—

"The Custodian General, Custodian, Addl. Custodian, or Authorised Deputy Custodian, but not a Dy. or an Assistant Custodian may, after giving notice to the parties concerned, review his own order."

Sub-section (6) further lays down that:

"Subject to the foregoing provisions of this section, any order made by the Custodian General, Custodian, Addl. Custodian, Authorised Dy. Custodian, Dy. Custodian or Assistant Custodian shall be final and shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceedings".

The argument of the learned Counsel for the Custodian General and the respondents 2 and 3 is that the Custodian General has unlimited powers of review, he is not bound by any of the limitations as prescribed under Order 47 of the Code of Civil Procedure. In other words the argument of the learned counsel for the respondents is that the Custodian General and other officers mentioned in sub-section (5) of Section 30 of the Act can review an order passed by himself or by his predecessor. He is not fettered by any limitations in the exercise of this power. There is no time limit within which he should be moved, he can be moved to exercise his powers after any lapse of time. The learned counsel for the appellant on the other hand argues that the Custodian General or the Officers mentioned in sub-section (5) can only review an order passed by him personally and not by his predecessors. Secondly a review is warranted only on such conditions as are given in Order 47 of the Code of Civil Procedure, and thirdly the period of limitation prescribed for review petitions under the Limitation Act should govern such applications.

5. We shall consider these points separately. First we take up the point whether it is necessary for the Custodian General exercising the powers of review to be the same gentleman who passed the order sought to be reviewed or he can review an order passed by his predecessor also. This point is not very difficult and is governed by the authority of this Court namely 1965 Kash. L. J. 258=(AIR 1966 J & K 12). In that authority his Lordship Justice Ali (as he then was) who wrote the Judgment of the Division Bench has held that:—

"The words 'his own order' do not refer to a particular person who is holding the office but to a particular office which the officer concerned is holding. In other words, what this section contemplates is that an order passed by the Custodian can be reviewed only by the Custodian and not by any other authority. The word 'own' does not refer to a particular person who is holding the office for the time being and is wide enough to include the successor of the officer concerned."

The same view has been taken in AIR 1952 Pepsu 82 and AIR 1963 Bom. 110. In the last authority it was held that:

"..... the word 'own' occurring in the expression 'review his own order' does

not mean that the power to review is available only to the officer who made the order and not to his successor. The word 'own' has been necessary since the power is given to several officers of varying authority to review the order. In the absence of the word 'own' the Dy. Custodian might be called upon to review the order of a Custodian and an Addl. Custodian may be called upon to review the order either of a Dy. Custodian or a Custodian a thing which was likely to introduce chaos in the administration of law, in order to confine each one within his own authority, the word 'own' has been used."

Therefore, we do not find any force in the argument of the learned counsel for the appellant that the present Custodian General could not review the order passed by his predecessor.

6. Next we turn to the scope and limits of the authority of review by the officers mentioned in sub-section (5) of Section 30 of the Act. It is true that this sub-section does not mention any circumstances under which a review application can be entertained or upon what grounds a review petition lies. There is not consensus of authority on this point. We have the following authorities: AIR 1954 Pat. 43, AIR 1960 J & K 125 and AIR 1967 J & K 8 on the one hand and AIR 1963 Bom. 110 and AIR 1952 Pepsu 82 on the other hand. The two sets of authorities take apparently contrary views. Before we discuss these authorities, a reference may be made to a Supreme Court authority referred to by the learned counsel for the respondents namely AIR 1953 SC 298. In that authority it was laid down that Section 141 of the Code of Civil Procedure does not apply to the Custodian as he is not a Court; though the proceedings held by him are of a quasi-judicial nature. The provisions relating to substitution were held therefore, not applicable to proceedings before the Custodian. This decision does not however, throw any light on the matter in dispute in this case; because in that case the point for consideration was only whether substitution should be ordered after the death of some party in proceedings before the Evacuee authorities.

7. A further argument of the learned counsel for the Custodian General is that the Code of Civil Procedure has been specifically applied in a limited manner to proceedings before the Evacuee authorities. He has referred to Section 3 of the Act, which lays that:—

"The provisions of this Act and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any

other law for the time being in force or in any instrument having effect by virtue of any such law."

And Section 29 of the Act expressly lays down that the Civil Procedure Code shall apply to the proceedings under the Act in respect of enforcing the attendance of any person and examining him on oath, compelling the discovery and production of documents and in other prescribed matters. The review powers are not prescribed either under the Act or in the rules. This argument also does not clinch the matter because the argument is not that the procedure laid down in the Code of Civil Procedure should be applied to the proceedings before the Evacuee authorities. On our part, we also do not propose to lay down that the Act or the rules framed thereunder anywhere suggest that the grounds of review should be the same as mentioned in the Code of Civil Procedure strictly speaking. But our decision stands on entirely different grounds namely the ground relating to interpretation of statutes and sound principles which would govern the administration of justice whether by Courts of civil origin or by the authorities under the Act. It is not disputed that the authorities under the Act hold quasi-judicial powers and have to decide cases after hearing parties, after giving them notice and questions relating to important matters affecting the evacuee property have to be decided by them between different persons appearing before them. Therefore the interpretation to be put on some sections of the Act where no specific provision to the contrary is laid down, should be similar to those applied or acted upon in day to day administration of justice in Courts of civil jurisdiction. In the first place it is a well recognized principle of interpretation that any interpretation which leads to absurdity or which makes the implementation of some enactment difficult or will result in chaos or anomalies or inconveniences should be avoided. Maxwell in the Interpretation of Statutes (8th Edition) on page 202 states:

"Whether the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

To the same effect is AIR 1927 Cal. 415. Another principle of interpretation is that a rational meaning is to be given to the language of a statute. In *Emperor v. Somabhai Govindbhai*, 178 Ind. Cas. 588 = (AIR 1938 Bom. 484) (FB) Beaumont C. J. observed that:—

"But I protest against the suggestion that a Judge construing an Act of Parliament, is a mere automation whose only duty is to give out what he considers to be the primary meaning of the language used. A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair he is entitled and indeed bound, to assume that the Legislature did not intend such a construction to be adopted and to try to find some more rational meaning to which the words are sensible."

If we accept the interpretation put by the learned counsel for the respondents one has to come to the conclusion that the Custodian General or for that matter the other officers and authorities mentioned in sub-section (5) of Section 30 can review any order either of their own or any of their predecessors without any justification and without any fetters as to the limitations or finality of the decisions given by themselves or by their predecessors. In matters where rights of parties are to be adjudicated some sort of finality must be attached to the decisions of the authorities legally competent to decide; otherwise it is not unlikely that two gentlemen exercising the same powers may come to opposite conclusions on the same facts. If individual opinions are allowed to have their sway; so many decisions solemnly arrived at after spending years and years can be set aside at any time by any officer at any time, and thus leave society and the decisions of such tribunals in a chaotic and perilous state. On this principle alone when a matter is decided by one competent authority it should not be allowed to be disturbed unless there is clear law authorising the same; otherwise there will be no finality to any decision or action of any tribunal or authority.

8. Now coming to the matter strictly in question i.e., the power of review, here again it is a well established principle of law that although words are primarily to be construed in their popular sense, terms of art must be taken in their technical or legal sense, rather than be restricted or enlarged according to their popular meaning, unless a contrary intention appears". See Halsbury's Laws of England, (3rd Edition), Volume 36, page 393. Similarly Lord Coleridge in (1885) 15 QBD 403, *Barlow v. Teal*, at pages 404-405 says that:—

"Whatever may have been the intention of the legislature we can only decide this case on general principles, and one of those general principles is, that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words

which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."

In 1893-1 QBD 25, *Jay v. Johnstone*, the same Lord Chief Justice Coleridge observed at page 28 that:—

"There is a well-known principle of construction sanctioned, if sanction were necessary, by the decision of the Court of Appeal in *Greaves v. Tofield* (1) that where the legislature uses in an act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted....."

In *Robinson Bros. Ltd. v. Houghton and Chester-le-Street Assessment Committee*, 1938-2 All. E. R. 79, at page 87 it is said that:—

".....where Parliament in re-enacting legislation uses language which has been the subject of judicial interpretation, it must be presumed to have used that language in the sense in which it has been judicially interpreted....."

The term 'review' is a term of art and has received judicial recognition. Aiyar's Law Lexicon defines 'review' as "a proceeding which exists by virtue of statute. It is in the nature of new trial of the issue previously tried between the parties. The cause of action being brought into Court again for trial by new petition. The proceedings in some respects resembles a writ of error and also a new trial". In judicial pronouncements these three terms 'appeal, review and revision' have received more or less a definite and precise meaning which on the face of it suggests itself to anybody conversant with the functioning of Courts of Law. In Section 30 the three remedies 'appeal, revision and review', are put in together and the hierarchy of the officers competent to hear appeals from orders of subordinate officers are clearly indicated. Similarly under sub-section (4), the Custodian General, Custodian, Addl. Custodian etc., have been given the power to revise orders passed by their subordinates and under sub-section (5) the same officers have been given powers to review their orders which shows that this word 'review' has been used more or less in a well-recognized legal sense and is lumped together in the same section which pertains to appeal and revision. Therefore, in our opinion the power to review should be analogous to those given by the Code of Civil Procedure.

In this view we are supported by the authorities mentioned earlier namely AIR 1954 Pat. 43, AIR 1960 J & K 125, AIR 1967 J & K 8. In AIR 1954 Pat. 43 a Division Bench of that Court held that:—

"When the legislature has deliberately used a term which has a known legal significance in law, it must be taken that the legislature has attached to that term that known legal significance. The expression 'review' used in S. 26(2), Administration of Evacuee Property Act must be construed not in a grammatical sense but it must be construed to have the same legal meaning as in O. 47, R. 1, Civil P. C. In that view the Custodian has no jurisdiction to review the order of his predecessor, in absence of any fresh material or in the absence of any mistake or error apparent on the face of the record."

This was a case under the Administration of Evacuee Property Act. This view has been accepted as correct by our Lord the Chief Justice Mr. Ali in AIR 1967 J. & K. 8 wherein his Lordship says that:—

"The Custodian General has been given power to review his own order under the Act. Although the grounds of such review have not been specified in Sec. 30 on the principle that when a statute uses a term of well-known significance the Legislature must be presumed to have the intention of attaching to that term that known legal significance, the Custodian General is required to review his order only on certain specified grounds as provided for in Order 47, Rule 1 of the Civil Procedure Code that is, only when there is an error of fact apparent on the face of the record or where there is a discovery of new and certain matters or the like." His Lordship has referred to AIR 1954 Pat. 43 also. The same view was expressed by Justice Nazir in AIR 1960 J & K 125.

9. Against this view we have to consider only two authorities namely AIR 1952 Pepsu 82. In that case review proceedings were started by the very Custodian who had made the original order. It was held that the review proceedings would not be without jurisdiction if the succeeding Custodian took additional evidence. The other authority AIR 1963 Bom. 110 is a judgment of a single Judge of that court. It has no doubt held that the word 'review' should not be given a restricted meaning either narrower than that contained in the Civil Procedure Code or larger. It has been further held that:—

"..... Larger power of review seem to have been vested in the officers concerned to set the matters right, where injustice was caused to any party....." But the same authority at the same time lays down that:—

"..... this wider meaning of the word 'review' does not mean that merely because a succeeding officer takes a contrary view that he is entitled to set aside that order"

Some reasons have been given why the power of review should be construed liberally in the case of the Administra-

tion of Evacuee Property Act; but the authority read as a whole supports the view we have taken namely that under the garb of possessing unlimited powers of review an order passed by his predecessor cannot be set aside by a succeeding authority simply because he has contrary views on the matter. Therefore taking all these authorities and the well-known rules of construction of statutes, the scope and ambit of the Act, the absurdities and hardships and anomalies that would arise by interpreting the word 'review' as giving unlimited powers to an officer, into consideration, we are clearly of the opinion that the grounds on which a review application can be entertained by the Custodian General or any other officer empowered to exercise such powers under the Act, should be analogous to those given to a Civil Court under the provisions of Order 47, Rule 1, C.P.C. In this case the learned Custodian General has himself after discussing the law relevant to review application, come to the conclusion that 'the application before me did not fulfil the conditions of a review'. Therefore, there was no justification for him to have set aside the order passed by his predecessor, notwithstanding the fact that the latter order did substantial justice.

10. The second point for consideration is that of time. In this case the review petition has been presented after one year and three days. The order of the previous Custodian General was dated 15-4-1961 and this review petition was presented on 18-4-1962. Before discussing this point of limitation it is necessary to observe that as the order of the Custodian had been reversed by the previous Custodian General by means of his order dated 15-4-1961, a further appeal lay to this court under the provisions of Section 30(1) (c) of the Act. But no such appeal was preferred. On the other hand a writ petition was presented which also was withdrawn as not pressed.

11. Ordinarily under the Limitation Act a review petition under the Code of Civil Procedure can be presented within 30 days (Articles 160 and 161). Even an application for review of the judgment of the High Court in its original jurisdiction can be preferred within the same period (Article 162) and the maximum period for a review petition under Article 173 is 90 days from the order. In this case a review has been entertained after over a year and no cogent grounds have been mentioned why delay should be condoned nor has any reason been given by the Custodian General in his order under discussion on what grounds he has condoned the delay. Even if we assume that no specific period for bringing in review application under such circumstances is

prescribed yet reason and justice demand that the maximum period allowed for review i.e., 90 days should be construed to be the period of limitation within which such review petitions should ordinarily be presented. For preferring a revision under the Civil Procedure Code no limitation is prescribed but it has been held by the Courts in India that a revision application should be presented ordinarily within the same period as is provided for an appeal. This Court also had occasion to consider this point and it has been held in a Division Bench case that a revision petition should be presented within the time limit provided for an appeal.

12. Applying the same principles to a review under the Act, it should have been presented within the same period. As that has not been done, therefore also the order of the Custodian General dated 22-4-1965 is liable to be set aside.

13. The result is that the appeal is accepted and the order of the learned single Judge of this court dated 29-8-1966 and that of the Custodian General dated 22-4-1965 are set aside. There will be no order as to costs.

14. ANANT SINGH, J.:—I fully agree with my learned brother Bhat J. I may only add that the Custodian General, when he himself conceded that the application before him in substance was one for review, and it "did not fulfil the condition of a review", he manifestly acted in excess of his jurisdiction in setting aside the order of his predecessor-in-office, dated 16-4-1961. The scope of the application for review would not be enlarged by merely labelling it as a 'miscellaneous application', as the Custodian General would seem to think, so as to give him the requisite authority to set aside the order. The change in the nomenclature of the application could not enhance its scope. It continued to be an application for review, and before it could be granted, the conditions must have been found to have been existing.

15. It is true that the Evacuee Administration of Property Act, has not prescribed its own terms for a review of any order while making a provision for it in Section 30. But for this reason alone, the well-known legal connotation attached to the term, review, as in Order 47, Rule 1 of the Civil Procedure Code, has to be given to it for the interpretation of the term used in this Act as well. If any Act or Rule uses any term of legal phraseology without defining it, and if such phraseology has been defined in any other enactment, and has been largely recognized, the same interpretation has to be given to it, when it is not specifically defined otherwise. A wider interpretation must be avoided, where the term is not defined. Brother Bhat J. has referred to

the authorities in this regard, and I need not repeat them.

16. I may, however, also add that even if the Custodian General could be conceded to include any other ground, not provided for in Order 47, Rule 1 of the Civil Procedure Code for review, he had no other valid ground either. The order of his predecessor-in-office was based on the recognition of a Civil Court decree in favour of the appellant's father. The present Custodian General had no authority to ignore and act against the civil court decree, which had become final, and was binding on him. He could not ignore it in law even by invoking the provision of the Big Landed Estates Abolition Act 2007, as he seems to have been done in supersession of the Civil Court decree in favour of the appellant's father. The provisions of Big Landed Estates Abolition Act have to be enforced against any owner of Big Estates within the scope of this Act, and by the authorities prescribed therein. The Custodian General has acted without jurisdiction in setting aside the order of his predecessor-in-office, and that also against the law of limitation, as has been worked out by brother Bhat J., although, it may be conceded that there was no bar, to his reviewing the order of his predecessor-in-office within the meaning of sub-section (5) of Section 30 of the Evacuee Administration of Property Act, if there had been valid grounds for it.

BY THE COURT

17. After this Bench announced judgment on 30-12-1968 in this case, the learned Additional Advocate General brought to our notice the provisions of Rule 27(6) made under the Administration of Evacuee Property Act, which read as under:—

"An application for review of any order may be made within thirty days of the date of such order and shall be presented either in person or through a legal practitioner or a recognized agent." This rule was not cited at the bar at the time of arguments nor were these rules available in the High Court library so that they could be made use of at the time of writing judgment. This rule provides a limitation of 30 days for a review petition. After this rule was brought to our notice, we ordered that the case would be re-heard on this point. We have heard the learned counsel for the parties.

18. Under this Rule 27(6) of the Rules under the Evacuees' (Administration of Property) Act, 2006, as already indicated a period of limitation for a review petition is 30 days. In our judgment of 30th December, 1968, we had decided this point on general principles as no period of limitation for a review petition was brought to our notice at the time of arguments. Therefore our judgment dated

30th December 1968 stands amended on the point of limitation for review. The application for review before the learned Custodian General was presented after one year and three days. Obviously it was time barred. There was no attempt at getting the delay condoned nor was there any reason given by the learned Custodian General for condoning the delay. Therefore also the order of the Custodian General was bad in the eye of law and had to be set aside.

19. Some sort of a written memorandum called 'submissions' on behalf of the respondents 2 and 3 on the merits of the case have been placed on the file by Mr. Joginder Singh Advocate but he was not present to press these at the time of re-hearing. We have gone through the submissions also but in our opinion they are not relevant for the disposal of this petition. Therefore our order dated 30th December 1968 stands.

20. It is modified only to this extent that instead of holding 90 days as the period of limitation for a review of an order by the Custodian General we hold that on the basis of Rule 27(6) of the Rules under the Act 30 days from the impugned order as the time within which ordinarily an application for review should be presented before the Custodian General.

21. The result is that the appeal is accepted and the order of the learned Single Judge of this Court dated 29-8-1966 and that of the Custodian General dated 22-4-1965 are set aside. There will be no order as to costs.

Appeal allowed.

AIR 1970 JAMMU & KASHMIR 57
(V 57 C 14)

FULL BENCH

S. M. FAZL ALI, C. J., J. N. BHAT AND
ANANT SINGH, JJ.

Lal Chand Pargal and others, Petitioners v. Director NES and others, Respondents.

Writ Petns. Nos. 61, 87, 88, 126 and 127 of 1967, D/- 24-4-1969.

(A) Civil Services — Jammu and Kashmir Civil Services (Classification, Control & Appeal) Rules (1956), Rr. 2(a), 2(b), 2(c), 2(d), 2(h), 2(j), 2(k), 25(2) and 25(3) — Extent, scope and application of Rule 25, sub-rr. (2) and (3) — Principles governing promotion stated — Distinction between ordinary servants and Government servants pointed out.

Per Majority (Bhat J. contra) — Sub-rr. 25(2) and (3) deal with the promotion of Government servants in their own service and has no application when there

is a transfer of a member of one service to another. Even if by such transfer the Government servant gets into a higher category it will be really an appointment by transfer rather than a promotion in the service. Promotion conceives appointment from a lower category to a higher category of the same service or an allied service because the words "such service" mentioned in Rule 2(h) clearly denote that service must be the same. The order of the Government classifying various gazetted services dated 19-10-1955 cannot be taken as a guide or a basis for the interpretation of the rules. (Para 8)

Rule 25(2) merely incorporates the general desire of the employer to promote efficiency and integrity in the services so that a real impetus is given to meritorious persons in the matter of promotion. The words used in sub-rule (2) are of a very wide amplitude and cover almost every category of service so that the general rule contained herein is that promotion should be made on the basis of merit and ability alone, seniority to be considered only where merit and ability are approximately equal. Thus this rule contains what is known as the merit cum seniority formula. To begin with, the words, "promotion to a service" includes also promotion to all groups of posts declared by Government to be a service and thus it includes every category of the post borne on the cadre of a service. Such an interpretation is in consonance with the definition of the word "service" as given in Rule 2(k). The word 'class' includes not only promotion from one class to another but also promotion between classes inter se, that is to say, even if there are posts belonging to the same class but carrying different scales of pay and one class is superior to another in the matter of status and emoluments, then promotion even between the same class would be governed by Rule 25(2). (Paras 9, 10)

Sub-rule (3) of Rule 25 would apply only to such cases which are not covered by sub-rule (2) and it is the residuary rule which would apply if a residue is left, otherwise not. It would apply to such cases where there is promotion from one grade to another, though the posts may be of the same nature or character though with slightly different emoluments. Thus if there is promotion from one grade to another, it may be covered by sub-rule (3) and would have to be governed by seniority alone, until and unless promotion is withheld by way of penalty or when some other member is given promotion for extraordinary merit and ability. Writ Petn. No. 175 of 1966, D/- 3-3-1967 (SC) Foll. (Para 11)

Every Government is guided by the sole consideration of improving the efficiency, integrity and stability of the services and in order to promote these quali-

ties in services, it is only necessary that in the matter of promotions merit and ability should be given topmost preference. This should be the first consideration present in the mind of the appointing authority if efficiency is to be brought about in the services. This is the anxiety not only of the Government but of any master regarding the servants which he employs. The relationship between the Government and its servants is similar to that of an ordinary master and servant with the difference that the conditions of service of Government servants are governed by statutory rules or constitutional safeguards contained in the Constitution. Excepting this prominent feature the other incidents are the same. Once a person enters a Government service, he has no right to be appointed to a higher post only on the basis of his seniority if he does not possess any merit. Indeed if promotions are made on the basis of seniority alone then it will be difficult to promote efficiency in the services and there will be no tendency for any person to improve his quality because the Government servant would know that he would be promoted when his turn comes whether he deserves it or not, whether he improves his quality or not. He would get into the higher post merely by virtue of his seniority. Such a method of promotion is not consistent with the notions of a civilized society. (Paras 9, 12)

(B) Civil Services — Jammu & Kashmir Civil Services (Classification, Control & Appeal) Rules (1956), Rr. 8, 25, sub-r. (2) and (3), 30(3) — Reasons for making promotion — Appointing authority is required to give — Subjective satisfaction of appointing authority in the matter of promotion cannot be questioned—(Constitution of India, Art. 226) — AIR 1957 J. & K. 31 & AIR 1957 J. & K. 8 (FB), Partly Dissented from.

The words 'shall be made on the ground of merit and ability' in Rule 25(2) clearly postulate that the order of the appointing authority must show *ex facie* that the considerations mentioned in the rule were present in the mind of the appointing authority at the time of making promotions and the word 'ground' implies that these considerations should be stated in the order so that anybody reading the order may know that action has been taken under Rule 25(2) of the Rules. The question of promotion depends largely on the subjective satisfaction of the appointing authority and the assessment of the appointing authority regarding the work and the performance of the Government servant cannot be questioned, unless it is shown to be tainted by a mala fide or colourable intention; yet the statutory rules do require that the considerations which had weighed with the appointing authority must find place in the order of

promotion and then alone it would be a compliance with the provisions of Rule 25(2). It is not that in every case the appointing authority should write a detailed order dealing with the merits and demerits of the promotion of a Government servant but what is contemplated by sub-rule (2) is a bare statement of the grounds on the basis of which promotion is made. AIR 1957 J & K 31 & AIR 1957 J & K 8 (FB), Partly Dissented from. AIR 1969 Punj. 161, Dist.

(Paras 14, 15)

(C) Civil Services — Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), Rr. 25(2), 30—Promotion cannot be claimed as a matter of right — Appointing authority is not required to give opportunity of being heard before promotion is refused — (Constitution of India — Natural justice).

A promotion bypassing the senior servant may take place in either of the following two ways:— (i) A junior person may be appointed on the basis of merit and ability superseding the senior man. In such a case the senior man has no right at all because merit prevails over seniority. (ii) A junior man may be promoted to a higher post by superseding a senior man because the senior man though equal in merit to the junior servant is guilty of negligence or other laches as a result of which his promotion is withheld. In a case falling in the latter class, the appointing authority under Rule 30 is bound to hear the Government servant before withholding his promotion. Thus under Rule 25(2) promotion cannot be claimed as of right. The principles of natural justice cannot be applied to matters of promotion which are purely administrative in nature unless the rule itself requires, and do not deal with the right of citizens, and there is no question of giving a reasonable opportunity to the Government servant concerned of being heard before promotion is refused to him unless the appointing authority withholds promotion by way of penalty. Case law discussed. (Paras 24, 29)

The rules regarding promotion provide sufficient guarantee against any arbitrary exercise of power inasmuch as they lay down, that reasons for promotion must be given and secondly where promotion is withheld by way of penalty, a reasonable opportunity to the Government servant concerned of being heard in the matter is also provided for.

(Paras 20, 21)

(D) Civil Services — Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), R. 25(2) & (3) — Grant of promotion on merits — No infringement of Art. 16, Constitution of India — (Constitution of India, Arts. 16 and 226).

In granting promotion to a Government servant in accordance with the con-

ditions prescribed in Rr. 25(2) and 25(3), Art. 16 of the Constitution of India is not infringed in any way. Indeed, if the appointing authority acts contrary to the rules or where its action is mala fide amounting to an arbitrary or colourable exercise of jurisdiction, the aggrieved Government servant can always approach the Court for an appropriate remedy. AIR 1968 SC 81 & AIR 1960 SC 384, Rel. on. (Para 32)

Concept of equality contained in Art. 16 of the Constitution of India cannot be attracted where a promotion of Government servant is made on the basis of merit. Before this Article would apply, it must be established that the Government servants are similarly circumstanced and have been selected for hostile discrimination. Where the rule provides for promotion to be made on the basis of merit and ability and when he is not similarly circumstanced with his junior who is of a superior merit, then in the event of the junior being promoted, the senior cannot take shelter under the infraction of Art. 16 of the Constitution of India. AIR 1962 SC 36, Rel. on. (Para 29-A)

(E) Civil Services — Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), R. 24 — Inter se seniority of Government servants — Principle governing determination, stated.

Seniority is to be governed with reference to service, class, category or grade which is held by the Government servant and has to be determined by the date of his first appointment to such service, class, category or grade. The words 'first appointment' have been further defined as relating to the date of the first substantive appointment, that is to say, the date of the permanent appointment against a clear vacancy. If two persons are appointed in the same class on the same date, then the date on which one of these persons has been confirmed or rather has secured the permanent appointment would be the date from which his seniority would run. The proviso to Rule 24 lays down that in cases where persons have been appointed on the same date, their inter se seniority would be determined in the following manner:— (i) in the case of those promoted by their relative seniority in the lower service, class, category or grade from which they have been promoted, their seniority would be governed by CL (a) of the proviso which refers to the date of their permanent or substantive appointment. (ii) In the case of employees recruited direct their seniority will be governed according to the positions attained by them or assigned to them in the competitive examination or on the basis of merit, ability etc. In such cases there is no difficulty in determining the seniority of the Government servant.

(iii) As between some persons promoted and others recruited direct their seniority will be governed by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules. The difficulty may arise where the rules do not prescribe the date of allocation. In such a case it is obvious that the principles governing CL (a) would naturally apply and the promotee will be deemed to be senior to the direct recruit unless there is a rule to the contrary. (Para 33)

Cases Referred: Chronological Paras

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T. R. Bhasin, R. N. Bhalgotra, Joginder Singh and O. N. Tikku, for Petitioners;

Addl. Advocate General, Advocate General and V. S. Malhotra, for Respondents.

FAZL ALI, C. J.:— These writ petitions arise out of various orders passed by the appointing authority against the petitioners regarding their promotion to the next higher post. As these petitions involve substantial questions of law of far-reaching consequences, they have been referred to us for an authoritative pronouncement. Unfortunately, however, no particular question has been framed by the Bench concerned. It has therefore become necessary for us to frame questions involved in the light of the arguments of the parties, the principles involved, and the facts common to all the cases. The questions which we have formulated are as follows:—

(1) The extent, scope and application of Rule 24, Rules 25(2) and 25(3) of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, as also the principles governing promotion of Government servants under these provisions.

(2) Whether or not the appointing authority is required to give reasons for making promotion, and if so, to what extent?

(3) Whether or not the Government servants have a legal right to promotion under the rules so as to make the act of promotion a judicial act requiring an objective consideration?

(4) Whether or not the appointing authority is to follow the principles of natural justice by giving a reasonable opportunity to the Government servants of being heard before promotion is decided upon?

(5) Whether in granting promotion to one Government servant and not to the other rights of equality under Art. 16 of the Constitution of India are infringed?

(6) The principle governing inter se seniority of Government servants as contained in the rules.

1-A. We would take up the points formulated by us ad seriatim.

Question 1. The extent, scope and application of Rule 24, Rules 25(2) and 25(3) of the Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, as also the principles governing promotion of Government servants under these provisions.

2. In the State of Jammu & Kashmir the service conditions of most of the Government servants are determined by the Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules 1956 (hereinafter to be referred to as the Rules). These rules were published in the Government Gazette by Government Order No. 952-C of 1956 dated 14-6-1956. The rules deal with a variety of subjects regarding the conditions of service of

Government servants beginning from their appointment right upto the punishment or penalties that may be imposed upon them, and the mode prescribed therefor. We might state here that these rules are not only statutory in character but have also the authority of the Constitution because under the proviso to S. 124 of the State Constitution these rules have been directed to be continued to be effective subject to the provisions of any law made by the legislature after the coming into force of the Constitution. Since on the points involved in this case no such law has so far been made by the State legislature, it follows therefore that these rules would be deemed to be effective under the provisions of the Constitution referred to above.

3. In order to understand the scope and the ambit of Rule 25 of the Rules it will be necessary to analyse the real import of the various terms defined in the Rules. Rule 2(a) defines cadre as the sanctioned strength of class, category or grade. Rule 2(b) defines category as the posts borne on the cadre of a service or class, but imposes two conditions before the posts can be said to fall within the same category. These conditions are:—

(i) That the duties of the posts must be of the same character and importance.

(ii) That they must be known by the same designation and the scales of pay should also be the same.

In other words, category is a sub-division of a particular post borne on the cadre of a service, carrying the same emoluments and known by the same designation. Class has been defined thus:—

"Class means the posts borne on the cadre of a service between which and the other posts borne on the cadre of the same service promotions and transfers are not ordinarily admissible."

In order, therefore, to satisfy the definition of a class two attributes must be fulfilled. In the first place the posts of the same class must belong to the same service; secondly promotions and transfers between these posts forming a class are not ordinarily admissible.

4. Promotion has been defined thus:—

"Promotion means the appointment of a member of service or class of a service, in any category or grade to a higher category or grade of such service or class." It would thus appear that under the Rules promotion tantamounts to the appointment of a member of a service or a class of service to a higher category, grade or class of the same service. The words 'such service' clearly indicate that promotion contemplates appointment to a higher post of the same service.

5. Rule 2 (i) which defines recruitment by transfer runs thus:—

"A candidate is said to be recruited by transfer to a service when at the time of

his first appointment thereto he is either a member or a probationer in another service."

6. Service is defined as a group of posts declared by Government to be a service.

7. We have taken pains to give detailed definition of some of the terms because there appears to be serious divergence between the argument of the counsel for the parties with respect to the import and connotation of these terms. We shall now take up Rule 25 (2) and (3) which run thus:—

All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any test or special qualifications prescribed by Government unless—

(a) the promotion of a member has been withheld as a penalty or

(b) a member is given special promotion for conspicuous merit and ability."

The learned counsel for the petitioners submitted that sub-rule (3) is the general rule of promotion, whereas sub-rule (2) of Rule 25 is a rule which applies to exceptional cases covered by or mentioned in sub-rule (2). The Addl. Advocate General on the other hand submitted that sub-rule (2) is the general rule under which promotions have to be made, whereas sub-rule (3) is the residuary rule which will cover cases not falling within the ambit of sub-rule (2) of Rule 25. The Addl. Advocate General initially submitted that the word 'promotion' as used in Rule 25(2) is wide enough to cover and include promotion from one service to another, though the two services may be of different kind altogether. Subsequently the Addl. Advocate General changed his stand and argued that promotion means an appointment to a higher category of either the same service or an allied service. In our opinion the altered stand taken by the Addl. Advocate General is absolutely correct. We have pointed out from the definition of the word 'promotion' that promotion conceives appointment from a lower category to a higher category of the same service or an allied service because the words 'such service' mentioned in Rule 2(h) clearly denote that service must be the same.

In fact if we accept the argument of the petitioners that Rule 25(3) is wide enough to cover promotion from one service to another, even if the two services

are absolutely different, then such a conclusion would lead to most anomalous results. For instance it may so happen that the appointing authority of one service and that of the other are not the same and the two may not agree in which case the promotion will not be possible at all. Furthermore where there is service of a technical kind, for instance, the Engineering service, it will be absurd to expect that an Overseer or an Asstt. Engineer would be promoted to another service, say the judicial service and be appointed a Sub-Judge or a District Judge. In our opinion such a state of affairs was never contemplated by the rules and that is why Rule 2(j) clearly defines recruitment by transfer. The definition of this term signifies that a member of one service may be transferred to another service.

It is obvious therefore that a member of one service is transferred to another service only if the transfer is possible and not otherwise. For these reasons therefore sub-rs. 25(2) and (3) deal with the promotion of Government servants in their own service and has no application when there is a transfer of a member of one service to another. Even if by such transfer the Government servant gets into a higher category it will be really an appointment by transfer rather than a promotion in the service.

8. Reliance was however, placed by the Addl. Advocate General as also by the counsel for the petitioners on an order of the Government classifying various gazetted services where a number of services have been mentioned, enumerating the class or the category. This classification was made on 19-10-55 that is to say long before the rules came into force. Furthermore this classification has been made in order to describe the status of a Government servant, the emoluments to which he is entitled, and the T.A. that he is entitled to draw. This classification has nothing to do with the interpretation of the rules. In fact clause 4 of the preface to the rules makes this position absolutely clear by providing as follows:

"Nothing however, in this classification should be taken to convey any change in the conditions of service of a post or a group of posts in regard to their permanent or temporary nature of their being pensionable or non-pensionable. Such conditions will be determined by the general or special rules pertaining to a service or its class or category or the sanction under which a particular post has been created."

It is therefore manifest that we cannot interpret the terms mentioned in the rules with reference to the classification of gazetted services made by the Government which has been done for a very different purpose. Furthermore this classi-

fication has now become out of date because it is conceded by the Addl. Advocate General that a number of additional posts have come into being which do not find place in the said classification and some of the posts mentioned in the classification have ceased to exist. For all these reasons therefore we are not in a position to take the aforesaid classification as a guide or a basis for the interpretation of the rules.

9. We would now take up the first question, namely the scope and the ambit of R. 25(2) and (3). In our opinion every Government is guided by the sole consideration of improving the efficiency, integrity and stability of the services and in order to promote these qualities in services, it is only necessary that in the matter of promotions, merit and ability should be given topmost preference. This should be the first consideration present in the mind of the appointing authority if efficiency is to be brought about in the services. This is the anxiety not only of the Government but of any master regarding the servants which he employs. The relationship between the Government and its servants is similar to that of an ordinary master and servant with the difference that the conditions of service of Government servants are governed by statutory rules or constitutional safeguards contained in the Constitution. Excepting this prominent feature the other incidents are the same. In our opinion, therefore, Rule 25(2) merely incorporates the general desire of the employer to promote efficiency and integrity in the services so that a real impetus is given to meritorious persons in the matter of promotion.

The words used in sub-rule (2) are of a very wide amplitude and cover almost every category of service so that the general rule contained herein is that promotion should be made on the basis of merit and ability alone, seniority to be considered only where merit and ability are approximately equal. Thus this rule contains what is known as the merit cum seniority formula. To begin with, the words "promotion to a service" includes also promotion to all groups of posts declared by Government to be a service and thus it includes every category of the post borne on the cadre of a service. Such an interpretation is in consonance with the definition of the word 'service' as given in Rule 2(k) referred to above. The word 'class' includes not only promotion from one class to another but also promotion between classes inter se, that is to say even if there are posts belonging to the same class but carrying different scales of pay and one class is superior to another in the matter of status and emoluments, then promotion even between the same class would be governed by Rule 25(2).

10. The learned counsel for the petitioners, however, submitted that the word 'class' used in sub-rule (2) of Rule 25 postulates promotion from one class to another and not promotions within the same class. We do not find any warrant for this view because no such distinction has been laid down in the rules for delimiting the scope of the word 'class'. Furthermore such an interpretation does not appear to be consistent with the definition of the word 'class' in Rule 2(d). According to the definition class means the posts borne on the cadre of a service between which and the other posts borne on the same service promotions and transfers are not ordinarily admissible. For instance in the classification of gazetted services produced by the Addl. Advocate General, the Chief Secretary and the Commissioner have been placed within same class but they carry different emoluments. It is obvious that promotions between these two members of the class are neither admissible nor can a member of one category in the class be transferred to another. In other words it cannot be said that a Commissioner can be transferred as Chief Secretary and a Chief Secretary as Commissioner.

Similarly in the Kashmir Judicial Service Sub-Judges and Munsiffs are shown as belonging to the same class, but it cannot be urged with any show of force that Munsiffs can be transferred as Sub-Judges and Sub-Judges as Munsiffs. Such transfers cannot be done until the Munsiffs are promoted to the rank of Sub-Judges. The emoluments of these two posts and the scales of their pay are also different. It is therefore clear that the word 'class' used in Rule 25(2) is wide enough not only to include promotion from one class to another but also promotions within the same class.

11. The third contingency contemplated by sub-rule (2) is that promotions should be made to a selection category which is defined in Rule 2(c) as a category declared to be a selection category by the appointing authority. Thus analysing the provisions of this rule it would appear that the rule governs all cases of promotion to a service, that is to say (1) between the posts belonging to a particular service (2) to posts contained either in the same class or to posts from one class to another; and (3) to posts which are declared by the appointing authority to be a selection category. In the case of all these promotions, the rules lay down that the primary consideration for promotion should be merit and ability and such tests as may be prescribed, seniority to be considered only when merit and ability are equal. In other words the rule clearly contemplates that where a junior member of the service is superior in merit and

ability to his senior, he is entitled to be promoted in preference to the senior on the grounds of merit and ability. The senior member has no right to promotion unless he can show that he is equal in merit and ability to the junior member. If this criterion is adopted, it will improve the efficiency and integrity of the services and give an impetus to the members of the services to improve their quality.

Sub-rule (3) would apply only to such cases which are not covered by sub-rule (2) and it is the residuary rule which would apply if a residue is left, otherwise not. The question which arises for our serious consideration is as to what cases would be covered by sub-rule (3) if we hold sub-rule (2) to be the general rule. There is however no difficulty in finding an answer to this question. Sub-rule (3) would apply to such cases where there is promotion from one grade to another, though the posts may be of the same nature or character though with slightly different emoluments. For instance in the State we have two grades of clerks (Junior Assistants), Rs. 65-130 and Rs. 75-150. Assistants working in both the grades bear the same designation. Thus if there is promotion from one grade to another, it may be covered by sub-rule (3) and would have to be governed by seniority alone, until and unless promotion is withheld by way of penalty or when some other member is given promotion for extraordinary merit and ability. We might mention here that the Supreme Court in case of Ghulam Nabi Shora v. the State of Jammu & Kashmir, Writ Petition No. 175 of 1966, D/- 3-3-1967 (SC) appears to have gone into this question and interpreted the language of Rr. 25(2) and 25(3).

In this case their Lordships were considering the promotion of Munsiffs to the rank of Sub-Judges and their Lordships clearly held that such a promotion was covered by Rule 25(2) and not by R. 25(3). Their Lordships observed as follows:—

"It is common ground that in the matter of promotion Munsiffs are governed by the J. & K. Civil Services (Classification, Control and Appeal) Rules 1956..... Under Cl. (2) of R. 25 promotion is to be made strictly on merit and ability and the petitioners cannot claim as of right to be promoted merely on the ground that they were placed higher in rank in the list of appointees to the posts of Government Prosecutors than respondents 4 to 9..... It was somewhat faintly suggested on behalf of the petitioners that Cl. (3) of R. 25 which is the residuary rule applies to the case of the petitioners..... Prima facie it appears that in appointing Munsiffs to the post of Subordinate Judges the State promotes them to a selection

category of in any case to a class within the meaning of R. 25(2). The expression 'class' is defined in R. 2(d) as meaning the posts borne on the cadre of a service between which and the other posts borne on the cadre of the same service, promotions and transfers are not ordinarily admissible. It is not suggested that Munsiffs and the Subordinate Judges are borne on the cadre of the same service and promotions and transfers are not ordinarily admissible."

These observations of their Lordships fully fortify the view taken by us that Rule 25(2) is the general rule which governs all promotions and Rule 25(3) is the residuary rule which governs only those cases which are not covered by Rule 25(2).

12. It was however contended on behalf of the petitioners that if promotions are made by and large on the basis of merit and ability ignoring seniority, it would lead to demoralization in the State services. We are, however, unable to agree with this argument. Once a person enters a Government service, he has no right to be appointed to a higher post only on the basis of his seniority if he does not possess any merit. Indeed if promotions are made on the basis of seniority alone then it will be difficult to promote efficiency in the services and there will be no tendency for any person to improve his quality because the Government servant would know that he would be promoted when his turn comes whether he deserves it or not; whether he improves his quality or not. He would get into the higher post merely by virtue of his seniority. Such a method of promotion is not consistent with the notions of a civilized society such as ours. For these reasons we answer the first question accordingly.

13. Question No. 2:— Whether or not the appointing authority is required to give reasons for making promotion, and if so, to what extent?

13-A. It was urged by the counsel for the petitioners that the language of sub-r. (2) and (3) of Rule 25 makes it incumbent on the appointing authority to give reasons for the promotion of a Government servant indicating the grounds on which the promotion is made. The Addl. Advocate General however contended that the sub-rules nowhere expressly lay down the requirements of giving any reasons for the promotions to be made but only mention the considerations that should govern the appointing authority in making promotions. In support of his submission the learned Addl. Advocate General relied upon a decision of the Punjab and Haryana High Court in 1968 SLR (Service Law Reports) 764=(AIR 1969 Punj. 101), and drew our attention

to the following observations made in that case:—

"It is patent that regulation 5(3) does not require any reason to be recorded for holding any person to be of exceptional merit and suitability..... In any case when once the committee has arrived at an opinion to the said effect regarding a candidate's exceptional merit and suitability the statute in its wisdom has thought it expedient to respect that opinion..... It would therefore be treating a dangerous ground to go behind the clear expression of subjective satisfaction and the expression of opinion following thereto which had been expressly averred to in the written statement on behalf of the Committee."

It is true that Rule 25(2) does not in so many words express any reasons to be recorded for promotion to be granted to a member of the service, but the language of this rule is essentially different from that of the Indian Administrative Service Rules which was being considered by the Punjab and Haryana High Court. To begin with it would appear from the judgment in the case (Supra), that R. 5(5) of the Indian Administrative Service Rules expressly required reasons to be recorded in writing whereas Rule 5(3) which almost immediately preceded the said rule did not mention anything about reasons being given. In view of this strange placing of the language of the statute their Lordships rightly held that the previous provision namely Rule 5(3) did not require any reasons to be recorded. Furthermore the language of Rule 5(3) in that case was as follows:—

"The names of the officers included in the list shall be arranged in order of seniority in the State Civil Service.

Provided that any junior officer who in the opinion of the committee is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him."

14. It is therefore clear that Rule 5(3) (Supra) merely requires a list to be prepared in order of seniority, whereas the proviso mentions that a junior officer could be considered in view of his exceptional ability. The language of Rule 25(2) in the present case is quite different. The words 'shall be made on the ground of merit and ability' clearly postulate that the order of the appointing authority must show ex facie that the considerations mentioned in the rule were present in the mind of the appointing authority at the time of making promotions and the word 'ground' implies that these considerations should be stated in the order so that anybody reading the order may know that action has been taken under R. 25(2) of the Rules. In other words while we fully agree with the principle that the question of promotion depends largely on

the subjective satisfaction of the appointing authority and that the assessment of the appointing authority regarding the work and the performance of the Government servant cannot be questioned, yet we cannot help feeling that the statutory rules do require that the considerations which had weighed with the appointing authority must find place in the order of promotion and then alone it would be a compliance with the provisions of Rule 25(2).

15. There is yet another circumstance that lends support to this view. Under Rule 30(3) withholding of promotion amounts to a punishment and it can be resorted to only after giving a notice to the delinquent servant and giving him an opportunity of defending himself. There may be cases where an appointing authority in the garb of promoting a junior man acts under sub-rule (2), whereas his real intention is to act under Rule 30(3) by withholding promotion. But in order to deprive the delinquent servant of an opportunity of being heard a junior is promoted under the cover of merit and ability so that the delinquent servant is not in a position to know whether he has been bypassed by a junior, because the junior possessed superior merit and ability or because the appointing authority chose to withhold promotion of the senior member by way of penalty. Where the order of promotion specifies the grounds mentioned in Rule 25(2), there can be no confusion on this account and the order of promotion being a speaking order would apprise the Government servant of the actual situation. This is yet another reason why we think that the rule-makers intended that the appointing authority must give at least the grounds on the basis on which promotion is made under sub-rule (2).

By laying stress on the appointing authority to give reasons we do not mean to suggest that in every case the appointing authority should write a detailed order dealing with the merits and demerits of the promotion of a Government servant but what is contemplated by sub-rule (2) is a bare statement of the grounds on the basis of which promotion is made, that is to say, the appointing authority must say specifically in its order that a person is being promoted because in its opinion he is superior in merit and ability to the other member of the service who is being superseded. In other words what Rule 25(2) requires is only to record grounds by the appointing authority and no more. Such a requirement would serve two purposes: it would guard the appointing authority against making promotions on the basis of favouritism or nepotism and secondly it would apprise the person bypassed with the reasons why he has

AIR 1970 KERALA 65 (V 57 C 14)

V. R. KRISHNA IYER, J.

A. Ibrahim Kunju, Petitioner v. State of Kerala and others, Respondents.

O. P. No. 5325 of 1968, D/- 19-2-1969.

Constitution of India, Art. 226 — Principles of natural justice — Duty of executive authorities — Opportunity to delinquent to explain action should be real and fair — Reasons for orders passed is necessary requirement — Discretionary matters — Power of High Court in writ proceedings — Suggestion to educate Officers minimum needs of natural justice and obligations under Arts. 14 and 19 of the Constitution.

The doctrine of natural justice is a part of the humanist discipline of the executive authorities who affect rights of citizens by their acts. Even when an executive body is given the power to decide something in its discretion, the Courts would still keep it in the leading strings of fair procedure. Opportunity to explain any action or conduct of the delinquent should be real and not ritualistic, effective and not illusory and must be followed by a fair consideration of the explanation offered and the materials available, culminating in an order which discloses reasons for the decision sufficient to show that the mind of the authority has been applied relevantly and rationally and without reliance on facts not furnished to the affected party. (Para 6)

Natural justice operates in the field of administrative action, ordinarily, only when there is a duty to act judicially. Quasi-judicial obligation involves giving of reasons for orders, and failure to give reasons ordinarily voids the order. AIR 1963 SC 1430 and AIR 1967 SC 1606 Relied on. (Paras 7, 8)

Giving reasons for orders is certainly a requirement of natural justice, but this does not mean that every incidental or interlocutory or other similar orders must contain elaborate reasons. That would make the canon of natural justice unnatural and unjust. It may be that the granting of adjournment is a purely discretionary matter and the exercise of that discretion cannot be dissected by the writ Court. But the circumstances of the case must also be borne in mind. If counsel, engaged by a party, without informing his client, requests for an adjournment which is turned down, the dismissal of the appeal visits a punishment on the party which may be neither fair nor just.

Administrative agencies, intend on doing justice and acting expeditiously and enthusiastically, get tripped unwittingly on account of their ignorance of the nuances or even the minimum needs of natural

justice and of the obligations under Articles 14 and 19 of the Constitution. It would, therefore, be proper that Administrative Officers charged with the duty to pass orders and a fortiori those in the higher echelons of authority, affecting the civil rights of citizens, should be educated in administrative law, particularly in the basic requirements of natural justice. (Paras 9, 10)

Cases Referred: Chronological Paras (1969) 1969 Ker LT 96=ILR (1969)

1 Ker 546 (FB), Appukuttan Nair v. State of Kerala 6

(1967) AIR 1967 SC 1269 (V 54)= (1967) 2 SCJ 339, State of Orissa v. Dr. (Miss.) Binapani Dei 6

(1967) AIR 1967 SC 1606 (V 54)= (1967) 2 SCWR 598, Bhagat Raja v. Union of India 8

(1966) AIR 1966 Ker 55 (V 53)= ILR (1965) 2 Ker 240, Appukutty v. Sales Tax Officer, Kozhikode 8

(1964) 1964 A. C. 40=1963-2 WLR 935, Ridge v. Baldwin 6

(1963) AIR 1963 SC 1430 (V 50)= 1963 (2) Cri LJ 397, Chandra Deo Singh v. Prokash Chandra Bose 8

(1963) 1963 Ker LJ 1200=1963 Ker LT 1051, Guptan v. State of Kerala 6

(1961) AIR 1961 Ker 197 (V 48)= 1960 Ker LT 1304, Joseph v. Superintendent of Post Offices 8

(1953) AIR 1953 Mad 59 (V 40), M. U. M. Services Ltd. v. R. T. Authority Malabar 8

(1951) 1951-1 KB 711=1951-1 All ER 268, Rex v. Northumberland Compensation Appeal Tribunal Ex parte, Shaw 8

(1934) 79 L Ed. 1023=294 US 499, United States v. Chicago M. St. P. & P. Co. 8

(1930) 75 L Ed 291=282 US 194, Florida v. United States 8

(1923) 68 L Ed 549=264 US 32, Mahler v. Eby 8

(1922) 67 L Ed 124=260 US 48, Wichita Railroad & Light Co. v. Public Utilities Commission 8

(1878) 4 AC 30=48 LJ MC 65, Overseers of the Poor of Walsall v. L. & N. W. Rly. Co. 8

(1723) 1 Strange 557=93 ER 698, R. v. Chancellor of Cambridge 6

K. Shahul Hameed and P. P. Mathew, for Petitioner; Govt. Pleader, for Respondents (Nos. 1 & 2); K. Sudhakaran and C. P. Sudhakara Prasad, for Respondent (No. 4).

ORDER:— This writ petition, which I propose to allow, underscores the need of the administrator to be aware of the new frontiers of natural justice, now more than ever before, since on the one hand a welfare-oriented, activist government does, and has necessarily to exercise

powers affecting the civil rights of the citizen in a plurality of ways, and on the other, our democratic Constitution entitles every member of the community to expect observance of the rule of law which implies the essential norms of administrative propriety summed up in the expressive, though hackneyed, phrase natural justice.

2. The facts, relevant to explain the issues raised in the present petition, are few. A co-operative society whose affairs were committed to the management of a Board, was faring ill and so the Deputy Registrar, after a preliminary probe, submitted a report which revealed several, serious irregularities in the functioning of the society. Alerted thus, the Joint Registrar, who has statutory responsibilities of supervisory action, proceeded to supersede the Board under Section 42 of the Travancore-Cochin Co-operative Societies Act. In response to his notice (Ext. P1) to the affected party, the Board, an explanation was submitted refusing the charges *seriatim* (Ext. P2) which, however, did not satisfy the authority and he therefore, passed the order Ext. P3. This order is impugned in the writ petition. It bodily reproduces the irregularities set out in Ext. P1, the 'show cause' notice, and runs on:

"The explanation filed by the President on behalf of the committee to the notice that as first paper above is found to be not at all satisfactory. The explanation on the various points are either false or unreasonable. From the above facts it is clear that the committee of the Society has been, and is, mismanaging the affairs of the Society. Further, I am convinced that the present committee is not functioning properly and that any attempt to set right matters with the present committee in office, will do no good. The Deputy Registrar of Co-operative Societies, Trivendrum have recommended to supersede the present committee at an early date.

In the circumstances do hereby order under Section 49(1) of the T. C. Co-operative Societies Act, 1951 (Act X of 1952) that the committee of the Palode Service Co-operative Society Ltd., No. 792 be superseded for a period of six months from the date of this order." (The mistakes are seen in the Exhibits marked).

Although the facts set out in Ext. P1 are controverted in Ext. P2 no further enquiry is seen conducted nor additional material collected and put to the delinquent Board. The 'item by item' consideration of the charges and the indication of the conclusion on each are absent. Nor are any reasons given why the charges are held proved and the explanation unacceptable. The Officer merely dismisses the Board's pleas on the various points

by four indifferent, indolent and unconvincing words 'either false or unreasonable'. Which are false and why? Which unreasonable and how? Such an unspeaking order is clearly insufficient when we see serious accusations made in Ext. P1 against presumably responsible persons. The graver the charges the greater the circumspection and to act quickly is not to act carelessly. What is more, there is a dark reference to the Deputy Registrar having recommended supersession. Therefore, the authority which decides must consider on the merits and not merely act on recommendations of subordinates; more serious is the violation when it is asserted by the petitioner that a copy of this report has not been furnished to the Board and there is no reference to it in Ext. P1 (show cause notice).

3. Anyway, the aggrieved petitioner appealed to the Government, through advocate under S. 50 of the Act whereupon notice (Ext. P. 4) was given to the advocate, that his appeal had been posted for hearing by the concerned minister on 11-12-1968 at 11 a. m. However, the advocate sent in a written request dated 11-12-1968 (Ext. P 6) couched in the following words:

"Since I am laid up I am unable to appear and argue the appeal. Hence it is prayed that an adjournment be given."

One of the members of the Society, anxious to save the institution from the harmful grip of the delinquent Board, chose to petition Government to implead and hear him through Advocate. This request was allowed but the appellant's prayer for adjournment was rejected. Eventually, the appeal was dismissed by order dated 16-12-1968 (Ext. P7) which I may usefully read here:

"This is an appeal petition filed by Shri A. Ebrahim Kunju, President of the Palode Service Co-operative Society Ltd., No. 792 against the orders of the Joint Registrar of Co-operative Societies (Credit) No. CR3-55042/67 dated 1-11-1968 superseding the Managing Committee of the Palode Service Co-operative Society Ltd., No. 792 for a period of 6 months and appointing a Rectification Officer for the said period. Shri K. Krishnan, a Member of the Society, has filed a petition opposing the appeal petition.

This case was taken up for hearing. Neither the appeal petitioner nor his advocate was present. The Advocate for the petitioner has sent a petition requesting for an adjournment. The request is declined. Shri K. Krishnan a member of the Society opposed the appeal petition. His counsel appeared and argued the case on his behalf. His arguments were heard and the records were perused.

It is seen that the committee of the Society was ordered to be superseded by

the Joint Registrar of Co-operative Societies in his proceedings dated 1-11-1968 for very grave irregularities detected in the working of the Society including misappropriation from the funds of the Society. Government do not therefore consider it necessary to interfere with the orders passed by the Joint Registrar of Co-operative Societies appealed against. The stay granted in letter No. 82722/C2/68/AD dated 8-11-68 against the implementation of these orders is vacated. The appeal petition is dismissed."

4. This order is attacked by the petitioner on several grounds in the above O. P. Primarily his contention is that Ext. P3 is a nullity, being violative of natural justice and Ext. P7 also is void for similar reasons. So, the contours of this canon require to be clearly delineated to see if there is any contravention.

5. What are the defects urged against Exts. P3 and P7? The Joint Registrar's order (Ext. P3) is bad because (1) it relies on no materials to prove the alleged irregularities, (2) it fails to consider the explanation of the affected party, (3) it relies on a report or recommendation of Deputy Registrar without furnishing a copy thereof to the Board against which it was perhaps used, (4) it fails to give reasons to support the order. Likewise, Ext. P7 is void because (1) it does not advert to the merits of the charges, (2) gives no reasons to uphold the order (3) unjustly and arbitrarily declined an adjournment requested by the advocate, giving no opportunity to the party to engage another advocate. Let me consider the merits of these contentions.

6. I may permit myself a prefatory observation. However irritating to the administrator the application of this expensive doctrine may be the battle for natural justice in administrative actions has already been fought and won in the Courts of countries where the rule of law is respected so that we may take it as well settled in India also as part of the humanist discipline of the executive authorities who affect rights of citizens by their acts. This obligation has to be tattooed on the administrator's conscience, as it were. If doubts existed on the question they have been dispelled by the rulings in *Ridge v. Baldwin*, 1964 AC 40, *State of Orissa v. Dr. Binapani Dei*, AIR 1967 SC 1269 and *Appukuttan Nair v. State of Kerala*, 1969 Ker LT 96 (FB). The wide observations in *Guptan v. State of Kerala*, 1963 Ker LJ 1200, set out in para 6 thereof viz., "An important question of administrative law is whether some principles of procedure are not so universal as to apply to all wielding of power, whether judicial or administrative. And the answer that the Courts have given over the years is that even when

an executive body is given the power to decide something, in its discretion, the courts would still keep it in the leading strings of fair procedure" are not an over-statement of the law, in the light of the rulings of the House of Lords, the Supreme Court of India and the Full Bench of the Kerala High Court referred to above. The principles of natural justice are neither new nor limited in their applicability and indeed even God, — and certainly therefore civilised man made after his image — is bound by it. Fortescue J. in *R. v. Chancellor of Cambridge*, 1723-1 Strange 557 (I quote from Marshall on Natural Justice, pp. 17, 18) observes:

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

Of course, opportunity to explain has preceded Exts. P3 and P7; but such opportunity should be real and not ritualistic, effective and not illusory and must be followed by a fair consideration of the explanation offered and the materials available, culminating in an order which discloses reasons for the decision sufficient to show that the mind of the authority has been applied relevantly and rationally and without reliance on facts not furnished to the affected party.

7. Natural justice, I must warn, cannot be perverted into anything unnatural or unjust and cannot therefore be treated as a set of dogmatic prescriptions applicable without reference to the circumstances of the case. The question merely is, in all conscience have you been fair in dealing with that man? If you have been arbitrary, absent-minded, unreasonable or unspeaking, you cannot deny that there has been no administrative fair play.

8. Certainly, natural justice operates in the field of administrative action, ordinarily, only when there is a duty to act judicially.

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. . . Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: it need not be shown to be superadded. If there is power to decide and determine to the pre-

judice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

If this be the law, what facets of natural justice have been violated in the present case? The contention that there has been no application of the mind to the explanation submitted by the Board sounds in natural justice, as has been pointed out in Appukutty v. Sales Tax Officer, Kozhikode, ILR 1965 (2) Ker 240=(AIR 1966 Ker 55). Neither Ext. P3 nor Ext. P7 indicates, *ex facie*, consideration of the materials or the explanation furnished by the Board nor have reasons been given in these two orders as to why the alleged irregularities are held to have been proved. Ext. P7 merely states that the Joint Registrar has ordered the committee of the Society to be superseded for very grave irregularities and that "Government do not therefore consider it necessary to interfere with the orders passed by the Joint Registrar of Co-operative Societies appealed against." This is an abdication of the appellate power rather than an exercise of it and from the point of view of the appellant it is doing injustice to natural justice. Quasi-judicial obligation involves giving of reasons for orders, since justice is not expected to wear the inscrutable face of a sphinx. A Division Bench of the Kerala High Court in Joseph v. Superintendent of Post Offices, 1960 Ker LT 1304=(AIR 1961 Ker 197) spoke emphatically and at length on this point, as follows:

"That apart, there are judicial pronouncements, which insist on administrative orders assigning reasons for the conclusions, and such pronouncements have received legislative recognition. Thus, in the United States S. 8(b) of the American Administrative Procedure Act, requires Administrative decisions to be accompanied by findings and conclusions, as well as the reasons or basis thereof, upon all the material issues of law or facts presented on the record. Also S. 12 of the English Tribunals and Inquiries Act, 1958, requires reasons for such a decision as is mentioned in paragraph (a) or (b) of sub-section (1) of the section; whether given in pursuance of that sub-section or of any other statutory provision; which reasons shall be taken to form part of the decision and accordingly to be incorporated in the record. It follows that when Rule 4 requires findings and the grounds thereof to be given by the punishing authority, it is providing for what has become the accepted rule of administra-

tive procedure. Even where there be no express provisions, and administrative authorities be discharging quasi-judicial functions, judicial pronouncements insist on reasons being given for the order. There are a series of such observations in America. Thus, in Wichita Railroad & Light Co. v. Public Utilities Commission, (1922) 67 Law Ed 124 at p. 130, it has been held that a valid order of the commission under the Act, must contain a finding of fact after hearing and investigation, upon which the order is founded and that, for lack of such a finding, the order in the case was void. So the absence of a finding by the requisite officer, in Mahler v. Eby, (1923) 68 Law Ed 549 at p. 560, on the undesirability of residents sought to be deported as undesirable aliens, was held fatal to the validity of the warrant for deportation. In Florida v. United States, (1930) 75 Law Ed 291 it was held that the Inter-State Commerce Commission must have appropriate finding upon evidence to be supported. Again, it was held in United States v. Chicago M. St. P. & Co., (1934) 79 Law Ed. 1023 at p. 1032 that the Court must know that a decision means before the duty becomes theirs to say whether it is right or wrong. The English rule we find not to be different; for, Lord Cairns in Overseers of the Poor of Walsall v. London and North Western Railway Co., (1878) AC 30 at p. 40, has observed:

'But supposing that the Court of Quarter Sessions did not adopt that course, there was still another mode by which any question of law which appeared to the court of Quarter Sessions doubtful, might be left open for the exercise of the judgment of a higher Tribunal. All that was necessary was that the Court of Quarter Sessions, in making its order should not make it unspeaking or unintelligible order, but should, in some way state upon the face of the order, the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then, that part might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by certiorari, and when so removed to pass judgment upon it, whether it should or should not be quashed.'

'Speaking order' in the aforesaid observation, has been explained by Lord

Goddard, C. J. in *Rex v. Northumberland Compensation Appeal Tribunal*; Ex parte Shaw, (1951) 1 KB 711 at p. 718, in these words:

'When Lord Cairns, L. C., speaks of an unspeaking or unintelligible order he obviously means an order which gives no reasons, or does not explain in any way why the Court made the order but simply states that the Court made such and such a conviction, order for removal or for quashing the poor rate, or other order of that sort, giving no reasons for doing so. It may not be unintelligible in one sense, but it is unintelligible in that it does not tell the superior court why the inferior court made that order.'

In this country, Subba Rao J., has in *M. U. M. Services Ltd. v. R. T. Authority, Malabar*, AIR 1953 Mad 59, held that order under S. 57(7) of the Motor Vehicles Act, requires reasons to be given for issuing a permit and in such a manner that an Appellate Court may be in a position to canvass the correctness of the reasons given. In *M. Ramayya v. State of Andhra*, AIR 1956 Andhra 217, it was held that the orders of the tribunals must 'ex facie' disclose the reasons, which operated on them in granting or refusing a permit. It follows that where the order by administrative authorities be quasi-judicial, it must be 'speaking order', and absence of reasons in it, would be fatal to its legality. The complaint by the petitioner is that he was suspended in 1952, and had not been allowed to do any work thereafter; that the criminal complaint against him has been found not to be established; that he has been thereafter dismissed for unsatisfactory conduct; but he does not know what that conduct is, and is not, from the record, in a position to exercise properly the right of appeal, which the Rules give him. We feel there is substance in the complaint, for, where one does not know the facts, on which the conclusion against one is drawn, it would be impossible to challenge it or lead rebuttal."

In a different context, but in a manner relevant to our present purpose, the Supreme Court pointed out in a ruling reported in *Chandra Deo Singh v. Prokash Chandra Bose*, AIR 1963 SC 1430 while dealing with a complaint that reasons were not given by the Magistrate while dismissing a complaint under Section 203 of the Criminal Procedure Code, as follows:—

"It is possible to say that giving of reasons is a pre-requisite for making an order of dismissal of a complaint and absence of the reasons would make the order a nullity The complainant is entitled to know why his complaint has been dismissed with a view to consider an

approach to a revisional Court. Being kept in ignorance of the reasons clearly prejudices his right to move the revisional Court"

A later ruling of the Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606 contains observations very pertinent to our point:

"Let us now examine the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review. It was argued that the very exercise of judicial or quasi judicial powers in the case of a tribunal entailed upon it an obligation to give reasons for arriving at a decision for or against a party. The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Art. 227 of the Constitution and of appellate powers of this Court under Art. 136. It goes without saying that both the High Courts and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected", or, "dismissed". In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court, in appeal may have to examine the case de novo without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances, what is known as a 'speaking order' is called for."

It is thus clear that failure to give reasons ordinarily voids the order.

9. Another point has been taken that the refusal of adjournment by the Gov-

ernment without assigning reasons. was arbitrary and therefore unjust. Giving reasons for orders is certainly a requirement of natural justice, but this does not mean that every incidental or interlocutory or other similar order must contain elaborate reasons. As I said earlier that would make the canon of natural justice unnatural and unjust. At the same time, there is force in the contention that the party had no opportunity to engage another advocate and argue his appeal as he had no knowledge that his advocate had not appeared and had only moved for adjournment which eventually was rejected. It may be that the granting of adjournment is a purely discretionary matter and the exercise of that discretion cannot be dissected by the writ Court. But the circumstances of the case must also be borne in mind. If counsel, engaged by a party, without informing his client, requests for an adjournment which is turned down, the dismissal of the appeal visits a punishment on the party which may be neither fair nor just. It may, perhaps be proper in the interests of justice to give the client some time, however, short, to engage a counsel. While this wholesome procedure might well have been adopted by the Government in this case. I am not prepared to strike down the order Ext. P7 for that reason alone.

10. A few other points also have been mentioned before me, but counsel for the writ petitioner ultimately said that he did not press his objection on the grounds of natural justice to the validity of Ext. P3. None of the alleged infirmities in Ext. P3, he assures me, he proposes to urge in appeal before the Government if Ext. P7 were to be quashed and a re-hearing of the appeal were to be allowed. He undertakes that he will confine himself to the merits of the charges of irregularities and not to put forward any other contentions before the appellate authority. Nor has he any objection to respondent Krishnan being impleaded or heard in appeal but not behind his back. Of course, if Government proposes to use the report of the Deputy Registrar or any other material not already mentioned in Ext. P1, it is only reasonable that it should be put to the appellant.

In this state of things, I am not called upon to quash Ext. P3 order and I do not do so. This relieves me from considering more fully the arguments of counsel for the State and for the 4th respondent to sustain Ext. P3. But, for reasons already stated, I quash Ext. P7 order and direct Government to re-hear the appeal de novo. I dare say that the appellant will be allowed to urge his contentions on the merits and will be given an opport-

unity to meet any additional material Government may seek to rely upon. It will not be a pious hope, I fancy, that the Government will consider the materials on record in a fair manner and give reasons for its conclusions.

It is far from me to suggest anything on the merits of the charges, but it may not be out of place to record my view that even correct conclusions and orders are upset in Courts, because there has been violation of natural justice or non-compliance with important procedural requirements. This is because of our national creed, in law and in life, that we should reach right ends through right means. I venture to suggest that all administrative officers charged with the duty to pass orders and a fortiori those in the higher echelons of authority, affecting the civil rights of citizens, should be educated in administrative law, particularly in the basic requirements of natural justice. Administrative agencies, intend on doing justice and acting expeditiously and enthusiastically, get tripped unwittingly on account of their ignorance of the nuances or even the minimum needs of natural justice and of the obligations under Articles 14 and 19 of the Indian Constitution. The present case, perhaps, is an instance in point. If the average administrative officer had been better informed about his procedural obligations, many an order of his would not have been a casualty on judicial scrutiny and many an unwanted babe in the writ jurisdiction would not have been born; After all, ephemeral victories ultimately do nobody any good.

11. I allow the O. P. to the extent indicated above by striking down Ext. P7 and further direct the State Government to re-hear the appeal in accordance with law. Since the matter is of some gravity and urgency I direct Government to dispose of the appeal within three weeks of the receipt of this order. No costs.

Petition partly allowed.

AIR 1970 KERALA 70 (V 57 C 15)
M. U. ISAAC AND P. NARAYANA
PILLAI, JJ.

S. Gopalan Nair, Appellant v. State of Kerala, Respondent.

Writ Appeal No. 157 of 1967, D/- 16-12-1968, against judgment of single J., Kerala in O. P. No. 2505 of 1965.

Civil Services — Kerala Civil Services (Classification, Control and Appeal), Rules, 1960, R. 10(1) — Suspension — When ceases — Circumstances under which it is passed decided — (Constitution of India, Art. 309).

GM/HM/C857/69/TVN/P

A Government servant subject to Kerala Civil Services (Classification, Control, and Appeal) Rules can be suspended only under any one or all of the three circumstances mentioned in sub-rule (1) of R. 10 of the above Rules. Suspension under clause (a) is in contemplation of a disciplinary proceeding or pending a disciplinary proceeding. It would cease to exist, when the contemplated proceeding is abandoned or when the proceeding is completed, as the case may be. Suspension under clause (b) is when a case against a Government servant in respect of a criminal offence is under investigation or trial. In such a case, the suspension would cease to exist, when the investigation is finally abandoned or the criminal proceeding is concluded. Cl. (c) relates to suspension pending final orders in disciplinary proceedings in the interest of public. Suspension is an interlocutory action in a penal proceeding pending against a Government servant; and an order of suspension either ceases to exist or merges with the final order in that proceeding. (Para 3)

The appellant working as a Block Development Officer was suspended by an order of the State Government dated 20-11-57 pending investigation into two cases of misappropriation of money detected in his office. The case was investigated by the Police. The appellant was convicted by the Special Judge, but the same was set aside by the High Court in appeal by its judgment dated 16-8-60. The appellant moved the Government for reinstating him in service, which was turned down. On the other hand, on 20-11-62 proceedings were started against him under the Service Rules on charges of misappropriation of money and negligence of duty. The tribunal found him not guilty of misappropriation but held him to be guilty of gross negligence. It recommended compulsory retirement from service. The Government accepted the recommendation and on 27-7-65 it ordered that the appellant be compulsorily retired with effect from date on which he was placed under suspension i. e. from 20-11-57. The appellant challenged the order and pleaded that in any event he could be retired only with effect from 27-7-65 and not from 20-11-57. It was argued that the order of suspension dt. 20-11-57 ceased to exist on his being acquitted by the court and there being no fresh order of suspension thereafter, he must be deemed to be on duty and his removal could not be made with retrospective effect from 20-11-57.

Held, (1) that the order of suspension dt. 20-11-57, was made not in pursuance of any disciplinary proceedings (R. 10(1)(a)) but was one falling under Cl. (b) of R. 10

(1) of the Service Rules and therefore ended with the conclusion of the Criminal prosecution against the appellant on 16-8-60 which resulted in his acquittal.

(Para 3)

and (2) that though so, the conduct of the Government in refusing to reinstate him and starting disciplinary proceedings against him on 20-11-62 amounted to suspension from 29-11-62, the date on which the said cause of action was communicated to him or when he must be deemed to have no notice of Govt's refusal to reinstate him. He must be deemed to be under suspension with effect from 29-11-62 pending disciplinary proceedings and hence the appellant stood removed from service with effect from that date viz., 29-11-62, or from the date of his retirement on superannuation, if earlier.

(Paras 5 & 6)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 800 (V 55)=
1968-2 Lab LJ 700, Balvantrai
Ratilal Patel v. State of Maharashtra

4

T. N. Subramania Iyer, for Appellant;
Govt. Pleader, for Respondent.

ISAAC, J. :— This is an appeal by the petitioner in O. P. No. 2505 of 1965 from the judgment of a learned Single Judge of this Court.

2. The appellant, while he was working as a Block Development Officer at Mavelikara, was placed under suspension by an order of the State Government dated 20-11-1957 pending investigation into two cases of misappropriation of money detected in his office. The case was investigated by the police, and the appellant and his Head Clerk were prosecuted for misappropriation of Government money. Both of them were convicted by the Special Judge who tried them; but the appellant's conviction was set aside by this Court in appeal by judgment dated 16-8-1960. Thereafter the appellant moved the Government for reinstating him in service; but the Government did not accede to his request. On the other hand, they started proceeding against the appellant under the Kerala Civil Services (Disciplinary Proceedings Tribunal) Rules, 1960 on charges of misappropriation of money and negligence of duty.

Ext. P-1 dated 29-1-1962 is the memo of charges served on the appellant. The Tribunal in its report, Ext. P-5 dated 18th November 1964, found that the appellant was not guilty of misappropriation; but he was guilty of gross negligence; and it recommended to the Government that the appellant be compulsorily retired from service. The report was duly considered by the Government which accepted the finding of the Tribunal. The Gov-

ernment by their proceedings, Ext. P-9 dated 27th July 1965, ordered that the appellant be compulsorily retired from service with effect from the date on which he was placed under suspension. The Original Petition was filed to quash the aforesaid order of the Government. The appellant also claimed that, in any event, he could be removed from service only from the date of Ext. P-9, and not from 20-11-1957 on which date he was actually placed under suspension. This claim was put forward on the ground that the order of suspension ceased to exist with the termination of the criminal proceeding, which ended in the acquittal of the appellant by the High Court, and that thereafter there was no order suspending the petitioner from service. The learned Single Judge rejected both the contentions and dismissed the Original Petition.

3. The appellant's learned counsel did not contend before us that Ext. P-9 should be quashed as a whole. He only contended that the direction in Ext. P-9 that the removal from service would take place with retrospective effect from the date of the appellant's suspension was illegal and should be quashed. Dealing with this contention, the learned Single Judge stated as follows:—

"I do not think it is possible to accept the contention that there has been no order of suspension. Factually, the order of suspension passed on 20-11-1957 continued to be in force. Whether there was justification for keeping the petitioner under suspension after 15-8-1960 is a matter *prima facie* for the State Government to decide."

It appears to us that the question that actually arises for consideration was not properly placed before the learned Judge. The question for decision is not whether there is any justification to continue the order of suspension after the acquittal of the appellant, but whether it survived after the final termination of the criminal proceeding with the acquittal of the accused. This depends to a large extent in what context the suspension was made, and what the order of suspension actually said. Unfortunately, this order is not part of the records in this case; but it was read over to us by the learned Government Pleader who appeared for the respondent. It is clear therefrom that the suspension was made pending investigation into certain irregularities mentioned in the said order. There is no dispute that the suspension order was passed in exercise of the Government's power under R. 10 of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960. Sub-rule (1) alone is relevant, and it reads as follows:—

10. Suspension:— (1) The appointing authority or any authority to which it is

subordinate or any other authority empowered by the Government in that behalf may at any time place a Government servant under suspension,

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation or trial; or

(c) where final orders are pending in the disciplinary proceeding, if the appropriate authority considers that in the then prevailing circumstances it is necessary, in public interest that the Government servant should be suspended from service."

A Government servant can be suspended only under any one or all of the three circumstances mentioned in the above sub-rule. The suspension of the appellant does not admittedly fall under clause (c) of Rule 10(1). Suspension under clause (a) is in contemplation of a disciplinary proceeding, or pending a disciplinary proceeding. It would cease to exist, when the contemplated proceeding is abandoned, or when the proceeding is completed, as the case may be. Suspension under clause (b) is when a case against a Government servant in respect of a criminal offence is under investigation or trial. In such a case, the suspension would cease to exist, when the investigation is finally abandoned or the criminal proceeding is concluded. Suspension is an interlocutory action in a penal proceeding pending against a Government servant; and an order of suspension either ceases to exist or merges with the final order in that proceeding.

If the appellant's suspension was made under clause (a) of Rule 10(1), it would remain in force until the disciplinary proceeding against him was finally disposed of. In this case it was finally disposed of by Ext. P-9 dated 27-7-1965. But if the appellant's suspension was under clause (b), it would remain in force until the final disposal of the criminal prosecution against him; and it was finally disposed of by the acquittal of the appellant on 16-8-1960. If the suspension was both under clause (a) and clause (b), it would remain in force until both the proceedings, namely, the disciplinary proceeding and the criminal proceeding are finally terminated. We have, therefore, to consider whether the suspension was under clause (a) or clause (b) or under both the clauses. The order of suspension does not say that it was being made in contemplation of any disciplinary proceeding against the appellant. The X-Branch of the Police started investigating a crime against the appellant for misappropriation of Government money, either immediately before

his suspension or immediately after that; and as already stated, the police instituted a prosecution against him before the Special Judge as a result of that investigation. If the prosecution ended finally in the conviction of the appellant, there would have been no question of initiating any disciplinary proceeding against him. The necessary disciplinary punishment would have been awarded to him on the basis of the finding of the court in the criminal proceeding. It is not, therefore possible to say that the suspension of the appellant was in contemplation of any disciplinary enquiry. Disciplinary enquiry was contemplated only after the prosecution failed; and it was more than four years after the appellant was suspended. The order of suspension does not, therefore, fall under clause (a) of Rule 10(1); and it falls only under clause (b). Hence it would end with the conclusion of the criminal prosecution instituted against the appellant. The result is that the appellant's suspension ceases to exist on 16-8-1960, when this court acquitted him of the offences for which he was tried.

4. The learned Government Pleader contended that the order of suspension continued in force until the disciplinary enquiry is concluded, unless the suspension is cancelled earlier. In support of that contention, he relied on a decision of the Supreme Court in Balvantrai Ratilal Patel v. State of Maharashtra, (1968) 2 Lab LJ 700 = (AIR 1968 SC 800). In that case the appellant who was a medical officer in the service of the State of Bombay was "suspended pending further orders", at a time when an investigation by the Anti-corruption Branch of the Police into an offence of receiving illegal gratification was pending against him. The police instituted a prosecution; but it finally ended in the acquittal of the appellant. Then a disciplinary enquiry was started against him, as a result of which he was dismissed from service. No fresh order of suspension was passed against the appellant after the acquittal of the criminal charge. It was contended that the order of suspension came to an end with the acquittal of the appellant, and that the appellant should be deemed to be on duty until he was dismissed from service. This contention was repelled by the Supreme Court. The learned Government Pleader submitted that the case before us is exactly similar to one decided by the Supreme Court, and that the contention of the appellant's learned counsel in this case that the appellant's suspension came to an end with his acquittal cannot be sustained. It is better that we quote the following passage from the judgment of the Supreme Court which contains the contention advanced by the appellant in that case and the

reasons stated by the Court for rejecting the same;

"It was contended on behalf of the appellant that he was suspended pending an inquiry into the charge for the criminal offence alleged to have been committed by him and as the proceedings in connexion with that charge ended with the acquittal of the appellant by the High Court on 15 February 1952, the order of suspension must be deemed to have automatically come to an end on that date. We see no justification for accepting this argument. The order of suspension dated 13 February 1950 recites that the appellant should be suspended with immediate effect "pending further order". It is clear therefore that the order of suspension could not be automatically terminated but it could have only been terminated by another order of the Government. Until therefore a further order of the State Government was made terminating the suspension; the appellant had no right to be reinstated to service."

This passage shows that the suspension would automatically come to an end with the termination of the criminal proceeding, in the absence of a provision to the contrary in the order of suspension. In the case before the Supreme Court, the suspension was "pending further orders", and the Supreme Court held that the suspension did not terminate until the Government passed further orders. The above decision does not, therefore, help the learned Government Pleader. It only lends support to what we have already stated.

5. The next question for consideration is whether on the facts and in the circumstances of the case, the appellant is to be deemed to be on duty from 16-8-1960. It is admitted that the Government did not thereafter pass any order suspending the appellant from service. But after the appellant was acquitted by this Court he applied to the Government for reinstatement in service. The Government refused to do so; but they instituted the disciplinary proceeding against him as per Ext. P-1 dated 29-11-1962. The learned counsel for the appellant contended that, as there was no fresh order of suspension, the appellant should be deemed to be on duty, as he was willing to work and it was not due to any fault on his part that work was not allotted to him. We are unable to accede to this contention. We agree with the learned counsel that the Government was bound to reinstate the appellant in service when his suspension ended with his acquittal by this Court, unless they again suspended him on some valid ground. But in our opinion the Government's refusal to reinstate him in service followed by initiation of disciplinary proceeding amounts to suspension.

from the date on which the said cause of action was communicated to him. There is nothing to show when the appellant was informed that his request for reinstatement could not be allowed and that a disciplinary enquiry was contemplated against him. The disciplinary enquiry was started against him as per Ext. P-1 on 29-11-1962, and this gives the appellant notice of the Government's refusal to reinstate him in service pending the disciplinary enquiry, though he was acquitted in the criminal prosecution. We, therefore, hold that the appellant would be deemed to be under suspension with effect from 29-11-1962 pending the disciplinary enquiry.

6. In the result, we hold that the appellant would stand removed from service as per Ext. P-9 with effect from 29-11-1962, or from the date of his retirement on superannuation, if earlier. The judgment appealed from is modified to the above extent; and the appeal is dismissed in other respects. In the circumstances of the case, we make no order as to costs.

Appeal partly allowed.

AIR 1970 KERALA 74 (V 57 C 16)

K. K. MATHEW, J.

Central Bank of India Ltd., Bombay-1,
Appellant v. V. Gopinathan Nair and
others, Respondents.

Second Appeals Nos. 1120 and 1287 of 1964. D/- 23-10-1968 from order of Dist. Court, Alleppey in A. S. Nos. 237 and 235 of 1962.

(A) Negotiable Instruments Act (1881), Ss. 85, 85A, 131, 131A — Protection under Ss. 85, 85A, when available stated — Negligence of drawee in cashing the draft held established — Protection under Ss. 131, 131A, when available stated — Protection held not available to collecting bank — (Civil P. C. (1968), Ss. 100-101 — Question of fact — Negligence).

Under the Act, a banker is protected only if he pays the amount in due course, that is, not only in accordance with the apparent tenor of the instrument but also in good faith and without negligence, and to a person, under circumstances not affording a reasonable ground for believing that he is not entitled to receive the payment.

In this matter, the law in India seems to be stricter than in England, and the protection afforded to the banker is not so wide.

The question whether there was negligence in making the payment is a question of fact. (1877) 47 LJ QB 303 (305) and AIR 1920 PC 88 (91), Ref.

Plaintiff purchased a demand draft from A branch of defendant bank (defendant 1) at Calcutta drawn on C Branch of defendant 1. It was payable to "Hurry Dass Auddy". Hurry Dass Auddy was a firm name of which P. W. 2 was the sole proprietor. The draft was sent to P. W. 2. But it was intercepted during transit and was presented by 3rd defendant for collection to S. Branch of the 2nd defendant, with a forged endorsement in his favour purporting to be that of payee Hurry Dass Auddy. The 2nd defendant credited the amount in the account of the 3rd defendant and cashed it from C Branch of defendant 1. It was established that the account of the firm "Hurry Dass Auddy" was being operated by P. W. 2, the proprietor and "Hurry Dass Auddy" was a fictitious person. This was known to the C Branch of defendant 1, where P. W. 2 had his account in the name of "Hurry Dass Auddy". Endorsement on the draft by the first payee was an endorsement in full. It was partly in manuscript and partly in a rubber stamp impression. It was as follows: "please pay to Esmitter & Co. Hurry Dass Auddy". The words "please pay to" were in manuscript while "Esmitter & Co." were in a rubber stamp impression.

Held that now "Hurry Dass Auddy" got the rubber stamp of "Esmitter & Co." of which the 3rd defendant claimed to be the proprietor, was something which should normally excite suspicion in the mind of a careful banker. The fact that the endorsement by the 3rd defendant was in the same rubber stamp impression should naturally have put the 1st defendant on enquiry as to how "Hurry Dass Auddy" got the rubber stamp. By a course of conduct, the C Branch of the 1st defendant bank had come to know that Hurry Dass Auddy is the name of the business concern of a customer of theirs, namely, P. W. 2. The Bank should therefore have been put on enquiry when they found that the signature of the payee as "Hurry Dass Auddy". The 1st defendant did not succeed in proving good faith and absence of negligence on its part in paying the amount to the 2nd defendant. (Paras 15, 16)

Held further the liability of the 2nd defendant (the collecting banker) had to be decided with reference to the provisions of Sections 131 and 131A of the Act. In determining the question whether a collecting Banker had or had not been negligent in a particular case it was necessary to take into consideration many factors, such as the customer, the account and surrounding circumstances. The burden of proving absence of negligence was on the 2nd defendant. The test of negligence under Section 131 was whether the payment, considered in the light of

the circumstance antecedent and present, was so much out of ordinary course, that it ought to have aroused doubt in the banker's mind and caused him to make enquiries; and that primarily the enquiry should be to find out whether there was negligence in collecting a cheque and not in opening the account but if there was any antecedent or present circumstance which aroused the suspicion of the banker then it would be his duty before he collects the cheque to make the necessary enquiry; and undoubtedly one of the antecedent circumstance would be the opening of the account. AIR 1956 Cal 399 (409) and AIR 1948 Bom 1, Rel. on; AIR 1920 PC 88 and AIR 1946 Bom 482, Ref. (Paras 17, 18, 19)

The protection under Sections 131 and 131-A is afforded only if the Banker has received the payment on behalf of a customer in good faith and with due diligence. The draft was crossed generally. The evidence showed that the 2nd defendant Bank obviously treated the 3rd defendant as a favoured constituent or customer. All these facts may show that even though the 3rd defendant had a current account with the 2nd defendant Bank, it was doubtful whether he could be treated as a 'customer' for the purpose of Section 131 of the Act. The current account was opened and operated upon in flagrant violation of the rules of the Bank. No enquiry was made as regards the regularity of the endorsements in favour of "Esmmitter & Co." Hurry Dass Auddy, the payee under the draft was not admittedly a customer of the 2nd defendant. In the light of these facts, the 2nd defendant should have made an enquiry as to how the 3rd defendant came into possession of the draft and the circumstances under which 'Hurry Dass Auddy' happened to endorse the same in his favour. Such an enquiry was rendered all the more necessary in the face of the endorsement in full purported to have been made by the payee, 'Hurry Dass Auddy', on the draft partly in writing and partly by using the rubber stamp of the 3rd defendant. The 2nd defendant was not entitled to get the benefit of Section 131-A.

(Para 22)

(B) Negotiable Instruments Act (1881), S. 131 — "Customer" who is, stated — (Words and Phrases — "Customer of bank").

The term customer is not defined in the Negotiable Instruments Act. Broadly speaking, a customer is a person who has the habit of resorting to the same place or person, to do business. So far as banking transactions are concerned he is a person, whose money has been accepted on the footing, that the Banker will honour up to the amount standing to his credit, irrespective of his connection

being of short or long standing.

(Para 22)

- Cases Referred: Chronological Paras
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| (1956) AIR 1956 Cal 399 (V 43), | |
| Brahma v. Chartered Bank | 18 |
| (1948) AIR 1948 Bom 1 (V 35) = | |
| ILR (1947) Bom 643, Sanyasilingam v. Exchange Bank Ltd. | 19 |
| (1946) AIR 1946 Bom 482 (V 33) = | |
| 48 Bom LR 393, Bapulal v. Nath Bank Ltd. | 21 |
| (1933) 1933 AC 201 = 102 LJKB | |
| 224, Lloyds Bank Ltd. v. Savory & Co. | 21 |
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| (1920) 1920 AC 683, Commrs. of Taxation v. English Scottish and Australian Bank Ltd. | 21 |
| (1914) III LT 43=30 TLR 433, | |
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| (1877) 47 LJQB 303 = 3 AC 193, | |
| Metropolitan Railway Co. v. Jackson | 13 |

In S. A. No. 1120/64

P. K. Kurien, V. Desikan, K. A. Nayar and K. Sukumaran, for Appellant; V. Rama Shenoi and R. Raya Shenoi, for Respondent (No. 1) T. K. Kurien and M. C. Varghese, for Respondent (No. 2).

In S. A. No. 1287/64

P. Krishnamoorthy and P. C. Chacko, for Appellant; V. Rama Shenoi and R. Raya Shenoi, for Respondent (No.1); P. K. Kurien, V. Desikan and K. A. Nayar and K. Sukumaran, for Respondent (No. 2).

JUDGMENT:— These appeals are directed against the decree and the judgment in O. S. No. 19 of 1954 of the District Court, Alleppey, subsequently renumbered as O. S. No. 229 of 1956 of the Alleppey Sub-court. The 1st defendant is the appellant in S. A. No. 1120 of 1964 and the 2nd defendant in S. A. No. 1287 of 1964.

2. The suit was for recovery of the amount covered by Ext. P-1, a demand draft, and the interest thereon, from defendants 1 to 3.

3. The plaintiff is the proprietor of a business carried on at Alleppey in the name and style of "The Pioneer Trades". Rama Prasad Auddy, P. W. 2 carried on a business at Calcutta in the name and style of M/s. Hurry Dass Auddy. M/s. Hurry Dass Auddy was a customer of the New Market branch of the Central Bank of India, Ltd., the 1st defendant.

4. The plaintiff used to purchase goods from M/s. Hurry Dass Auddy from 1953 onwards and pay the price thereof sometimes by purchasing demand drafts from the Alleppey branch of the 1st defendant-Bank on its New Market

branch at Calcutta payable to Hurry Dass Auddy or order and delivering the same to M/s. Hurry Dass Auddy through P. W. 1, a friend of the plaintiff at Calcutta. Ext. P-1 is one such draft purchased by the plaintiff from the Alleppey branch of the 1st defendant-Bank for Rs. 4,000. It was drawn on the New Market branch of the 1st defendant at Calcutta and was payable to 'Hurry Dass Auddy'. It was sent by the plaintiff to P. W. 1 to be delivered over to M/s. Hurry Dass Auddy. It was intercepted during transit, and was presented before the Shambazar branch of the 2nd defendant by the 3rd defendant for collection, with a forged endorsement in his favour purporting to be that of the payee. The 3rd defendant endorsed Ext. P-1 in favour of the 2nd defendant. The 2nd defendant credited the amount covered by Ext. P-1 in the account of the 3rd defendant and cashed it from the New Market branch of the 1st defendant-Bank on 2-11-1953. The plaintiff's case was that (the appearance of) the endorsement on Ext. P-1 draft, purported to have been made by the payee, was sufficient to put the 1st defendant on enquiry, that the payment to the 2nd defendant by the 1st defendant was not a payment in the course, that the 1st defendant is liable to the plaintiff for the amount and the interest thereon, and that defendants 2 and 3 are guilty of conversion of the amounts, and are equally liable to the plaintiff for the amount and interest.

5. The 1st defendant contended that the 2nd defendant presented Ext. P-1 on 2-11-1953 through the clearing house and that the amount was paid in good faith and without negligence in accordance with the apparent tenor of the instrument; and claimed immunity under Section 85-A of the Negotiable Instruments Act, 1881 (Act 26 of 1881), hereinafter referred to as the Act. The 2nd defendant contended that the amount covered by Ext. P-1 was collected on behalf of its customer, the 3rd defendant, in good faith and without negligence; and claimed protection under Section 131-A of the Act. The 3rd defendant did not contest the case.

6. The trial court held that the payment of the amount to the 2nd defendant by the New Market branch of the 1st defendant-Bank was not a payment in due course, and therefore, the 1st defendant was not protected by Section 85A of the Act. The Court also held that since the 2nd defendant collected the amount on behalf of its customer, the 3rd defendant, in good faith and without negligence, it is entitled to get the protection envisaged by Section 131-A of the Act. The suit was therefore decreed as against

defendants 1 and 3, but dismissed as against the 2nd defendant.

7. The correctness of the judgment and the decree was challenged in A. S. No. 235 of 1962 by the plaintiff and by the 1st defendant in A. S. No. 237 of 1962 before the District Court.

8. The District Court agreed with the finding of the learned Subordinate Judge, and held that the 1st defendant is not entitled to claim immunity under Section 85A of the Act as the payment was not in due course, but differed from the finding of the trial court, and found that the 2nd defendant was not entitled to the protection under Section 131-A of the Act, and decreed the suit as against it also.

9. Both the courts below have found that M/s. Hurry Dass Auddy is a business concern of P. W. 2, that the concern had a current account in the New Market branch of the 1st defendant at Calcutta, that previous to Ext. P-1, two demand drafts were purchased by the plaintiff from the Alleppey branch of the 1st defendant on its New Market branch at Calcutta, payable to 'Hurry Dass Auddy,' that they were endorsed by P. W. 2 on behalf of the payee in his capacity as the proprietor of M/s. Hurry Dass Auddy, that the amounts due thereunder were credited in the account of M/s. Hurry Dass Auddy, that the 1st defendant therefore had reason to believe that the payee in Ext. P-1, namely, Hurry Dass Auddy was the business concern known as M/s. Hurry Dass Auddy and that P. W. 2 its sole proprietor, that the 1st defendant acted without due care and therefore the payment made by it to the 2nd defendant was not a payment in due course.

10. The main contention urged on behalf of the 1st defendant was that the payment made by the 1st defendant to the 2nd defendant was a payment in due course. In other words, the argument was that 'Hurry Dass Auddy' was the payee under Ext. P-1, that there was an endorsement on the instrument by a person purporting to be the payee, that the 1st defendant had no reason to suspect that 'Hurry Dass Auddy' was a fictitious person, or that the endorsement on the instrument was not an endorsement made by him, that there was no negligence in its thinking that the signature of payee was genuine and therefore it is entitled to the protection envisaged by section 85A of the Act.

11. Sections 85 and 85A of the Act read: "85(1) Where a cheque payable to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due

course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

85A. Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course."

12. Under the Act, a banker is protected only if he pays the amount in due course, that is, not only in accordance with the apparent tenor of the instrument but also in good faith and without negligences, and to a person, under circumstances not affording a reasonable ground for believing that he is not entitled to receive the payment.

"The corresponding English Section (S. 60) provides that the banker must in order to entitle him to protection pay the cheque in good faith and in the ordinary course of business; and under Section 90 of the Bills of Exchange Act, a thing is said to be done in good faith where it is done honestly, whether negligently or not. It would seem, therefore, that in English law, however negligent a banker might have been, provided he acts honestly, he is protected if the payment is one made in the ordinary course of business. Negligence does not necessarily preclude the protection of Section 60 of the English Act. In this matter, the law in India seems to be stricter than in England and the protection afforded to the banker is not so wide." (See the Negotiable Instruments Act by Bhashyam and Adiga — 11th Edition — page 410).

13. The question whether there was negligence in making the payment is a question of fact. In *Metropolitan Railway Co. v. Jackson*, (1878) 47 LJQB 303 at p. 305, Lord Chancellor Cairns said:—

"The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jury has to say whether from those facts, when submitted to them, negligence ought to be inferred."

14. In *Commissioners of Taxation v. English Scottish and Australian Bank Ltd.*, AIR 1920 PC 88 at p. 91. Lord Dunedin said that the question of negligence is one of fact and that a finding by a Judge is not liable to be interfered with unless it is not supported by any evidence.

15. The concurrent finding of the courts below on the question of negligence is clear. They have found that the branch of the 1st defendant-Bank at New Market, Calcutta, had reason to believe that 'Hurry Dass Auddy' is really the business

concern known as "M/s. Hurry Dass Auddy", that P. W. 2 is its sole proprietor and that the payee in Ext. P-1 is really M/s. Hurry Dass Auddy of which P. W. 2 is the proprietor. That finding, I think, is supported by evidence. The endorsement in Ext. P-1 by the first payee is an endorsement in full. It is partly in manuscript and partly in a rubber stamp impression. It is as follows:

"please pay to Esmitter & Co. Hurry Dass Auddy". The words "please pay to" are in manuscript while 'Esmitter & Co.' are in a rubber stamp impression. How 'Hurry Dass Auddy' got the rubber stamp of 'Esmitter & Co.' of which the 3rd defendant claims to be the proprietor, is something which should normally excite suspicion in the mind of a careful banker. The fact that the endorsement by the 3rd defendant is in the same rubber stamp impression should naturally have put the 1st defendant on enquiry as to how 'Hurry Dass Auddy' got the rubber stamp.

16. Ext. P-29 is the folio of the ledger kept by the New Market branch of the 1st defendant in respect of demand drafts drawn by the Alleppey branch on the New Market branch of the 1st defendant. The demand drafts purchased by the plaintiff in favour of Hurry Dass Auddy are the only drafts included in the folio. Prior to the presentation of Ext. P-1 demand draft two other drafts Nos. 17/1 and 17/2 drawn on 3rd and 21st October respectively had been presented for encashment at the New Market branch of the 1st defendant by Rama Prasad Auddy (P. W. 2), the sole proprietor of the business concern M/s. Hurry Dass Auddy. He was having a current account in the New Market Branch for the last 20 years. P. W. 2 has sworn that he signs cheques and drafts as "For M/s Hurry Dass Auddy, Ramprasad Auddy, sole proprietor," and that the two demand drafts drawn in favour of "Hurry Dass Auddy" had been sent by him to the New Market branch of the 1st defendant for crediting their proceeds in Ext. P-30, the current account of M/s. Hurry Dass Auddy and that the amounts covered by the drafts have been credited. Ext. P-3 is the folio of the telegraphic transfer issue register of the Alleppey branch of the 1st defendant-Bank. From Ext. P-3 it is clear that from 5th August 1953, the plaintiff made remittances of amounts by T. T. to M/s Hurry Dass Auddy, Ext. P-28 is the corresponding T. T. register of the New Market branch of the 1st defendant-Bank. Ext. P-31 series are the T. T. receipts kept by the New Market branch of the 1st defendant-Bank in respect of Ext. P-3 remittances. Some of these receipts would show that the remittances were to "Hurry Dass Auddy." In all the receipts, P. W. 2 has signed "for M/s. Hurry Dass Auddy"

describing himself as the sole proprietor. So, by a course of conduct, the New Market branch of the 1st defendant-Bank had come to know that 'Hurry Dass Auddy' is the name of the business concern of a customer of theirs, namely, P. W. 2. The 1st defendant's branch at New Market dealt with the two demand drafts drawn prior to Ext. P-1 in the same month. The Bank should therefore have been put on enquiry when they found that the signature of the payee as "Hurry Dass Auddy". No person employed in the New Market branch of the 1st defendant has been examined in the case to show the circumstances in which the payment under Ext. P-1 has been made to the 2nd defendant. I think, the 1st defendant has not succeeded in proving good faith and absence of negligence on its part in paying the amount to the 2nd defendant.

17. Then, the further question is whether the 2nd defendant is liable to the plaintiff. The liability of the 2nd defendant, has, to be decided with reference to the provisions of Sections 131 and 131-A of the Act. They read:—

"131. A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

Explanation:— A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

131-A. The provisions of this Chapter shall apply to any draft, as defined in Section 85A, as if the draft were a cheque."

In determining the question whether a collecting Banker has or has not been negligent in a particular case it is necessary to take into consideration many factors, such as the customer, the account and surrounding circumstances.

18. In *Brahma v. Chartered Bank*, AIR 1956 Cal 399 at p. 409, the Calcutta High Court observed:

"Now in finding out whether a collecting banker has or has not been negligent in a particular case, it becomes necessary to take into consideration many factors such as the customer, the account and the surrounding circumstances"

The burden of proving absence of negligence is on the 2nd defendant. In the above referred case, the Calcutta High Court said:

"The onus of proving "good faith" and "absence of negligence" is on the banker claiming protection under Section 131, Negotiable Instruments Act."

19. In *Sanyasilingam v. Exchange Bank of India*, AIR 1948 Bom 1, the Court held that the test of negligence under Section 131 is whether the payment, considered in the light of the circumstance antecedent and present, was so much out of ordinary course, that it ought to have aroused doubt in the banker's mind and caused him to make enquiries; and that primarily the enquiry should be to find out whether there is negligence in collecting a cheque and not in opening the account; but if there was any antecedent or present circumstance which aroused the suspicion of the banker then it would be his duty before he collects the cheque to make the necessary enquiry; and undoubtedly one of the antecedent circumstances would be the opening of the account. The Court said that where the account of the customer was opened without obtaining a reference and without any enquiry and where the manner in which the account was operated upon was peculiar, and where there was something in the endorsement to the customer which would excite suspicion, then it must be held that the bank failed to prove that it was not guilty of negligence in collecting the amount of the draft.

20. Counsel for the 2nd defendant referred to the decision in AIR 1920 PC 88, and said that there was no negligence on the part of the 2nd defendant.

The facts there were: One A. Friend of Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786.13.3 into an envelope, along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. This cheque was in payment of an assessment for income-tax. It was crossed with the word "Bank", that is to say, generally not specially. This cheque was stolen by some person unknown and was never cashed by the Commissioners of Taxation. On the following day a man who gave his name as Stewart Thallon entered the head office of the respondents' Bank at Sydney and stated that he wished to open an account. The Accountant took his name and address which this man gave at certain well known residential chambers in Sydney. He then handed in a sum of £20. The Accountant filled up the 'paid-in' slip and the account was duly opened and a cheque book issued to Thallon. On the following day the stolen cheque was handed in by Thallon; and on the next day Thallon withdrew three sums of £483.16.6, £260.10.0, and £50.12.6 by cheques drawn by himself. Thallon was never seen again and it was found that no person of that name lived at the address he had given.

The Commissioners of Taxation then filed an action from which the appeal went to the Privy Council against the Bank for conversion of the cheque. The Supreme Court for New South Wales held that the bank was not guilty of negligence.

In discussing the question of negligence, their Lordships of the Privy Council are at pains to point out that the negligence with which the Court was concerned was not in opening the account but "in collecting the cheque" though the circumstances connected with the opening of an account may shed light on the question whether there was negligence in collecting the cheque, and the test of negligence which their Lordships adopted was whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make enquiry. Their Lordships emphasized that negligence was a question of fact and they rejected the argument of the learned Chief Justice of the Supreme Court that the care that the bankers should take should not be less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. Their Lordships thought that it was no part of the business or ordinary practice of individuals to cash cheques which were offered to them, whereas it was part of the ordinary business or practice of a bank to collect cheques for their customers.

The argument that was presented to the Board was that the bank was negligent in collecting the cheques for a customer who was of recent introduction and about whom the bank knew nothing. Their Lordships then pointed out that there was nothing suspicious about the way the account was opened; they were of the opinion that there was nothing suspicious in the fact that a cheque was paid into that account for collection one day after the account had been opened; they further pointed out that if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. But their Lordships do say that if the cheque had been for some unusually large sum, perhaps suspicion might have been aroused; but whether the cheque is or is not for an unusually large sum is really a question of degree. Their Lordships finally point out that in the cheque presented by Thallon there was no note of alarm or of warning which could have aroused the suspicion of the

Bank. Under the circumstances their Lordships dismissed the appeal and held that the Bank was not negligent.

21. Counsel also strongly relied on the decision of the Bombay High Court in *Bapulal v. Nath Bank Ltd.*, AIR 1946 Bom 482 and said that the only question for consideration is whether there was negligence on the part of the 2nd defendant in collecting the draft and that the question whether there was negligence in opening an account in the name of the 3rd defendant was immaterial and relied on the observations of Chagla J. (as he then was):

"Primarily enquiry as to negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account; but if there is any antecedent or present circumstance which aroused the suspicion of the banker then it would be his duty before he collects the cheque to make the necessary enquiry and undoubtedly one of the antecedent circumstance would be the opening of the account. In certain cases failure to make enquiries as to the integrity of the proposed customer would constitute negligence. But it would depend upon the facts and circumstances attendant upon the opening of an account by the new customer whether an enquiry about him was necessary and called for or not. There is no absolute and unqualified obligation on the Bank to make enquiries about the respectability of the proposed customer. It is true that modern banking practice requires that a customer should be properly introduced and it would be wiser and more prudent for a Bank not to accept a customer without some reference. But it cannot be suggested that after a Bank has been given a proper reference with regard to the proposed customer and although there are no suspicious circumstances attendant upon the opening of the account it is still incumbent upon the bank to make further enquiries with regard to the customer, and the bank cannot be held to be guilty of negligence in having failed to make any such further enquiries so as to disentitle it to the protection given by Section 131." (see the headnote).

The question whether negligence could be inferred from the circumstances in which an account was opened for a customer and the manner in which it was operated upon was considered in *Lloyds Bank Ltd. v. Savory & Co.*, 1933 AC 201 at p. 236 Lord Wright said that:

"It is true that the question of absence of negligence must be considered separately in regard to each cheque, but it is also true that the matter must be considered, as Lord Dunedin says in *Commissioners of Taxation v. English, Scottish and Australian Bank Ltd.*, 1920 AC 683 at

689, in view also of all the circumstances antecedent and present. There may thus be relevant negligence in connection with the opening of the customer's account by the banker. It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under Section 82 if a cheque were converted subsequently in the history of the account: this rule was applied by Bailhache J. in *Ladbroke v. Todd*, (1914) III LT 43 who on that ground held that the banker had not made out his defence under Section 82. The matter is now so well appreciated by bankers that the appellants have a printed rule saying that no new current account is to be opened without knowledge of or full enquiry into the circumstances and character of the customer."

The passage would indicate that what goes into an account calls for as much careful scrutiny as what goes out and the circumstances in which an account is opened and operated upon are relevant to the enquiry.

22. In the light of these decisions, let us see whether there was negligence on the part of the 2nd defendant in collecting the draft. The protection under Sections 131 and 131-A is afforded only if the Banker has received the payment on behalf of a customer in good faith and with due diligence. Ext. P-1 shows that it is crossed generally. The term "customer" is not defined in the Act. Broadly speaking, a customer is a person who has the habit of resorting to the same place or person, to do business. So far as banking transactions are concerned he is a person, whose money has been accepted on the footing, that the Banker will honour up to the amount standing to his credit, irrespective of his connection being of short or long standing. The 3rd defendant, in this case, opened an account which the Shambazaar branch of the 2nd defendant-Bank on 27-11-1952. The account was opened by depositing Rs. 300. Ext. B is a copy of that account. After the account was opened, the 3rd defendant deposited on 29-11-1952 another sum of Rs. 300 by cheque. Thereafter, till the 31st of December, 1952 he withdrew amounts from the Bank in piecemeal. The balance he had to his credit on the 1st of January, 1953 was only Rs. 236. From 28th of April, 1953 the 3rd defendant began to withdraw amounts by cheque for less than Rs. 10. He had only a balance of Rs. 8 on the 31st of December, 1953. The balance to his credit was nil on the 25th November, 1954. Ext. I is the current account

rules of the 2nd defendant-Bank, which would show that a current account is to be opened with not less than Rs. 500. It also would show that no agent of the Bank is authorised to open a current account for a sum of less than Rs. 500. The rules are also clear that the balance in the current account should not be allowed to fall below Rs. 300 at any time and that no cheque shall be drawn for a sum of less than Rs. 20 for payment over the counter.

It is clear from the evidence that no less than 12 cheques for less than Rs. 10 were honoured by the 2nd defendant-Bank obviously treating the 3rd defendant as a favoured constituent or customer. All these facts may show that even though the 3rd defendant had a current account with the 2nd defendant-Bank, it is doubtful whether he could be treated as a "customer" for the purpose of Section 131 of the Act. The current account was opened and operated upon in flagrant violation of the rules of the Bank as embodied in Ext. 1.

The testimony of D. W. 2 would reveal that before Ext. B account was opened, the 3rd defendant was not properly introduced. Ext. C is the application filed by the 3rd defendant for opening Ext. B account. The 3rd defendant, who is Sudhir Kumar Mithra as disclosed by Exts. P-20 and P-20(a) has described himself in Ext. C as Sudhir Kumar Mitter. The account was opened in the name of the firm "Esmmitter & Co." doing Hardware and Chemical business. The person who introduced the 3rd defendant is mentioned in Ext. C application as one K. Chakravathy. This person was never contacted by D. W. 2 or by any other officer of the 2nd defendant-Bank before the account was opened. The testimony of D. W. 2 would also show that the only person contacted was the brother of the 3rd defendant, Sushil Kumar Mithra, who is said to be a customer of the 2nd defendant-Bank. Barring the statement of D. W. 2, absolutely no record has been produced for making cut that Susil Kumar Mithra was a customer of the 2nd defendant-Bank. It is clear from Ext. C application that the name of Susil Kumar Mithra was not written at the time when the name of Sri K. Chakravathy was written. The name of Susil Kumar Mithra is written in a different hand and ink. Susil Kumar Mithra also does not figure as a witness in the case. It is difficult therefore to accept the testimony of D. W. 2 when he says that Ext. B account was opened after enquiries with Susil Kumar Mithra. The 3rd defendant, who is Sudhir Kumar Mithra and is also the brother of Susil Kumar Mithra has sworn his name in Exts. C

was no consideration for that special agreement, AIR 1926 All 493, Diss.; 1956 Ker LT 63 & 1957 Ker LT 495 & AIR 1930 PC 142, Foll. (Paras 5, 7)

(B) Limitation Act (1908), Arts. 132 and 148 and S. 28 — Transfer of Property Act (1882), S. 91(a) — Puisne mortgagee not in possession of mortgaged property — His right to recover mortgage money becoming barred by limitation under Art. 132 — He has no subsisting right to redeem prior mortgage within S. 91(a) T. P. Act — Suit for redemption of prior mortgages even though not barred under Art. 148 is not maintainable. AIR 1925 Mad 76 & (1909) 5 Ind Cas 877 (Cal) & AIR 1933 Bom 25, Diss. from. (Travancore Limitation Act, S. 29, Arts. 119 and 136).

A puisne mortgagee who is not in possession of the mortgaged property and whose right to recover the mortgage money has become barred by limitation under Art. 132 Limitation Act has no right to sue for redemption of prior mortgages even though such right has not become barred by limitation under Art. 148 of the Limitation Act. AIR 1930 All 416 & AIR 1951 Trav-Co. 17 & AIR 1952 Trav-Co. 295 & AIR 1957 Trav-Co. 174 Dist. (Paras 10, 13)

With regard to a person to whom money is due charged on property he has two distinct remedies. He can either sue for the money due to him at any time within the period prescribed under the Limitation Act for that purpose or if he comes into possession of the property within that period retain possession of it and at the time of surrender of possession insist on payment to him of time barred debts charged on it also. The latter remedy is in character only a shield. This is not a rule peculiar to cases where there are several charges in respect of a property. It applies equally well to a case where there is only one mortgage in respect of a property. To recover the money due to him charged on property a mortgagee with possession has only 12 years under Art. 132 of the Limitation Act. But even after that right has become barred by limitation he can retain possession of the mortgaged property until the mortgage is redeemed, for which there is 60 years under Art. 148. If a suit for redemption is filed after the expiry of 12 years but within 60 years of the mortgage the mortgagee is entitled to get the mortgage money due to him before surrender of possession of the property although the right to recover that amount through suit has become barred. But such a right can be availed of only if the mortgagee or charge-holder gets into possession of the property before the right to recover the money charged on it becomes barred by limitation. (Para 11)

It is true that section 28 of the Limitation Act only provides for extinction of right to property where suit for recovery of possession of that property is not filed within the period mentioned in the Act and consequently has no application to omission to file suits for money charged upon property. The right to bring the mortgaged property to sale through court is the essence of the life of a charge. When that is lost by the bar of limitation if the mortgagee is not in possession of the mortgaged property nothing survives the barred charge except an imperfect legal right not constituting an interest in the property sufficient to attract Section 91(a) of the T. P. Act and consequently unenforceable in action. The right of redemption given to puisne mortgagee is only ancillary to his right of sale and when that right is lost by limitation the right of redemption also becomes lost. AIR 1925 Mad 76 & (1909) 5 Ind Cas 877 (Cal) & AIR 1933 Bom 25, Diss.; AIR 1935 Oudh 139 & 39 Cochin LR 480, Foll.

(Para 13)

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P. Subramanian Potti, S. A. Nagendran,
P. A. Mohammed and C. P. Sudhakara
Prasad, for Appellant; G. Vishwanatha
Iyer and S. Bhagavathilekshmi Ammal,
for Respondents.

NARAYANA PILLAI, J. :- The suit filed on the strength of Ext. F, a hypothecation bond dated 12-3-1923, for redemption of 2 earlier mortgages dated 29-4-1909 and 11-2-1910 of the same properties and copies of which are Exts. XI and XII, was dismissed by both the lower Courts and it is from these decrees that the present Second Appeal has been filed by the plaintiffs.

2. The transactions took place in the erstwhile Travancore State. Under Art. 119 of the Travancore Limitation Act, 6 of 1100 (M. E.), the appellants had 12 years' time to recover through suit the money due under Ext. F. That was not availed of by them. According to the learned Advocate General who appeared for them Ext. F was a mortgage by conditional sale, it had worked itself out as a sale and therefore they as owners of the properties had a right to redeem the earlier mortgages even though the right to claim the amount due under Ext. F had become barred by limitation. He argued that even if Ext. F had become barred under the Limitation Act that bar related only to recovery of money due under Ext. F and not to the other rights including the right of redemption of the earlier mortgages that the appellants had under Ext. F, that the right of redemption could be lost only after the expiry of the period provided for redemption in the Limitation Act, that that period not having elapsed on the date of suit they were competent in the present suit to redeem the earlier mortgages for that reason also and that the suit was not barred by limitation. These in brief were the points pressed by him when this appeal was heard.

3. We must now deal with the question whether the appellants can be allowed

to redeem the earlier mortgages on the ground that Ext. F was a mortgage by conditional sale and that it had worked itself out as a sale. The document is styled as a "Sthreedhana Eedadharam". It was executed for 14,000 Fanams by one Meeran Pillai in favour of his daughter Pathummal and her husband Peerukannu. The consideration for the document was the Stridhanam amount agreed to be paid by Meeran Pillai to Pathummal and Peerukannu at the time of their marriage. It is stated in the document that it was being executed as Meeran Pillai was not in a position to pay the amount ready cash. He agreed to pay the hypothecation amount within a year. If it was not paid within that time he further agreed that Pathummal may enjoy the properties as full owner. According to the learned Advocate General as Meeran Pillai did not pay the hypothecation amount within the time stipulated in Ext. F the transaction had become a sale of the properties.

4. The Transfer of Property Act, for short the T. P. Act, had no statutory force in the erstwhile Travancore State. Nevertheless, the courts there were freely following many of the principles laid down in that Act. In this connection the following observations in Velandy Vadhiar v. Sankarapandian Mudaliar, 1943 Trav-Co. LR 425 of Sankarasubba Iyer, J. who was for long a Judge of the High Court there and who had wide experience with regard to the conditions prevalent and the state of the law there are entitled to great weight:

"It cannot be said that the prevailing view in a neighbouring Presidency will not have affected the people of the State in so far as their legal relations are concerned. The Transfer of Property Act became law in British India in 1882. This Court has been accepting the provisions of the Act and acting upon them, when they are in accordance with justice and equity, even though the enactment is of no statutory force in the State. It is therefore probable that mortgages in Travancore, executed at least after 1882, when the Transfer of Property Act became statute law in British India, might have been executed in accordance with the principles contained there rather than on the basis of an archaic rule embodied in the Hindu Smritis."

The conditions laid down in Section 58 (c) of the T. P. Act which defines a mortgage by conditional sale were applied to the transaction in dispute in 1943 Trav-Co. LR 425 to find out whether it was really a mortgage by conditional sale. In Padmanabha Pillai v. Umamaheswara Iyer, 1948 Trav-Co. LR 556 also the Travancore High Court freely followed the

principles in the T. P. Act for construing the documents which came up for interpretation there to find out whether they were mortgages by conditional sale. From all these it has to be taken that even in the erstwhile Travancore State a transaction after 1882 could be treated a mortgage by conditional sale only if it satisfied the conditions laid down in Section 58(c) of the T. P. Act.

5. Section 58(c) read thus:—

"Where the mortgagor ostensibly sells the mortgaged property —

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

It shows that in order that a transaction can be treated as a mortgage by conditional sale it should, to begin with, have the resemblance of a sale. That is implied in the expression "ostensibly sells" at the beginning of the definition. Where the transaction has, to start with, the appearance of only a mortgage it cannot come under S. 58(c). In such a transaction provision to treat it as a sale if the mortgage amount is not paid within a stipulated period is a clog on the right of redemption and cannot be given effect to. No doubt the provision to treat the transaction as a sale in a mortgage document is also an agreement between the parties. But is there consideration for it in order to treat it also as a valid contract? It is a special agreement in the contract of mortgage. Let me take Ext. F in the instant case. The consideration for the mortgage was 14,000 Fns. It got itself exhausted by the contract of mortgage. The special agreement to treat the transaction as a sale if the mortgage amount was not paid within a particular time was really outside the contract of mortgage. Time of payment is not of the essence of a mortgage transaction. Consequently non-payment of the mortgage amount within the period stipulated in the mortgage document cannot be deemed a detriment furnishing the consideration for the special agreement to treat the transaction as a sale of the mortgaged property. Really there was no consideration for that special agreement.

6. Without attempting to survey all the cases dealing with the subject of

mortgage by conditional sale the following may be referred to now as being representative:

(1) In 1943 Trav-Co. LR 425 one of the questions which had to be considered was whether Ext. A in that case was a mortgage by conditional sale. It was a hypothecation bond which provided for payment of the principal amount and interest before a particular date. If the money due under it was not paid within the stipulated period the transaction was directed to be treated as a sale of the property covered by the hypothecation bond. It was held by a Full Bench that the document could not be treated as a mortgage by conditional sale.

(2) 1948 Trav-co. LR 556 is also a decision of a Full Bench. There it was interpretation of certain mortgage transactions with possession that arose for consideration. In them also there were provisions for treating them as sales if the mortgage amounts were not paid within the periods prescribed. They were not treated as mortgages by conditional sale.

(3) In Mathen v. Kottayam Bank Ltd., 1956 Ker LT 63, the document that came up for interpretation was styled as a "Sthreedhanam udampady." It was provided in it that if the amount mentioned in it was not paid within 2 years the property covered by it was to be enjoyed by the person in whose favour it was executed with full proprietary rights. The amount was not paid within the stipulated period. It was held that the document was only a mortgage with possession.

(4) In Mrs R. F. Gomez v. P. V. Chelammal, 1957 Ker LT 495, with regard to the stipulation in a mortgage deed that if the mortgage was not redeemed within a certain period the transaction had to be treated as a sale it was held that it was a clog on redemption and was invalid.

(5) In Mehrban Khan v. Makhana, AIR 1930 PC 142 it was the interpretation of a mortgage deed that provided for the mortgagees becoming owners of the mortgaged properties if the mortgage was not redeemed within 19 years that came up for interpretation. The mortgage was not redeemed within that time. The case arose from a decision of the Judicial Commissioner in the erstwhile North West Frontier Province where the T. P. Act had no statutory force. It was held that that matter had to be decided by equity and good conscience and that that meant that the rules of English law applied. Applying those rules it was held by the Privy Council that the provision in the document stipulating the mortgagees becoming owners of the mortgaged property if the mortgage was not redeemed within the prescribed period was a clog upon the

equity of redemption and that consequently it was void.

(6) In *Thumbuswamy Moodelly v. Hos-sain Rawthen*, (1876-78) ILR 1 Mad 1 (PC) a mortgage deed provided for the income from the mortgaged properties being utilised for payment of Government revenue and similar other things by the mortgagee and thereafter the balance being utilised by him for the liquidation of the mortgage debt. It also provided that after the period prescribed in the document if on settlement of accounts it was found that money was still due to the mortgagee he was to become the purchaser at a fixed value of so much of the land as would satisfy such balance. The Privy Council construed it as a mortgage. It was observed in that case that the distinction between a sale with a condition for repurchase and mortgage by conditional sale was dependent upon the intention of the parties and that such intention could be proved by oral evidence.

(7) In *Sheoram Singh v. Babu Singh*, AIR 1926 All 493 a mortgage deed which provided for that document being treated as a sale deed if the mortgage amount was not paid within the time stipulated was construed as a mortgage by conditional sale.

7. Except in the last mentioned case in all the other cases referred to above a transaction which originated as a mortgage was not treated as a mortgage by conditional sale. In (1876-77) ILR 1 Mad 1 (PC) it was observed that allowing the parties to adduce oral evidence to prove their intention to ascertain whether a transaction was a mortgage by conditional sale would open a wide field of litigation. It was also observed that the state of the law as it stood was unsatisfactory and that it called for the interposition of the Legislature. It was a few years thereafter that the T. P. Act was passed. One of the decisions followed in AIR 1926 All 493 was (1876-77) ILR 1 Mad 1 (PC). With great respect to the learned Judges who decided AIR 1926 All 493 it has to be stated that due importance does not appear to have been given by them in that decision to the principle that a transaction can be treated as a mortgage by conditional sale only if, to begin with, it was ostensibly a sale.

"Art. 132. To enforce payment of money charged upon immoveable property.

Twelve years

When the money sued for becomes due."

"Art. 148. Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

Sixty years

When the right to redeem or to recover possession accrues : "

8. According to the learned Advocate General besides the right to recover the money due under Ext. F the appellants being puisne mortgagees had also a right

I respectfully disagree with that decision and agree with the other decisions referred to above. On an examination of the provisions of Ext. F in the light of the principles and the decisions discussed above I hold that Ext. F is not a mortgage by conditional sale and that the condition in it for the mortgage working itself out as a sale is a clog on the right of redemption and as such invalid.

8. I turn now to the question whether the appellants can be allowed to redeem the mortgages, Exts. XI and XII, treating Ext. F as a pure mortgage without possession. Art. 119 of the Travancore Limitation Act, corresponding to Art. 132 of the Indian Limitation Act, 9 of 1908, provided for 12 years from the date the money became due for institution of suits for recovery of money due charged on property. The right to recover the money due under Ext. F, had become barred by limitation long before the institution of the present suit. Art. 136 of the Travancore Limitation Act fixed a period of 60 years for redemption of mortgages. The corresponding provision in the Indian Act, 9 of 1908, is Art. 148 which provided a period of 60 years for institution of suits for redemption of mortgages. Section 29 of the Travancore Limitation Act corresponding to Section 28 of the Indian Limitation Act, 9 of 1908, provided that at the determination of the period mentioned in the Articles for a person for institution of a suit for recovery of possession of property his right to such property would get extinguished. It was agreed by learned counsel appearing for both sides when this appeal was heard that the right to redeem the prior mortgages, Exts. XI and XII, had not become barred by limitation on the date of suit. For convenience reference is being made hereafter only to the provisions of the Indian Limitation Act and wherever the words 'Limitation Act' are mentioned they are with reference to the Indian Act, 9 of 1908. We shall now read Section 28 and Articles 132 and 148 of the Limitation Act:

"Section 28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

under Section 91 of the Transfer of Property Act to redeem the prior mortgages and the latter right had not become barred by limitation on the date of suit.

Even as regards the former right for recovery of the money due under Ext. F only the right to recover it through suit had become barred on the date when the present suit was filed. There is nothing in the Limitation Act to indicate that on the expiry of the period fixed in it for enforcement through suit of the right to recover money charged on property that right is lost to the mortgagee for being used in other manners also. Section 28 of the Limitation Act which provides for extinction of rights in property applies only to omission to institute within the prescribed period suits for possession of property and not to suits for recovery of money charged on property. If a mortgagee is in possession of property and money is due to him on other accounts charged on that property he can recover all those amounts on settlement of accounts at the time of redemption. That is an instance to show that although a suit to recover the money charged on property may be barred under Art. 132 of the Limitation Act it could still be recovered if the person entitled to it was in possession of that property. That indicates that even if the right to recover the money charged on property is barred under Art. 132 the charge-holder has still an interest in the property and any interest in the property is sufficient to entitle him to claim redemption of prior mortgages under Section 91 (a) of the Transfer of Property Act, which reads as follows:—

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;"

In the present case on the date of suit the period prescribed for redemption of the prior mortgages had not become barred by limitation. Therefore the suit by the appellants on the strength of Ext. F for redemption of the prior mortgages was competent and had not become barred by limitation. So goes the interesting and apparently logical argument of the learned Advocate General.

10. I shall now examine the decisions cited by him in support of the position he has taken. *Joikhu Bhunja v. Sitla Baksh Singh*, AIR 1930 All 416; *Varaha Devaswom v. Ummer Sait*, AIR 1951 Trav-Co. 17; and *P. Neelakantan v. Umminnui Pillai* 1952 Ker LT 129=AIR 1952 Trav-Co. 295 are cases in which on settlement of accounts at the time of the redemption mortgagees were directed to be paid not merely the money due under the mort-

gages which were sought to be redeemed but also time-barred debts charged on the mortgaged property.

In other words, the time-barred debts charged on the mortgaged property were allowed to be tacked on to the mortgage amount at the time of redemption of the mortgage. In all those decisions it was while the mortgagee was in possession of the mortgaged property that the debt due to him charged on the property became barred by limitation. In *In Re Hepburn; Ex Parte, Smith*, 1884-14 QB 394 Cave, J. said:—

"There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action. When the debt is barred by the statute and the creditor has no lien, the debt is gone for all purposes."

This was one of the decisions followed in AIR 1951 Trav-Co. 17 and *Mariyakutty v. Chaladean Syrian Bank Ltd.*, Trichur, AIR 1957 Trav-Co. 174. In the latter case a person in possession of pledged goods was held entitled to hold those goods until he was paid the money due to him in respect of those goods even though the right to recover that money through suit had become barred by limitation. These decisions have application only to cases where the charge-holder in respect of a property comes into possession of it before the creation of the charge or before the right to recover the money charged on it becomes barred by limitation and not to cases where he comes into possession of it after the right to recover the money has become barred by limitation.

11. With regard to a person to whom money is due charged on property he has two distinct remedies. He can either sue for the money due to him at any time within the period prescribed under the Limitation Act for that purpose or if he comes into possession of the property within that period retain possession of it and at the time of surrender of possession insist on payment to him of time-barred debts charged on it also. The latter remedy is in character only a shield.

This is not a rule peculiar to cases where there are several charges in respect of a property. It applies equally well to a case where there is only one mortgage in respect of a property. To recover the money due to him charged on property a mortgagee with possession has only 12 years under Art. 132 of the Limitation Act. But even after that right has become barred by limitation he can retain possession of the mortgaged property until the mortgage is redeemed, for which there is 60 years under Art. 148. If a suit for redemption is filed after the expiry of 12 years but within 60 years of the mortgage the mortgagee is entitled to get the mortgage money due to him before surrender of possession of the property although the right to recover that amount through suit has become barred. But such a right can be availed of only if the mortgagee or charge-holder gets into possession of the property before the right to recover the money charged on it becomes barred by limitation. If the rule was otherwise a charge-holder whose right to recover the amount due to him becomes barred by limitation, by taking an assignment of the rights of a mortgagee with possession and getting into possession of the property can retain possession of it until the time-barred debt also is paid. But that is not the law.

12. The decisions dealing with the question as to whether the mortgagee who is not in possession of the property and whose right to recover the mortgage amount has become barred by limitation has a subsisting right to redeem an earlier mortgage in respect of the property can now be considered. In *Lakshmanan v. Sella Muthu*, AIR 1925 Mad 76 the Court was concerned with two mortgages in respect of the same properties in favour of two different persons. Each of the mortgagees obtained a decree on his mortgage without impleading the other and in execution purchased the equity of redemption. The puisne mortgagee after purchasing the equity of redemption in execution of the decree obtained by him sued for redemption of the prior mortgage. Following *Nidhiram Bandopadhyaya v. Sarbessur Biswas*, 5 Ind Cas 877=14 Cal WN 439 it was held that it was Art. 132 and not Art. 148 of the Limitation Act that applied to the case and that as the suit was filed more than 12 years after the date of the puisne mortgage it was barred by limitation. In *Sayamali v. Anisuddin*, AIR 1929 Cal 609 (FB) a Full Bench of the Calcutta High Court held that if it was supposed that it was decided in (1909) 5 Ind Cas 877=14 Cal WN 439 that a suit for redemption was governed by Art. 132 then it was wrongly decided. In *Sundar Das v. Beli Ram*,

AIR 1933 Lah 503 it was held following AIR 1929 Cal 609 (FB) that it was Art. 148 and not Art. 132 that applied to a suit by a puisne mortgagee to redeem a prior mortgage. No doubt in that case the suit by the puisne mortgagee was filed more than 12 years after the date of his mortgage. But the question as to whether he had a subsisting right to redeem the earlier mortgage was not considered. That was because the suit happened to be disposed of by the trial Court on the question of limitation and the other questions involved in the suit had to be decided by the trial Court after remand. In *Ramjhari Koer v. Kashi Nath*, AIR 1926 Pat 337 the learned Judges who decided that case differed from the view taken in (1909) 5 Ind Cas 877=14 Cal WN 439 and holding that it was Art. 148 that applied to a suit by a puisne mortgagee to redeem a prior mortgage decreed redemption. No doubt in that case the suit was filed more than 12 years after the date of the second mortgage. But the question as to whether the puisne mortgagee in that case had a subsisting right to redeem was not specifically considered there. *Priya Lal v. Champa Ram*, AIR 1923 All 271 (2) was also a suit by a puisne mortgagee for redemption of a prior mortgage. In that case each of the mortgagees had obtained a decree on his mortgage without impleading the other and purchased the mortgagor's right in court auction. It was held that the suit for redemption by the puisne mortgagee was governed by Art. 148 and not Art. 132 of the Limitation Act. In *Ram Adhar v. Shankar Baksh Singh*, AIR 1935 Oudh 139 it was observed that although a puisne mortgagee's right to recover the mortgage amount would be lost by efflux of time if he omitted to bring a suit for sale or foreclosure within the statutory period of 12 years his right as a mortgagee would not get extinguished by Section 28 of the Limitation Act. That was because that section was confined to suits for possession. It was held in that case that when a puisne mortgagee after his right to recover the mortgage amount had become barred by limitation instituted a suit for redemption of the prior mortgage it was governed by Art. 148 and not 132 of the Indian Limitation Act. Nevertheless, the suit in that case was dismissed on the ground that he had no subsisting right to redeem. The reason given was that the right given to a puisne mortgagee for redemption of a prior mortgage was for the protection of his right to recover the mortgage amount and that when the remedy available to him in respect of that right had been lost by limitation he was left with nothing which required protection. In *Nathmal v. Nilkanth*, AIR 1933 Bom 25 also the suit for

redemption was filed after the right of the puisne mortgagee to enforce his claim for the mortgage amount had become barred by limitation. Although the suit was dismissed on other grounds it was observed in that case that even though the puisne mortgagee's right to enforce his mortgage under Art. 132 of the Limitation Act had become barred he was nevertheless entitled to redeem the prior mortgage. This view was dissented from by the Cochin High Court in the Full Bench decision in *George v. Raghava Menon*, 39 Cochin LR 480. It was observed there that if the puisne mortgagee did not sue within 12 years for the mortgage amount the foundation of his right to redeem itself disappeared. It was further observed that the words "interest in or charge upon" occurring in Section 91 of the T. P. Act meant subsisting interest or charge.

13. A suit by a puisne mortgagee for redemption of a prior mortgage is governed by Art. 148 and not Art. 132 of the Limitation Act. I respectfully disagree with the decisions which have taken an opposite view. The question as to whether a puisne mortgagee has a right to redeem an earlier mortgage depends upon the construction of Section 91(a) of the T. P. Act. According to that section any person 'who has an interest in or charge upon' the mortgaged property can sue to redeem. The expression 'any interest in or charge upon' necessarily implies a subsisting interest or subsisting charge. A mortgagee without possession of the mortgaged property and whose right to recover the mortgage money has become barred by limitation cannot be considered as a person who has a subsisting interest in or charge upon the mortgaged property. It is true that Section 28 of the Limitation Act only provides for extinction of right to property where suit for recovery of possession of that property is not filed within the period mentioned in the Act and consequently has no application to omission to file suits for money charged upon property. It is also true that if a mortgagee does not sue for recovery of the mortgage amount due to him within the period fixed in the Act only his right to recover the mortgage amount through suit becomes barred by limitation and that there is nothing in the Limitation Act or any other law to show that his other rights under the mortgage transaction would get extinguished. But has he rights in the mortgaged property other than the right to get the mortgage amount? The right to bring the mortgaged property to sale through court is the essence of the life of a charge. When that is lost by the bar of limitation, if the mortgagee is not in possession of the

mortgaged property nothing survives the barred charge except an imperfect legal right not constituting an interest in the property sufficient to attract Sec. 91 (a) of the T. P. Act and consequently unenforceable in action. The right of redemption given to a puisne mortgagee is only ancillary to his right of sale and when that right is lost by limitation the right of redemption also becomes lost. I respectfully disagree with the decisions which have taken a different view in this respect, also.

14. As the right to recover the money due under Ext. F had become barred by limitation before the institution of the present suit the appellants have no right to redeem the mortgages, Exts. XI and XII.

In the result, this appeal is dismissed with costs.

15. ISAAC, J. : I agree with the conclusions of my learned brother on the two points raised in this appeal, and that it should accordingly be dismissed with costs.

Appeal dismissed.

AIR 1970 KERALA 88 (V 57 C 18)

M. U. ISAAC AND P. NARAYANA
PILLAI, JJ.

Executive Officer, Elavally Panchayat,
Appellant v. Smt. Rosa, Respondent.

Criminal Appeal No. 26 of 1968; Criminal R. P. No. 143 of 1968 and O. P. No. 2349 of 1968, D/- 22-1-1969, from orders of Sub-Magistrate's Court, Chowghat in C. C. No. 248 of 67 and Dist. Magistrate's Court Trichur, in Cri A. No. 43 of 67 respectively in Cri. A. No. 26 of 68 and Cri. R. P. No. 143 of 68.

(A) Panchayats—Kerala Panchayats Act (32 of 1960), Ss. 96, 97 — Constitution of India, Art. 246, Sch. 7, List 1, Entry 52 and List 2, Entry 6 — Rice Milling Industry (Regulation) Act (1958), Ss. 5, 6 and 2 — Validity of Ss. 96, 97 of Kerala Act — State legislature held competent to enact law contained in these sections.

Sections 96 and 97 of the Kerala Panchayats Act and the Rice-Milling Industry (Regulation) Act deal with entirely different matters. Sections 96 and 97 of the Panchayats Act relate only to matters mentioned in Entry 6 of the State List; and they do not trench on Entry 52 in the Union List. Therefore, the State Legislature was competent to enact the law contained in these sections. (Para 8)

The object of the Rice Milling Industry (Regulation) Act is to regulate the establishment of rice-mills in India for ensuring the adequate supply of rice.

HM/IM/D658/69/LGC/D

having regard to other relevant factors. The object of Section 96 of the Kerala Panchayats Act is to regulate the use of places within the Panchayat for purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property. Section 97 of this Act shows that its object is to control and regulate the establishment of factories, workshops and workplaces and installation of machineries and manufacturing plants within the Panchayat. The Rules made under the Panchayats Act would show that what is relevant in the grant of permission under the above section is the safety of the establishment and the persons employed therein as well as considerations of public health and sanitation. (Para 8)

(B) Panchayats — Kerala Panchayats Act (32 of 1960), Ss. 96, 97, 76 — Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (1963) — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — (Constitution of India, Art. 265).

The provisions contained in Sections 96 and 97 of the Panchayat Act and the Rules relating to levy of fees are invalid. As the issue of licenses and grant of permissions is conditional upon payment of such fees, the provisions relating to the issue of licenses and grant of permissions also become invalid. (Para 9)

There is no case that levy of fees is related to actual service, if any, rendered to the class of persons who pay the same, or that the total collections on this account are earmarked for rendering any service for those persons. On the other hand, the levy is admittedly for augmenting the general revenue of the Panchayat. Section 76 of the Panchayats Act expressly provides that all moneys received by the Panchayat shall constitute a fund called the Panchayat Fund, and that all taxes, duties, cesses, surcharge and fees levied under the Act or other law shall be included in the said fund. Such a levy is not a fee. Case law discussed. (Para 9)

(C) Constitution of India, Art. 246 — Entries in legislative lists — Interpretation of.

A legislature should be presumed to have acted within its powers; and if a statutory provision would yield to two constructions, one of which would make it beyond the power of the legislature and the other construction would bring it within that power, it has to be construed in the latter manner. AIR 1939 FC 1 & AIR 1962 SC 1044 & AIR 1959 SC 544 & AIR 1961 SC 459, Rel. on.

(Para 6)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Ker 99 (V 56) = 1968 Ker LT 589 (FB), City Corporation of Calicut v. Sadasivan 9
(1968) C. A. No. 186 of 1966, D/- 10-12-1968=1969-1 SCWR 371, Municipal Council, Cannanore v. C. T. Raman Nambiar 9
(1968) 1968 Ker LT 776=ILR (1968) 2 Ker 416 (FB), Travancore Tea Estates Co., Ltd. v. Executive Officer, Elappara Panchayat 9
(1968) 1968 Ker LT 789=1969 Ker LJ 220, Arya Vaidya Pharmacy Ltd. v. Health Officer, Ernakulam 9
(1962) AIR 1962 SC 1044 (V 49) = (1963) 1 SCJ 106, Calcutta Gas Co., (Proprietary) Ltd. v. State of West Bengal 7
(1961) AIR 1961 SC 459 (V 48) = (1961) 2 SCR 537, Hingir Rampur Coal Co., Ltd. v. State of Orissa 7
(1959) AIR 1959 SC 544 (V 46) = 1959 Cri LJ 660, State of Rajasthan v. G. Chawla 7
(1939) AIR 1939 FC 1 (V 26)=1939 FCR 18, In the matter of C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 7
In Crl. Appeal No. 26/68:—
V. M. Nayanar, for Appellant; S. Easwara Iyer, L. Gopalakrishnan Potti and C. S. Rajan, for Respondent.
In Crl. R. P. No. 143/68:—
S. Easwara Iyer, for Petitioner; V. M. Nayanar (for No. 1) and State Prosecutor (for No. 2), for Respondents.
In O. P. No. 2349/68:—
S. Easwara Iyer, L. G. Potti, C. S. Rajan, P. Sankarankutty Nair, E. Subramani, for Petitioner; State Prosecutor (for No. 1) and T. M. Krishnan Nambiar, V. Sivaraman Nair, V. M. Nayanar and K. C. Sankaran, (for No. 2), for Respondents.
M. U. ISAAC, J. :— These three cases are the sequence of a criminal complaint which the Executive Officer of Elavally Panchayat, (hereinafter referred to as the appellant) instituted as C. C. No. 248 of 1967 in the Sub-Magistrate's Court, Chowghat against one Smt. Rosa (hereinafter referred to as the respondent).
2. The respondent is the owner of a rice mill. The rice-milling industry is regulated by the Rice Milling Industry (Regulation) Act, 1958. She got a permit under Section 5 and a license under Section 6 of the Rice Milling Industry (Regulation) Act for the establishment of a rice mill within the Elavally Panchayat; and accordingly she established a rice mill. Section 96 of the Kerala Panchayats Act, 1960 provides that the Panchayat may with the previous approval of the Director notify that no place in the Panchayat area shall be used for any of the purposes specified in the rules made

in this behalf being purposes for which in the opinion of the Government, are likely to be offensive or dangerous to human life or health or property, without a licence issued by the executive authority and except in accordance with the conditions specified in such license. Section 97 of this Act provides, among other things, that no person shall, without the permission of the Panchayat and except in accordance with the conditions specified in such permission, instal in any premises any machinery, not being a machinery exempted by rules. Section 98 empowers the Government to make rules in respect of matters mentioned in Sections 96 and 97. Section 129 of the Act contains the general rule making power. In exercise of the powers conferred by the aforesaid sections of the Panchayats Act, the Government made the Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules 1963, (hereinafter referred to as the Rules.). The rules provide for the issue of licenses under Section 96 and the issue of permits under Section 97. Schedule I to the Rules specifies the purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property.

3. The Elavally Panchayat has notified under Section 96 of the Kerala Panchayat Act that no place within its limit shall be used for any of the above purposes without a license from the executive authority. Item 83 in Schedule I to the Rules is "Machinery — Used for industrial Purposes."; and item 94 is "Paddy — Boiling or husking by machinery (for other than domestic use)". Rice mills fall under both the above items. So, under the Panchayat Act and the Rules a person has to take a license and also obtain a permit for establishing a rice mill within the limits of the Elavally panchayat. The respondent did not obtain from the appellant any license for use of the mill premises. She applied for permission, to which she did not get a reply; and she started the mill without either the license or the permission. Section 109(3) of the Panchayats Act provides that, if orders on an application for a license or permission are not communicated to the applicant within 30 days or such longer period as may be prescribed in any class of cases, after the receipt of the application by the executive authority, the application shall be deemed to have been allowed. Section 132 of this Act provides, among other things, that whoever contravenes any of the provisions of the Act mentioned in Schedule III thereto shall be punishable with fine which may extend to the amount mentioned therein. Sections 96 and 97 are included in the above Schedule.

4. In the light of the above provisions of the Panchayat Act and the Rules, the appellant instituted C. C. 248 of 1967, charging the respondent with offences under Sections 96 and 97 of the Act. The trial court found the respondent guilty under Section 96 and sentenced her to pay a fine of Rs. 20/-. It acquitted her of the offence under Section 97, holding that, for failure of the executive authority to communicate its orders on the application for permission within the prescribed period, the respondent should be deemed to have been granted the permission. The appellant filed the present Criminal Appeal from the acquittal of the accused under Section 97 of the Panchayats Act. The respondent filed an appeal before the District Magistrate, Trichur from the order of conviction under Section 96. The appeal was dismissed; and the Criminal Revision Petition has been filed from the judgment of the District Magistrate. The respondent has stated several grounds in the Revision Petition; but at the hearing, the learned counsel urged only two points of law which she has raised against the maintainability of the prosecution. They are:—

(i) Sections 96 and 97 of the Kerala Panchayats Act, in so far as they relate to rice-milling industry, are beyond the legislative competence of the State Legislature, as rice mill industry falls under entry No. 52 in List I of the VII Schedule to the Constitution, and Parliament alone has the power to make any law in respect of that matter; and

(ii) The issue of licenses under Section 96 and permissions under Section 97 of the Panchayats Act is conditional upon payment of prescribed fees. What is prescribed as "fees" is not really fees; and the provisions relating to the issue of licenses and permissions under the Act and the Rules are, therefore, invalid.

The respondent has also filed the Original Petition for a writ of mandamus or other appropriate writ or order directing the appellant not to insist on the respondent to take out a license under Section 96 or to obtain the permission under Section 97 of the Kerala Panchayats Act, on the ground that these sections, in so far as they relate to rice-milling industry, are beyond the legislative power of the State Legislature. Therefore, the only question which arises for decision in the Original Petition is the first point raised in the Criminal Revision Petition. This point also arises for decision in the Criminal Appeal. The State of Kerala is also a respondent in the O. P.

5. I shall now consider the first point. Article 246 of the Constitution provides as follows:—

"246. Subject-matter of laws made by Parliament and by the Legislatures of States.—

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2) the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the Territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Entry 52 in List I of the VII Schedule to the Constitution reads:

"Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

The Rice-milling Industry (Regulation) Act 1958 was enacted by Parliament to regulate the rice-milling industry. Section 2 of this Act declares that it is expedient in the public interest that the Union should take under its control the rice-milling industry. Consequently, rice-milling industry fell within entry No. 52 in List I. By virtue of Article 246 of Constitution, Parliament alone has power to make laws in respect of this matter; and the Rice Milling Industry (Regulation) Act is such a law made by Parliament. Section 5 of this Act deals with grant of permits for establishment of a rice mill. It reads as follows:—

"5(1) Any person or authority may make an application to the Central Government for the grant of a permit for the establishment of a new rice mill; and any owner of a defunct rice mill may make a like application for the grant of a permit for recommencing rice-milling operation in such mill.

(2) Every application under sub-section (1) shall be made in the prescribed form and shall contain the particulars regarding the location of the rice mill, the size and type thereof and such other particulars as may be prescribed.

(3) If, on receipt of any such application for the grant of a permit, the Central Government is of opinion that it is neces-

sary as to do for ensuring adequate supply of rice, it may, subject to the provisions of sub-section (4) and sub-section (5), grant the permit specifying therein the period within which the mill is to be established or, as the case may be, the mill is to re-commence rice-milling operation and such other conditions as it may think fit to impose, in accordance with the rules, if any, made in this behalf.

(4) Before granting any permit under sub-section (3), the Central Government shall cause a full and complete investigation to be made in the prescribed manner in respect of the application and shall have due regard to —

(a) the number of rice mills operating in the locality;

(b) the availability of paddy in the locality;

(c) the availability of power and water supply for the rice mill in respect of which a permit is applied for;

(d) whether the rice mill in respect of which a permit is applied for will be the huller-type, sheller-type or combined sheller-huller type;

(e) Whether the functioning of the rice mill in respect of which a permit is applied for would cause substantial unemployment in the locality;

(f) such other particulars as may be prescribed.

(5) In granting a permit under this section the Central Government shall give preference to a defunct rice mill over a new rice mill.

(6) A permit granted under this section shall be effective for the period specified therein or for such extended period as the Central Government may think fit to allow in any case."

Section 6 of the above Act deals with grant of licenses for carrying on rice-milling operation and that section reads as follows:—

"6(1) Any owner of an existing rice mill or of a rice mill in respect of which a permit has been granted under Section 5 may make an application to the licensing Officer for the grant of a licence for carrying on rice milling operation in that rice mill.

(2) Every application under sub-section (1) shall be made in the prescribed form and shall contain the particulars regarding the location of the rice mill, the size and type thereof and such other particulars as may be prescribed.

(3) On receipt of any such application for the grant of a licence, the licensing officer shall grant the licence on such conditions (including, in particular, conditions relating to the polishing of rice), on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed.

(4) A licence granted under this section shall be valid for the period specified therein and may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed."

The above two sections show that the location of the rice mill is a relevant and important factor in the matter of granting the permit and the licence. The permit is given for establishing a rice-mill in a certain locality, and the licence is given for operating that mill in that locality.

6. The contention of the respondent is that Sections 96 and 97 of the Kerala Panchayats Act are so wide in language as to apply to rice-milling industry, and that, in so far as they would apply to that industry, they are beyond the legislative power of the State, or those sections should be construed in such a way as not to apply to rice-milling industry. A legislature should be presumed to have acted within its powers; and it is a well settled canon of construction that if a statutory provision would yield to two constructions, one of which would make it beyond the power of the legislature and the other construction would bring it within that power, it has to be construed in the latter manner. I shall now read Sections 96 and 97 of the Kerala Panchayats Act;

"96. Purpose for which places may not be used without a licence — The Panchayat may with the previous approval of the Director notify that no place in the Panchayat area shall be used for any of the purposes specified in the rules made in this behalf being purposes which in the opinion of Government, are likely to be offensive or dangerous to human life or health or property, without a licence issued by the executive authority and except in accordance with the conditions specified in such licence:

Provided that no such notification shall take effect until the expiry of sixty days from the date of its publication.

97. Permission for the construction of factories and the installation of machinery. — No person shall, without the permission of the Panchayat and except in accordance with the conditions specified in such permission —

(a) construct or establish any factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power; or

(b) instal in any premises any machinery or manufacturing plant driven by any power as aforesaid, not being machinery or manufacturing plant exempted by the rules."

The Panchayats Act deals with matters falling under entries 5 and 6 in List II

of the VII Schedule to the Constitution; and these entries read:—

"5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-Government or village administration.

6. Public health and sanitation; hospitals and dispensaries".

The power of a State Legislature to make laws on any of the matters enumerated in List II is subject to the power of the Parliament to make laws on any of the matters enumerated in List I. This is expressly stated in Article 246 of the Constitution. So, there can be no doubt that, if Section 96 or 97 of the Panchayats Act contains a law in respect of rice-milling industry, that law would be beyond the legislative power of the State Legislature. The learned counsel appearing for the appellant and the State of Kerala contended that Sections 96 and 97 of the Panchayats Act relate entirely to matters mentioned in entry 6 in List II, and that they do not relate to any matter mentioned in Entry 52 in List I, even though the provisions contained in the said sections may incidentally refer to a matter falling under Entry 52 in List I. They submitted that the above two Entries are entirely different, that the application of Ss. 96 and 97 of the Panchayats Act to a matter falling under Entry 52 in List I was only incidental, and that such incidental application would not make them a law on a matter mentioned in entry 52.

7. Disputes with regard to the legislative spheres of the Parliament and the State Legislature are inevitable in the federal character of our Constitution, even in spite of the non-obstante clause in Article 246 (1). Dealing with this problem, Sir Maurice Gwyer C. J. stated in the matter of C. P. Motor Spirit Act, AIR.1939 FC 1:

".....an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning,

there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess."

The principles stated in the above passage have been approved by the Privy Council and our Supreme Court. In *Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, the question arose whether the West Bengal Oriental Gas Company Act, 1960, which the State Legislature enacted, was void, on the alleged ground that it related to a matter mentioned in Entry 52 of List I. The State contended that it related entirely to the matter mentioned in entry 25 in List II. This entry reads:—

"Gas and gas works".

Dealing with these apparently overlapping entries, Subba Rao, J. in his judgment of the Court, said:—

"The power to legislate is given to the appropriate Legislatures by Art. 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate Legislatures can operate. It is also well settled that widest amplitude should be given to the language of the entries. But some of the entries in the different Lists or in the same Lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them."

After examining the relevant provisions of the Constitution, the learned Judge held:—

"It is, therefore, clear that the scheme of harmonious construction suggested on behalf of the State gives full and effective scope of operation for both the entries in their respective fields while that suggested by learned counsel for the appellant deprives Entry 25 of all its content and even makes it redundant. The former interpretation must, therefore, be accepted in preference to the latter. In this view, gas and gas works are within the exclusive field allotted to the States. On this interpretation the arguments of the learned Attorney-General that, under Art. 246 of the Constitution, the legislative power of State is subject to that of Parliament ceases to have any force, for the gas industry is outside the legislative field of Parliament and is within the exclusive field of the Legislature of the State. We, therefore, hold that the im-

pugned Act was within the Legislative competence of the West Bengal Legislature and was, therefore, validly made."

Reference may be made to two more decisions of the Supreme Court. In *State of Rajasthan v. G. Chawla*, AIR 1959 SC 544 the question arose whether the Ajmer (Sound Amplifiers Control) Act, 1953 was void being a law falling under Entry 31 of the Union List. This entry reads:—

"Post and Telegraphs; Telephones, Wireless, broadcasting and other like forms of communications."

The State contended that it was a law in respect of the matter mentioned in entry 6 of the State List and that it was within the power of the State Legislature. Entry 6 in the State List reads:—

"Public Health and Sanitation; hospitals and dispensaries."

Upholding the contention of the State, Hidayatullah J. delivering the judgment of the court, said:—

"On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by Entry No. 6 and conceivably Entry No. 1 of the State List, and it does not purport to encroach upon the field of Entry No. 31 though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under Entry No. 31 of the Union List by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited Entry and conceivably the other in the State List."

In the *Hingir Rampur Coal Co. Ltd. v. State of Orissa*, AIR 1961 SC 459, the validity of the Orissa Mining Areas Development Fund Act, 1952 which was passed by the State Legislature, was attacked on the ground that it related to a matter falling under Entry 52 of the Union List. The State contended that the Act related to a matter in Entry 23 of the State List, and that it was, therefore, within the power of the State Legislature. This entry reads—

"Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

In dealing with above contention, Gajendragadkar J. who delivered the majority judgment of the Court, examined the relevant provisions of the State Act and also of the Industries (Development and Regulation) Act, 1951 which the Parliament has made in respect of the

matter in Entry 52 of the Union List; and he held that the object of the State Act was the development of mining area in the State while that of the Central Act was to regulate the scheduled industries with a view to their development, and that these Acts, therefore, occupied different fields. The validity of the State Act was upheld on the above ground.

8. I shall now examine the constitutional validity of Sections 96 and 97 of the Kerala Panchayats Act. The Parliamentary declaration contained in Section 2 of the Rice Milling Industry (Regulation) Act shows that it was made in the public interest to take rice-milling industry under the control of the Union. Section 5 of this Act, which deals with grant of permits for establishing rice-mills, shows that the relevant considerations in the matter are the number of rice-mills operating in the locality, availability of paddy in the locality, availability of power and water for the mill, extent of unemployment that may be caused by the establishment of the mill etc., and that the permit is granted only if the Central Government is of opinion that it is necessary to do so for ensuring adequate supply of rice in the locality. Section 6, which deals with grant of licenses, shows that the relevant considerations are the location of the mill, the size and type thereof and other prescribed particulars; and they are granted subject to conditions relating to the polishing of rice. So the object of the Rice-Milling Industry (Regulation) Act is to regulate the establishment of rice-mills in India for ensuring the adequate supply of rice, having regard to other relevant factors. The object of Section 96 of the Kerala Panchayats Act is to regulate the use of places within the Panchayat for purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property. Section 97 of this Act shows that its object is to control and regulate the establishment of factories, workshops and work-places and installation of machineries and manufacturing plants within the Panchayat. The Rules would show that what is relevant in the grant of permission under the above section is the safety of the establishment and the person employed therein as well as considerations of public health and sanitation. Therefore, Sections 96 and 97 of the Panchayats Act and the Rice Milling Industry (Regulation) Act deal with entirely different matters. Sections 96 and 97 of the Panchayats Act relate only to matters mentioned in Entry 6 of the State List; and they do not entrench on Entry 52 in the Union List. I, therefore, hold that the State Legislature was competent to enact the law contained in these sections.

9. The next question for consideration is whether Sections 96 and 97 of the Kerala Panchayats Act and the provisions of the Rules relating to issue of licenses and grant of permissions are valid, as they are made conditional on payment of the prescribed fees. There is no case that levy of fees is related to actual service, if any, rendered to the class of persons who pay the same; or that the total collections on this account are earmarked for rendering any service for those persons. On the other hand, the levy is admittedly for augmenting the general revenue of the Panchayat. S. 76 of the Panchayats Act expressly provides that all moneys received by the Panchayat shall constitute a fund called the Panchayat Fund, and that all taxes, duties, cesses, surcharge and fees levied under the Act or other law shall be included in the said fund. It is well settled by the decisions of this Court, and also by a very recent decision of the Supreme Court that such a levy is not a fee — vide *City Corporation of Calicut v. Sadasivan*, 1968 Ker LT 589 = (AIR 1969 Ker 99) (FB). *Travancore Tea Estates Co. Ltd. v. Executive Officer, Elappara Panchayat*, 1968 Ker LT 776 (FB), *Arya Vaidya Pharmacy Ltd. v. Health Officer, Ernakulam*, 1968 Ker LT 789 and *Municipal Council, Cannanore v. C. T. Raman Nambiar* (Decision of the Supreme Court dated 10-12-1968 in C. A. No. 186 of 1966 (SC)). The provisions contained in Sections 96 and 97 of the Panchayats Act and the Rules relating to levy of fees are, therefore, invalid. As the issue of licenses and grant of permissions is conditional upon payment of such fees, the provisions relating to the issue of licenses and grant of permissions also become invalid.

10. In the light of my decision on the above two points, O. P. No. 2349 of 1968 should be dismissed; and I do so. Criminal R. P. No. 143 of 1968 is allowed; and Criminal Appeal No. 26 of 1968 is dismissed. The order of conviction and sentence of fine passed against the respondent is set aside; and the fine, if already recovered, is directed to be refunded to the respondent.

11. NARAYANA PILLAI, J. :— I agree.

Order accordingly.

AIR 1970 KERALA 94 (V 57 C 19)
T. S. KRISHNAMOORTHY IYER AND
P. NARAYANA PILLAI, JJ.

Cherla Poulase Koovapally Kattavil,
Appellant v. K. P. Sathivan Nair and
another, Respondents.

C. M. A. No. 12 of 1969, D/- 4-3-1969.

HM/JM/D664/69/NYR/M

Civil P. C. (1908), O. 21, R. 90 — Application by stranger auction-purchaser to set aside sale on ground of fraud practised by decree-holder and judgment-debtor — Not maintainable under O. 21, R. 90 — Stranger auction-purchaser is not "a person whose interests are affected by sale". AIR 1920 Mad 145 & AIR 1925 All 459 & AIR 1939 Nag 179, Diss. (1893) ILR 20 Cal 8 & (1888) ILR 15 Cal 488 (FB) & AIR 1928 PC 16, Ref.; AIR 1928 Cal 828 & AIR 1929 Rang 33(1) & AIR 1932 Lah 468 (2) & AIR 1936 Bom 311, Foll; AIR 1954 SC 349 & AIR 1967 SC 1344, Rel. on. (Paras 3, 7, 8)

Cases Referred: Chronological Paras

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Umanath Chowdhry 3
(1888) ILR 15 Cal 488 (FB), Asmu-
tunnissa Begum v. Ashruff Ali 3

K. M. Joseph, for Appellant; P. N. San-
karanarayana Pillai, for Respondent
(No. 1).

KRISHNAMOORTHY IYER, J. :— The
appellant who is the stranger-auction
purchaser in execution of the decree in
O. S. 15 of 1964 on the file of the Prin-
cipal Subordinate Judge's Court, Erna-
kulam, complains against the dismissal of
E. A. 813 of 1968 filed by him under
Section 151, Order 21, Rules 90 and 91

C. P. C. to set aside the Court sale. The
properties of the third defendant were
purchased by the appellant in Court
auction on 11-11-1968 for Rs. 9280.70 and
he deposited Rs. 2321 being 1/4th of the
auction amount under Order 21, Rule 84
C. P. C. E. A. 813 of 1968 was filed on
18-11-1968 on the ground that the lease-
hold interest created by the 3rd defen-
dant in the property in 1960 was not dis-
closed in the sale Proclamation and its
non-disclosure is an act of fraud practised
by the decree-holder and the 3rd
defendant on the intending purchasers
and the court and therefore the sale is
liable to be set aside. In E. A. 813 of
1968 the appellant also prayed for the
return of the sum of Rs. 2321 deposited
by him. The decree-holder filed his ob-
jections on 26-11-1968. Thereafter and
within fifteen days from the date of
auction the appellant deposited the full
amount of the purchase money payable
under Order 21, Rule 85 C. P. C. and the
amounts required for stamp duty for the
issue of sale certificate under Order 21,
Rule 94, C. P. C. It was after such
deposit that he prosecuted E. A. 813 of
1968 which was dismissed by the execu-
tion Court.

2. Though the person alleged to be the
lessee of the third defendant was im-
pleaded as a respondent in E. A. 813 of
1968 he was subsequently removed from
the party array. The Subordinate Judge
took the view that it is not open to an
auction purchaser to pray for setting
aside a court sale under Section 151 or
Order 21, Rule 90 or 91, C. P. C. It
has to be pointed that no enquiry was
conducted and no finding was given by
the execution court on the question whe-
ther the properties sold in court auction
are subject to any lease granted by the
3rd defendant.

3. There was considerable discussion
at the Bar as to the maintainability of
E. A. 813 of 1968 under Order 21, Rule 90.
C. P. C. we shall first examine that ques-
tion. The counsel for the appellant con-
tended that even though his client had no
interest in the property prior to the court
sale he is even then a person 'whose in-
terests are affected by the sale' under
Order 21, Rule 90, C. P. C. There is a
sharp difference of opinion on this issue,
among the several High Courts and the
question is not free from difficulty. The
words 'any person whose interests are
affected by the sale' in Order 21, Rule 90,
C. P. C. are no doubt of a wider import
than the expression 'a person holding an
interest in the property sold' occurring in
Order 21, Rule 89, C. P. C. The question
is whether an auction purchaser has got
any interests which are affected by the
sale. If the word "interest" occurring in
Order 21, Rule 90 C. P. C. is to denote

interests independent of the court sale and not those arising by virtue of the Court sale, then the auction purchaser has no right to apply. The reasonable view on a plain reading of the provision is to hold that the "interests" contemplated in Order 21, Rule 90, C. P. C. refer to interests not created by the sale itself but affected by the sale. The difference in the language in Order 21, Rule 89 and Rule 90 cannot have any bearing in this connection. If the decisions which have construed Section 311 of the C. P. C. 1882 are relevant in this connection it is clear in view of the decision of the Judicial Committee in *Birj Mohun Thakur v. Rai Uma Nath Chowdhry*, (1893) ILR 20 Cal 8 (PC), that an auction purchaser cannot apply to set aside a sale under Order 21, Rule 90, C. P. C. The expression "person whose immovable property has been sold" in the Code of 1882 was construed in the Full Bench decision of the Calcutta High Court in *Asmutunnissa Begum v. Ashruff Ali*, (1888) ILR 15 Cal 488 (FB) to mean "any person whose interests were affected by the sale" and the legislature adopted these words in the 1908 Code. The non-inclusion of an auction purchaser in Order 21, Rule 90, C. P. C. especially because of the decision in (1893) ILR 20 Cal 8 (PC), is a circumstance that cannot be overlooked. It is an accepted rule of construction as pointed out by the Privy Council in *Abdur Rahim v. Abu Md. Barkat Ali*, AIR 1928 PC 16. Their Lordships said:—

"It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may be founded, but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended."

4. The decisions in *Gopalakrishnayya v. Sanjeeva Reddi*, 38 Mad LJ 228=(AIR 1920 Mad 145) *Ravinandan Prasad v. Jagannath Sahu*, ILR 47 All 479=(AIR 1925 All 459) and *A. I. Railwaymen's Benefit Fund Ltd. v. Ramchand*, AIR 1939 Nag 179 would interpret the word "interests" in Order 21, Rule 90 C. P. C. to include the interests of the auction purchaser also. A different view was taken in *Surendra Nath Das v. Alauddin Mistry*: AIR 1928 Cal 828; *K. V. A. L. Chettiar Firm v. M. P. Maricar*, AIR 1929 Rang 33(1), *Nihal Chand v. Pritam Singh*, AIR

1932 Lah 468(2) and *Balkrisna v. Sakharan*, AIR 1936 Bom 311.

5. In this connection it is necessary to refer to some of the other provisions in the Code. Order 21, Rule 64, provides that the person declared to be the purchaser of immovable property shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer and in default of such deposit the property shall forthwith be resold. Order 21, Rule 85 provides that the purchaser shall pay the full amount of the purchase money into court on the 15th day from the date of the sale of the property. Order 21, Rule 86 says that if there is default to comply with Rule 85 of O. 21, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. O. 21, Rule 71, provides that any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

6. In *Manilal Mohanlal v. Sayed Ahmed*, AIR 1954 SC 349 their Lordships of the Supreme Court decided that O. 21, Rules 84, 85 and 86 requiring the deposit of 25 per cent of the purchase-money immediately, on the person being declared as a purchaser, such person not being a decree-holder, and the payment of balance within 15 days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all. According to their Lordships in the event of a default either under Order 21, Rule 84 or Rule 85 the proceedings for sale are completely wiped out as if they do not exist in the eye of law. This decision has been followed in *Ramchand Spg. & Wvg. Mills v. Bijli Cotton Mills (P) Ltd. Hathras*, AIR 1967 SC 1344.

7. Persons claiming title paramount to the judgment-debtor or persons claiming to be the purchasers of immovable property sold in court auction from the judgment-debtor prior to the attachment are not qualified to maintain an application under Order 21, Rule 90. The remedy of such a person is either to proceed under Order 21, Rule 58, or under Order 21, Rules 97 to 100, C. P. C. It is not necessary to decide in this appeal whether "interests" in Order 21, Rule 90, mean

tor to decide their dispute on merits as well. On the same day, a copy of this agreement was sent to the Central Government for publication. This was followed by a reminder dated February 11, 1966 from respondent No. 2. A reply (undated) was received from the Central Government returning the agreement, as it was not in the prescribed form. On February 21, 1966, an agreement was drawn up afresh in the prescribed form, referring the dispute on merits to the arbitration of Shri F. Jeejeebhoy. On March 12, 1966, this agreement was published by the Central Government. On May 24, 1966, the arbitrator made his award.

6. Aggrieved by this award, this petition was filed for a writ of certiorari.

7. Shri Nanavati, learned counsel for the Company, (respondent No. 2), raised a preliminary objection that an arbitrator, appointed under Section 10-A of the Act, is not a Tribunal, nor a statutory arbitrator but he is a private arbitrator of the choice of the parties, so that he is not amenable to the writ jurisdiction under Article 226 or 227 of the Constitution.

8. It is settled law that an arbitrator, appointed under Section 10-A of the Act, is not a Tribunal. Per *Engineering Mazdoor Sabha v. Hind Cycles*, (1962) 2 Lab. L. J. 760=(AIR 1963 SC 874). In that case, their Lordships were dealing with the question whether an appeal lies to the Supreme Court under Article 136 of the Constitution from an award of a Section 10-A arbitrator.

9. On the further question whether an arbitrator appointed under Section 10-A of the Act, is a statutory arbitrator, Shri Nanavati relies on *R. v. Dispute Committee of Dental Technicians*, 1953-1 All E. R. 327. In that case, there was a motion for an order of certiorari to quash an order made by the Disputes Committee of the National Joint Council for the Craft of Dental Technicians declaring that the employers of an infant apprentice were entitled to dismiss him from their employment and for an order of prohibition to prohibit the committee from further proceeding in the arbitration between the employers and the infant apprentice. Lord Goddard, C. J., said:—

"That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English Law, but in all the centuries that have passed since the decisions of English Courts first began there is no trace of an arbitrator being controlled by this Court by writ or either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory

powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the Courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by Parliament. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort".

That, undoubtedly, is the law in England and there it is well established that a writ of certiorari will lie against statutory arbitrators. See also *R. v. Powell*, (1925) 1 K. B. 641.

10. An examination of the relevant provisions of the Act shows that the proceedings before a Section 10-A arbitrator are quasi judicial proceedings and that the arbitrator must function within the limits of his powers as defined by the Act and the Rules. Section 10-A was inserted by Act No. 36 of 1955 to enable the parties to voluntarily refer their disputes to arbitration. While under Section 10, reference is compulsory, under Section 10-A, the reference is entirely voluntary. Sub-section (1) of Section 10-A provides that the employer and the employee may agree to refer any industrial dispute to arbitration of any person or persons of their choice. The sub-section conspicuously mentions the presiding officer of a Labour Court or Tribunal or National Tribunal also to be competent arbitrators. Sub-section (1-A) requires the agreement to provide for the appointment of an umpire in case the reference is to an even number of arbitrators, and it is also a statutory requirement of such an agreement that the award of the umpire shall prevail. Sub-section (2) further makes it mandatory that the agreement shall be in writing and shall be in such form and manner as may be prescribed. Under sub-section (3) a copy of the arbitration agreement has to be forwarded to the Government and then the Government has to publish it in the official gazette within one month from the date of its receipt. Under sub-section (3-A), employers and workmen, who are not initially made parties to arbitration agreement, but are concerned in the dispute are also given an opportunity of presenting their case before the arbitrator. Sub-section (4) imposes a duty on the arbitrator to investigate the dispute and submit his award to the Government. Sub-section (4-A) authorises the Government to prohibit continuance of any strike or lock-out in connection with such dispute.

Section 2(b) of the Act defines "award" so as to include an award under S. 10-A. Section 17 enacts that an award must be published by the Government within the prescribed time, and sub-section (2) of that Section gives finality to the award so published. Under Section 17-A, read with Section 18, the award becomes enforceable and binding on the parties on the expiry of 30 days from the date of its publication. Section 19(3) prescribes the period of operation of the award, and under sub-section (6) of that Section, the award continues to be binding on the parties until a notice is given by a party to the other intimating its intention to terminate the award and two months thereafter expire. Under sub-section (7) of that Section, a notice of such termination, in order to be effective, is required to be given by a party representing the majority of persons bound by the award. Further, Section 21 provides for keeping confidential certain matters before the arbitrator, and Section 30 provides for penalty in case of wilful disclosure of confidential information. Section 29 makes it penal to commit the breach of any term of the award. Section 31-C provides for a summary remedy for recovery of dues under the award. Section 36 confers upon the workmen the right to be represented in proceedings before the arbitrator. Section 36-A enables the Government to make a reference to the authorities with regard to interpretation of any provision of an award.

11. It is remarkable that sub-sec. (5) of Section 10-A completely excludes the application of the Arbitration Act to an arbitration under this Section. Therefore, it appears that there is no other appropriate and efficacious remedy against an award made under Section 10-A. This provision makes it abundantly clear that an arbitrator appointed under that Section is not a private arbitrator in the ordinary sense of the term.

12. From all these provisions of the Industrial Disputes Act, it becomes quite clear that the appointment of an arbitrator under Section 10-A is given a statutory recognition; that the agreement to refer an industrial dispute to him has to be in writing and in the prescribed form; that he must conform to the requirements laid down in the Act and the Rules framed thereunder; that the rights and liabilities of the parties, who refer their dispute under Section 10-A, are governed by the provisions of the Act; that the arbitrator is clothed with quasi-judicial powers and his proceedings are regulated by the rules and procedure; that a duty is cast on the arbitrator to submit his award to the Government; and that a duty is cast on the Government to publish the award within the prescribed period. We are clearly of the opinion that an arbitration

under Section 10-A has all the essential attributes of a statutory arbitration under Section 10 of the Act. In *Rex v. Electricity Commissioners*, (1924) 1 K. B. 171, Lord Atkin referred to the genesis and the history of the writs of prohibition and certiorari and held that whenever any body of persons, having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division.

See also *R. v. Northumberland Tribunal* (1951) 1 All. E. R. 268. In *Rohtas Industries Staff Union v. State of Bihar* AIR 1963 Pat. 170, the view taken was that an arbitrator appointed under Section 10-A of the Act, is a statutory arbitrator and, therefore, a certiorari can be issued to quash his award. It was argued that in view of Lord Goddard's unequivocal remark (supra) that a statutory arbitrator is a person to whom, by statute, the parties must resort, an arbitrator under Section 10-A of the Act cannot be held to be a statutory arbitrator in that sense, because an arbitration under that Section is voluntary, by choice of the parties, and they are not bound to resort to such arbitration unlike the compulsory reference under Section 10. Assuming that argument to be correct, that is not the end of the matter. Article 226 of our Constitution gives wide powers to the High Court to issue directions, orders or writs to any person or authority, and is not conditioned or limited by the requirement that writs can be issued only against orders of Courts or Tribunals. It is true that the expression "any person" does not mean any and every individual. In *Air Corporations Employees Union v. D. V. Vyas* AIR 1962 Bom. 274, it was held that the High Court has, under Article 227 of the Constitution, powers of superintendence over an arbitrator, who functions under Section 10-A of the Act and that the orders passed by such an arbitrator, who acts as a quasi-judicial body, are capable of being corrected by a writ of certiorari, provided there is an error of law apparent on the face of the record.

In (1962) 2 Lab. L. J. 760 = (AIR 1963 SC 874) (supra), it is true, their Lordships were not considering precisely the question whether a writ lies against the award of an arbitrator under Section 10-A of the Act, yet, the following observations fortify our conclusions:—

"Article 226 under which a writ of certiorari can be issued in an appropriate case, is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that

the said writs can be issued only against the orders of Courts or Tribunals. Under Article 226 (1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under Section 10-A is not a tribunal under Article 136 in a proper case, a writ may lie against his award under Article 226. That is why the argument that a writ may lie against an award made by such an arbitrator does not materially assist the appellants' case that the arbitrator in question is a tribunal under Article 136".

It was held in *K. P. Singh v. S. K. Gokhale* 1968 M.P.W.R. 733=(1969 Lab. L. C. 725) that if the High Court finds that the requisite procedure as prescribed by the Act was not followed so as to confer necessary jurisdiction on the arbitrator to proceed with the adjudication of the dispute referred to him under Section 10-A, it can, in exercise of prerogative powers issue the necessary writs.

13. Shri Nanavati relies on three decisions, where a contrary view is taken. In *A. T. E. M. Employees' Association v. Musaliar Industries* (1961) 1 Lab L. J. 81 (Ker), it was observed that the arbitration under Section 10-A itself and the choice of the arbitrator are left to the will of the parties and an arbitrator so appointed does not fulfil any of the characteristics of a statutory arbitrator as laid down in 1953-1 All. E. R. 327 (supra). In *A. T. E. M. Employees' Association v. Musaliar Industries* (1962) 2 Lab. L. J. 317 (Ker), stress was laid on the heading of Section 10-A "voluntary reference of dispute to arbitration" and on that the arbitrator derives his jurisdiction from a contract. Both these decisions were decided before the decision in (1962) 2 Lab. L. J. 760=(AIR 1963 SC 874) (supra). For the reasons already stated, we are unable to follow these decisions. In *P. Koru v. Standard Tile and Clay Works* AIR 1963 Ker 324 they have been held to be no longer good law. In *Anglo-American Tea Trading Co. v. Its Workmen* 1963-2 Lab. L. J. 752 (Mad), the argument advanced before the Madras High Court was that since the authority of an arbitrator appointed under Section 10-A does not depend on any statutory jurisdiction and he is a private tribunal, set up by an agreement no writ of certiorari or prohibition could be issued. But that was not the basis on which the petition was dismissed. It appears to us that that point was not seriously considered and the petition was dismissed on its merits.

14. As a result of the above discussion, we are of the opinion that although an

arbitrator appointed under Section 10-A is neither a Tribunal nor is he a statutory arbitrator within the definition given by Lord Goddard, C. J. in 1953-1 All. E. R. 327 (supra), yet having regard to the statutory provisions recapitulated above, an arbitration under Section 10-A of the Act has all the attributes of a statutory arbitration under Section 10. The appointment of an arbitrator under Section 10-A depends on a mutual agreement of the parties and the choice of the arbitrator is also entirely theirs, but the rest is regulated by the Act and the statutory rules. The proceedings before him are quasi-judicial in nature. He has to function within the limits of his powers as defined by the Act and the statutory rules. Therefore, he is a statutory arbitrator in this sense. He is a 'person' within the meaning of Article 226. He is, therefore, amenable to the writ jurisdiction of the High Court and a certiorari will issue to quash his award on well settled principles; for instance, where he acts without jurisdiction or in excess of jurisdiction, or where there is an error apparent on the face of the record, or there is violation of the principles of natural justice.

15. The preliminary objection is rejected.

16. The petitioner's first contention is that the arbitration under Section 10-A of the Act was illegal and void inasmuch as the dispute had already been referred to the Tribunal under Section 10 of the Act. It is true that the dispute had already been referred under Section 10 to the CGIT, Bombay, but it is quite clear from the facts stated above that by consent of the parties and with the permission of the Tribunal, the reference was withdrawn. Once a reference is validly withdrawn, it cannot be said that it is pending. A withdrawal of the reference tantamounts to its having not been made at all, so that it cannot be said that the condition prescribed by the Act "at any time before a dispute has been referred under Section 10" was not fulfilled.

17. It is then argued for the petitioner that the Tribunal had no jurisdiction to make the award, dated January 27, 1965, permitting withdrawal of the reference. The argument is that once a reference is made under Section 10, the Tribunal is bound to decide it on the merits and it has no jurisdiction to allow the parties to withdraw the reference. Reliance is placed on *Sital Sukhram v. Central Government Industrial Tribunal* 1969 MP L J 33 at p. 35=(AIR 1969 Madh. Pra. 200 at p. 203). In our opinion, that decision does not support the petitioner's contention. All that has been held there is that the Tribunal cannot abdicate its duties of adjudicating upon the dispute and when there is a compromise arrived at between

the parties, the Tribunal cannot deal with it like a settlement between the parties to a suit, which may be recorded under Order 23, Rule 3, Civil Procedure Code.

In that case, it has been further observed as follows:—

"Nevertheless it can adopt the compromise entered into by these parties as the foundation of its award after considering whether it is a fair and just settlement of the disputes".

18. In *State of Bihar v. Ganguli* (1958) 2 Lab. L. J. 634=(AIR 1958 SC 1018), their Lordships said:—

"It is true that the Act does not contain any provision specifically authorising the industrial tribunal to record a compromise and pass an award in its terms corresponding to the provisions of Order XXIII, Rule 3, of the Code of Civil Procedure. But it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties. We have already indicated that amicable settlements of industrial disputes which generally lead to industrial peace and harmony are the primary objects of this Act..... There can, therefore, be no doubt that if an industrial dispute before a tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties".

On the basis of this authority, we are of the view that if the Tribunal can act on a compromise, there is nothing in the Act to exclude this particular kind of compromise under which the parties amicably decide upon the machinery and the arbitrator of their own choice for resolving their differences, and seek the sanction of the Tribunal for the withdrawal on such a basis. No doubt, the Tribunal must be satisfied before such a joint request is accepted that there is nothing unfair, improper or unjust. The view that we take was also taken in *Krishnakutty Nair v. Industrial Tribunal* (1957) 2 Lab. L. J. 45=(AIR 1960 Ker 31). In the present case, several disputes had been pending between the parties and there was an agreement to refer all of them to the private arbitration of Shri F. Jeejeebhoy. He is an ex-President of the Labour Appellate Tribunal of India. If the parties desired to have the benefit of his learning and experience, it cannot be said that their compromise was unfair or unjust. The Tribunal, in its award dated January 27, 1965, clearly said:—

"I am satisfied that it would be in the interest of industrial peace to allow the application of the parties."

Nothing has been suggested to us to show how the compromise under which sanction was sought to withdraw the refer-

ence from the Tribunal, was unfair or unjust.

19. For yet another reason, the petitioner's contention must be rejected. It will be patent enough from the facts, which we are going to state in connection with the petitioner's next contention, that the petitioner submitted to the jurisdiction of the arbitration under Section 10-A and took part in the proceedings without objection on the ground that the arbitrator had no jurisdiction. See *Pannalal v. Union of India* AIR 1957 SC 397.

20. The petitioner's next contention is that the award must be quashed for want of jurisdiction inasmuch as the dispute on merits was not referred to the arbitrator; what was referred was merely the question whether the complaints were maintainable. It is averred in paragraph 25 of the petition that at the hearing before the first respondent, it was urged on behalf of the petitioner that the address was limited to the short question of maintainability of the complaints under Section 33-A of the Industrial Disputes Act and it was further urged that if necessity arose for going into the question of merits of the removal from the service, the matter would have to be investigated afresh by bringing to the notice of the respective workmen individually the allegations and the charges that led to their removal. This averment was emphatically denied in the return and it has been attacked as "factually false" to the knowledge of the petitioner-union and its representative who had sworn the petition. It was emphasised that the Union had not only led oral and documentary evidence on the merits of the discharge orders, but had addressed detailed arguments for several days, contending on their part that the discharge of 10 workmen was not justified on merits. An affidavit was also filed by the arbitrator, where he says that he is not interested in the result of this petition, but he has strongly controverted the averment made in paragraph 25 of the petition and has asserted that the parties had not limited their address or arguments only to the technical question of maintainability of the complaints under Section 33-A, but had led evidence as well as addressed their arguments on the merits of the discharge of the workmen concerned in the dispute.

In his affidavit, Shri F. Jeejeebhoy has clarified the position thus:—

"At first on 3rd November, 1965, an Arbitration Agreement was entered into by the parties appointing me to decide the merits of the dispute and that Agreement was accepted by me, and since the said Agreement was returned by the Central Government in order to comply with the

amended prescribed form, the parties signed before me another Arbitration Agreement dated 21-2-1966 which was also accepted by me at their request."

These facts are also asserted in the return filed by the 2nd respondent. No rejoinder was filed by the petitioner to deny these facts. Govindlal Govil, Labour Relations Adviser to the Company has filed with his affidavit, a carbon copy of the application which was filed before the arbitrator on November 3, 1965. It bears the signatures of the representatives of the parties, and also of the arbitrator, along with the words "I agree" written by him. Thus, it is quite clear that as back as on November 3, 1965, the parties referred to the arbitration of Shri F. Jeejeebhoy their dispute on merits: "Whether the discharge of the said 10 complainants from the Company's service is justified on merits and, if not, to what relief, if any, they are entitled, so that the industrial disputes between the parties arising out of their dispute may finally end". Shri Nanavati, learned counsel for the 2nd respondent, makes an unequivocal statement at the Bar that he himself appeared before the arbitrator and that voluminous evidence was produced by the petitioner-Union and recorded by the arbitrator on the merits of the dispute. We accept the affidavit of the arbitrator and Shri Nanavati's statement. We, therefore, hold that the dispute which was referred to the arbitration of Shri F. Jeejeebhoy was not limited to the question of maintainability of the complaints but also the dispute whether the discharge was justified on merits.

21. No other point was urged.

22. This petition is dismissed with costs. Counsel's fee Rs. 150/-.

23. **BHAVE, J.:**— I entirely agree with the Order proposed by my learned brother Shiv Dayal, J. that the petition may be dismissed with costs. I would, however, like to add a few words more.

24. There is another reason, in my opinion, why this petition should be dismissed. It is clear from the facts stated by both the parties that a number of disputes between the same parties were referred to the Bombay Tribunal under various orders of reference by the Government. During the pendency of those references, the parties with a view to establish goodwill and industrial peace entered into a 'package deal' under which it was agreed between the parties that all the disputes should be referred to the arbitration of Shri Jeejeebhoy, ex-President, Labour Appellate Tribunal of India, Bombay, under Section 10-A of the Industrial Disputes Act. Accordingly, applications were filed before the Bombay Tribunal and awards in terms of the agreement were obtained from the Tribunal in all those matters. Subsequently, all

those disputes were referred to Shri Jeejeebhoy as was agreed to between the parties. Out of the various matters, awards on two matters only are being challenged before us on the ground that Shri Jeejeebhoy had no jurisdiction to decide the disputes as a reference was already made under Section 10 to a Tribunal constituted under the Industrial Disputes Act. This the petitioner cannot be allowed to do. The principle of estoppel is clearly attracted in such a case. In any case, this Court must be adverse to exercise its special jurisdiction under Article 226 of the Constitution in such a case. In AIR 1957 SC 397, it was held by their Lordships of the Supreme Court that the petitioners before them were not entitled to invoke the jurisdiction of the Supreme Court under Article 32 of the Constitution as the conduct of the petitioners in submitting to the jurisdiction of the Income-tax Officer, to whom their cases had been transferred, would disentitle them to any relief at the hands of the Supreme Court on the ground that the said Income-tax Officer had no jurisdiction to proceed with their assessment. In other words, their Lordships of the Supreme Court held that a party invoking the jurisdiction of a tribunal or submitting to it without protest cannot be allowed to urge that the tribunal had no jurisdiction. It was, however, urged before us that this principle is applicable only when there is latent want of jurisdiction in the tribunal and not to a case where there is patent want of jurisdiction. Our attention was invited to the discussion by Seervai in his book "Constitutional Law of India" (1957 Edn.) at pages 645 and 646. The case of AIR 1957 SC 397 (supra) has been cited by Seervai with a comment that the observations of the Supreme Court were made without reference to the question whether there was patent lack of jurisdiction or not. The learned author thus desires to suggest that the case of the Supreme Court may be treated to be one of latent want of jurisdiction. Whatever that may be, it is sufficient to observe that the Supreme Court has not confined its observations to any one kind of case only. In this case, however, that question does not arise so much as, in my opinion, the principle of estoppel is clearly attracted that I heavily rely on it for rejecting the petition.

25. On merits also, there is no substance in the petition. The main contention of the petitioners is that a voluntary reference under Section 10-A of the Industrial Disputes Act can only be made "at any time before the dispute has been referred under Section 10". In other words, the right conferred under Section 10-A cannot be exercised once a reference is made by the Government under Section 10 and the only thing left

to the parties to the dispute is to abide by the award given on reference made by the Government. In (1958) 2 Lab. L. J. 634=(AIR 1958 SC 1018), their Lordships pointed out that even when a reference was made under Section 10, the parties to the dispute were not precluded from arriving at a private settlement of the dispute and the proper course for the Tribunal in such a case was to make an award in terms of the settlement arrived at between the parties. A situation slightly different came for consideration by their Lordships of the Supreme Court in *Sirsilk Ltd. v. Government of Andhra Pradesh*, AIR 1964 SC 160.

In that case, on reference under Section 10 the Tribunal made an award and sent the same to Government for its publication under Section 17 of the Act. After the award was given, but before its publication, the parties to the dispute came to a settlement and sent a joint letter to the Government not to publish the award. The Government expressed their inability to accede to the request of the parties as they thought that the provisions of Section 17 of the Act were mandatory and the Government were bound to publish the award. The parties, therefore, moved the High Court under Article 226 of the Constitution for a writ of mandamus restraining the Government from publishing the award. The matter ultimately was taken to the Supreme Court. Their Lordships held that the provisions of Sec. 17 of the Act were mandatory. It was, however, pointed out that the settlement arrived at between the parties became binding on them under Section 18(1) of the Act and so was the effect of an award published under Section 17. If the award was allowed to be published, two conflicting but equally binding settlements would come into existence and it was, therefore, the duty of the Government to resolve the conflict by not publishing the award. Preference was given by their Lordships of the Supreme Court to the private settlement as against the settlement on adjudication because that was more conducive to industrial peace.

Their Lordships further observed:

"The reference to the tribunal is for the purpose of resolving the dispute that may have arisen between employer and their workmen. Where a settlement is arrived at between the parties to dispute before the tribunal after the award has been submitted to Government but before its publication, there is in fact no dispute left to be resolved by the publication of the award. In such a case, the award sent to Government may very well be considered to have become infructuous and so the Government should refrain from publishing such an award because no dispute remains to be resolved by it."

What I wish to emphasise is that both the decisions of the Supreme Court clearly indicate that reference made by Government under Section 10 of the Act does not take away the right of the parties to settle their dispute in the manner they like best and the whole purpose of the Industrial Disputes Act being to establish industrial peace and harmony, preference must be given to the settlement arrived at between the parties as against an award given on reference. Now, settlement of a dispute may include the mode of settlement of the dispute as well. It, therefore, follows that if the parties before a tribunal decide to settle their dispute by referring the same to the arbitrator of their own choice, that settlement the tribunal is bound to accept as is clearly laid down by their Lordships in *Ganguly's case*, 1958-2 Lab. L. J. 634=(AIR 1958 SC 1018) (supra). This is exactly what was done by the Bombay Tribunal. The effect of the agreement reached between the parties to refer their dispute to the private arbitrator was to make the proceedings before the Tribunal infructuous. This is the effect of the decision of their Lordships in AIR 1964 SC 160 (supra). In this view of the matter, it must be held that no proceeding was pending before the Tribunal when the reference under Section 10-A was made to the arbitrator; firstly, because the Tribunal had given its award in terms of the agreement reached between the parties; and, secondly, because the proceedings before the Tribunal had become infructuous in view of the agreement reached between the parties. The submission of the petitioners that no reference to arbitrator could be made after the reference under Section 10 was made is, therefore, without any substance. The petition is therefore dismissed with costs. Hearing fee Rs. 150/-.

BY THE COURT

26. This petition is dismissed with costs. Counsel's fee Rs. 150/-.

Petition dismissed.

AIR 1970 MADHYA PRADESH 70
(V 57 C 17)

A. P. SEN AND G. P. SINGH, JJ.

M/s. Phoolchand Narendra Kumar and others, Petitioners v. State of Madhya Pradesh through Secretary, Govt. of M. P. and others, Respondents.

Misc. Petn. No. 87 of 1969, D/- 15-3-1969.

(A) Essential Commodities Act (1955), S. 3 — M. P. Foodgrains Dealers Licensing Order 1965, Cls. 3 and 7 — Licence — Renewal — Principles.

The renewal of an existing licence of a dealer from year to year, provided the
IM/JM/D896/69/MVJ/P

other conditions are fulfilled, has to be granted in the very nature of things, as without such renewal, he cannot deal in foodgrains at all.

Clause 3 of the Order which provides for licensing of dealers does not confer an absolute discretion on the Collector to grant or revoke a licence just as he pleases. The power has to be exercised in a reasonable manner, keeping in view all the considerations that are relevant. No doubt, the provisions of the Order nowhere furnish the grounds upon which the licensing authority can refuse to grant a licence or its renewal. They must, however, be interpreted in the light of the considerations arising from Art. 19(1)(g), read with Art. 19(6) of the Constitution, as otherwise, Cl. 3 will confer unguided discretion to the Collector in the matter of grant or refusal of licences and their renewal. So the grant of a licence or its renewal under the Order should be the normal rule as it is undoubtedly a restraint on the freedom of trade which is guaranteed to any citizen under Art. 19(1)(g) of the Constitution. (Para 6)

(B) Essential Commodities Act (1955), S. 3 — M. P. Foodgrains Dealers Licensing Order 1965, Cls. 3 and 7 — Renewal of licence — Refusal to renew — Consideration.

An order of Collector, refusing to renew Foodgrains Dealers Licence of a firm on the ground that some of the partners of the firm are also partners of other firm holding a separate licence, is liable to be struck down as the refusal of renewal of licence proceeds upon a ground which is wholly extraneous to the requirements of Cl. 7 of the Order. It is true that Cl. 7 does not indicate the nature of reasons on which the grant or refusal of a licence or its renewal may proceed. But the reasons for such grant or refusal must be such as will be in the interest of the general public. A licence to Foodgrain Dealers is issued with the object of preventing them from engaging in any nefarious trade or activities which would defeat any of the objects for which the Essential Commodities Act (Act No. X of 1955) had been enacted or the Madhya Pradesh Foodgrains Dealers' Licensing Order, 1965 had been made. It must necessarily have nexus to the main object and purpose of the legislation, i.e., control of production, supply and distribution of trade and commerce in certain commodities which are essential to the life of the community in general. (Para 8)

Moreover, from the provisions of Cl. 5 (4), which envisages the grant of separate licences to a dealer for each place of his business, it is evident that there will be no justification for refusal to grant separate licences in the names of different firms on the ground that some of the partners are common. (Para 10)

(C) Essential Commodities Act (1955), S. 3 — M. P. Foodgrains Dealers Licensing Order, 1965, Cls. 3 and 7 — Refusing to renew licence — Authority acts quasi-judicially — Principles of natural justice have to be observed.

An order of Collector refusing to renew licence of a foodgrain dealer, without giving any opportunity of hearing to the concerned dealer will be illegal, being in violation of the mandatory provisions contained in Cl. 7 of the Order besides being in breach of the rules of natural justice. It is well settled that, while considering the question of breach of the principles of natural justice, Courts should not proceed as if there are any inflexible rules of natural justice of universal application. Rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act. The language of Cl. 7 of the Order clearly enjoins that in making an order of refusal of a grant of a licence or its renewal, the Collector is obliged to act quasi-judicially. That the matter does not rest on the subjective satisfaction of the Collector is clear from the consideration that Cl. 10 provides for an appeal to State Government against such refusal of grant of licence or its renewal. (Para 10)

Cases Referred: Chronological Paras
(1969) AIR 1969 Madh. Pra. 176
(V 56)=1969 M. P. W. R. 296,
Sukhlal Sen v. Collector, Satna 10
(1967) AIR 1967 SC 361 (V 54)=
(1967) 1 SCR 739, Bharat Barrel
and Drum Mfg. Co. v. L. K. Bose 10
(1962) AIR 1962 SC 386 (V 49)=
1962-3 SCR 936, Mannalal Jain v.
State of Assam 7
(1957) AIR 1957 SC 232 (V 44)=
1957 SCR 98, New Prakash Trans-
port Co. Ltd. v. New Suwarna
Transport Co. Ltd. 10

P. C. Pathak, for Petitioners; Ku. Rama Gupta, Govt. Advocate, for Respondents.

A. P. SEN, J.:— By this application under Articles 226 and 227 of the Constitution, the petitioners seek a writ of Certiorari for quashing an order dated 13th December 1968 passed by the Collector of Jabalpur under Clause 7 of the Madhya Pradesh Foodgrains Dealers Licensing Order 1965 (hereinafter referred to as the "Order"), refusing to renew their Foodgrains Dealer's Licence No. 30/65 for the year 1969 and also for a consequential writ of Mandamus for directing its renewal.

2. The facts leading to this petition, shortly stated, are these. The petitioners are a partnership firm trading in foodgrains under the name and style "M/s Phoolchand Narendrakumar" in the city of Jabalpur, under Foodgrains Dealer's Licence No. 30/65 issued by the Collector

of Jabalpur under Clause 3 of the Order. The firm is constituted of 3 partners, namely, Narendra Kumar, Devendra Kumar and Nirmal Kumar (Petitioners Nos. 2, 3 and 4 herein), with the minor Lalchand (Petitioner No. 4) admitted to its benefits, and is registered as a partnership firm with the Registrar of Firms, Madhya Pradesh. There is another firm in the City, carrying on business in food-grains styled as "M/s Ramprasad Gokulprasad", Jabalpur. That firm consists of 9 partners, including the three partners of the petitioners' firm, M/s Phoolchand Narendrakumar. The remaining 6 partners are Gokulprasad, Navalkishore, Sunderlal, Surkhichand, Chhotelal and Mst. Jhunkari Bahu, who are all related to them. The minor Lalchand is a beneficiary in that firm as well. That firm is also registered as a partnership firm with the Registrar of Firms, Madhya Pradesh. Both the aforesaid firms are licensed as "dealers" under the Madhya Pradesh Foodgrains Dealers' Licensing Order, 1965 holding Foodgrains Licences Nos. 30/65 and 31/65 respectively from the year 1965 itself when the Order was brought into force, and since then these licences have admittedly been renewed by the authorities from year to year.

3. The Order in question was issued by the State Government of Madhya Pradesh, in exercise of the powers conferred under Section 3 of the Essential Commodities Act (Act No. X of 1955), and it provides, inter alia, by Clause 3 that no person shall carry on business as a dealer in foodgrains except in accordance with the terms and conditions of a licence issued in that behalf, by the Collector who is constituted to be the licensing authority for the purpose. The expression 'dealer' has been defined in Clause 2(a) of the Order, thus:

"2 (a) 'dealer' means a person who is engaged or intends to engage in the business of purchase, sale or storage for sale of paddy in quantity of 10 quintals or more at any one time or in quantity of 4 quintals or more at any time in respect of any one foodgrain other than paddy or in quantity of 25 quintals or more at any time in respect of all foodgrains taken together, whether on one's own account or in partnership or in association with any other person or as a commission agent or arhatiya (excludes Kachha Adatia) and whether or not in conjunction with any other business, but does not include a person—

- (i) who stores any foodgrains produced by him by personal cultivation, and
- (ii) who does not engage in the business of purchase or sale of foodgrains."

4. For the present year 1969, the petitioners' firm, M/s. Phoolchand Narendrakumar, had made a usual application for renewal of their Foodgrains Dealer's

Licence No. 30/65, as in the earlier years. Admittedly, that application was made on 19th October 1968 before the Collector, Jabalpur through the Food Officer, more than 30 days before the expiry of the pre-existing licence held by the petitioners, and the authorities issued an acknowledgment on that date in token of having received that application together with a treasury-challan showing payment of the renewal fee along with the licence in original for renewal. It appears that a similar application for renewal of the Foodgrains Dealer's Licence No. 31/65 was also made by the other firm, M/s. Ramprasad Gokulprasad. The Collector, Jabalpur, by his impugned order dated 13th December 1968, has refused to renew the licence of the petitioners' firm for the year 1969, on the ground that the 3 partners constituting their firm, M/s. Phoolchand Narendra Kumar, are also the partners in the other firm, M/s. Ramprasad Gokulprasad, which holds a separate Foodgrains Dealers Licence No. 31/65 in its name.

5. Since the validity of that order is in question in these proceedings, we think it convenient to set it out below:

“कार्यालय जिलाध्यक्ष, जबलपुर (अन्न शाखा)

आदेश

क्रमांक क/अ० लि०/६८ जबलपुर दिनांक १३ दिसम्बर

१९६७

नीचे लिखे खाद्यान्न अनुज्ञप्तिधारियों ने अपना खाद्यान्न लाइसेंस वर्ष १९६९ के नवीनीकरण हेतु प्रस्तुत किया है।

अनु०	अनुज्ञप्ति क्रमांक	नाम-फर्म-या अनुज्ञप्तिधारी
१	३०/६५	मेसर्स फूलचंद नरेन्द्र कुमार लार्डगंज।
२	३१/६५	मेसर्स रामप्रसाद गोकल-प्रसाद लार्डगंज।
३	३०९/६५	सुरखीचन्द गंजीपूरा।

उपरोक्त अनुज्ञप्ति के नवीनीकरण हेतु आवेदन पत्र को जांच करने से मालूम हुआ कि मेसर्स फूलचंद नरेन्द्र-कुमार अनुज्ञप्तिधारी अनुज्ञप्ति क्र० ३०/६५ फर्म में चार पार्टनर हैं जो कि फर्म मेसर्स रामप्रसाद गोकलप्रसाद (अनुज्ञप्ति क्र० ३१/६५ में भी पार्टनर है। इसी प्रकार अनुज्ञप्तिधारी सुरखीचन्द (अनुज्ञप्ति क्र० ३०९/६५) भी फर्म मेसर्स रामप्रसाद गोकलप्रसाद में पार्टनर है।

अतः खाद्यान्न अनुज्ञप्ति क्र० ३०/६५ मेसर्स फूलचन्द नरेन्द्रकुमार एवं ३०९/६५ श्री. सुरखीचन्द को वर्ष १९६९ के लिये नवीनीकरण न करके रद्द किया जाता है।

सही—अस्यष्ट

कलेक्टर द्वारा अनुमोदित

डिप्टी कलेक्टर

वास्ते कलेक्टर जबलपुर।”

It would be obvious from the terms of this order that the Collector has not only refused the renewal of the Foodgrains Dealer's Licence No. 30/65 held by the petitioners' firm but also has cancelled it presumably on the hypothesis that separate licences under the Order cannot be had in the names of different partnership firm when some of the partners are common to them.

6. Having heard the counsel, we are satisfied that the reliefs asked for by the petitioners must be granted. The scheme of the relevant Order as embodied in Clause 3 is that no person shall carry on any business as a dealer in foodgrains except under or in accordance with the terms and conditions of the licence issued in that behalf by the licensing authority. Under Clause 4, every application for a licence or renewal thereof shall be made to the licensing authority in Form A, and every licence issued or renewed on such application has to be in Form B, prescribed thereunder. The provisions of the Order nowhere furnish the grounds upon which the licensing authority can refuse to grant a licence or its renewal. They must, however, be interpreted in the light of the considerations arising from Article 19(1)(g), read with Article 19(6) of the Constitution of India, as otherwise, Clause 3 which provides for the licensing of dealers would confer unguided discretion to the Collector in the matter of grant or refusal of licences and their renewal. The grant of a licence or its renewal under the Order should be the normal rule as it is undoubtedly a restraint on the freedom of trade which is guaranteed to any citizen under Article 19(1)(g) of the Constitution. We are, therefore, of the view that Clause 3 of the Order does not confer an absolute discretion on the Collector to grant or revoke a licence just as he pleases. The power has to be exercised in a reasonable manner, keeping in view all the considerations that are relevant.

A fortiori, the renewal of an existing licence of a dealer from year to year, provided the other conditions are fulfilled, has to be granted in the very nature of things, as without such renewal, he cannot deal in foodgrains at all. We understand that the petitioners' firm M/s. Phoolchand Narendrakumar, has a subsisting contract with the State Government of Madhya Pradesh for the supply of foodgrains to the Central Jail, Jabalpur under the agreement dated 25th April 1968 (Annexure H) till the expiry of the financial year 1968-69, and due to the refusal of the authorities to renew their Foodgrains Dealer's Licence No. 30/65 for the year 1969, it has become impossible for them to perform their part of the contract.

7. The learned Government Advocate tried to support the impugned order on the basis that the State Government of Madhya Pradesh has by their Food Department Memo No. 5520/3077/XXX/68 dated 27th July 1968, issued certain executive instructions for the guidance of all Collectors in the State of Madhya Pradesh in the matter of grant or refusal of foodgrains dealers licences under the Order, and the instructions are against the grant of separate licences in favour of different firms where some of the partners are common, as the object in securing such separate licences may be actuated with a mala fide intention. We are not called upon him to pronounce in this case on the effect of these instructions for a variety of reasons. In the first place, the refusal to renew the petitioners' licence by the impugned order, does not rest on the ground that one of the two partnership firms was a fictitious one, or, that the Foodgrains Dealer's Licence No. 30/65 had been procured with any ulterior object. Secondly, the State Government of Madhya Pradesh have not filed any return supporting the impugned action of the Collector on the basis of the aforesaid instructions. Thirdly, such executive instructions cannot in the nature of things, be so framed or utilized in a manner as to override the provisions of the law. Their Lordships of the Supreme Court have stated in *Mannalal Jain v. State of Assam*, AIR 1962 SC 386, that such a method will destroy the very basis of the rule of law. In their Lordships' words, "it would be the duty of the licensing authority to ignore all instructions which are not in consonance with the provisions of law by which it is to be guided."

8. Now, the provisions of Clause 7 of the Order by which the licensing authority was to be guided nowhere provides that separate licences cannot be issued in the names of different firms where some of the partners are common. It reads:

"The licensing authority may, after giving the dealer concerned an opportunity of stating his case and for reasons to be recorded in writing, refuse to grant or renew a licence."

Thus, it is manifest that the impugned order suffers from a serious infirmity in so far as the refusal of renewal of the licence of the petitioners' firm proceeds upon a ground which is wholly extraneous to the requirements of Clause 7 of the Order, and is, therefore, liable to be struck down on that ground. It is true that Clause 7 does not indicate the nature of reasons on which the grant or refusal of a licence or its renewal may proceed. That provision must, however, be read in the context of the other provisions of the Order. Normally, when a holder of a licence contravenes any of the terms or

conditions of the licence, the licensing authority may, without prejudice to any other action that may be taken against him, cancel or suspend a licence by an order in writing under Clause 8. In this case it is not necessary, for us to catalogue the different reasons on which the licensing authority may refuse to grant or renew a licence. Suffice it to say that the reasons for such grant or refusal must be such as would be in the interest of the general public. A licence to Foodgrain Dealers is issued with the object of preventing them from engaging in any nefarious trade or activities which would defeat any of the objects for which the Essential Commodities Act (Act. No. X of 1955) had been enacted or the Madhya Pradesh Foodgrains Dealers' Licensing Order, 1965 had been made. It must necessarily have nexus to the main object and purpose of the legislation, i.e., control of production, supply and distribution of trade and commerce in certain commodities which are essential to the life of the community in general.

9. The learned counsel for the petitioners rightly draws our attention to Clause 5(4) of the Order for his submission that the scheme of the legislation envisages the grant of separate licences to a dealer for each place of his business. That provision reads:—

"A separate licence shall be obtained by a dealer for each place of business". By parity of reasoning, we would unhesitatingly hold that there is no justification for the attitude adopted by the State Government in this case, namely that separate licence cannot be granted in the names of different firms when some of the partners are common.

10. Apart from this, there is also another lacuna which entirely vitiates the impugned order. On a plain reading of Clause 7 *ibid*, it is manifest that the licensing authority has no power to refuse to grant or renew a licence unless he has (i) given the dealer concerned 'an opportunity of stating his case'; and (ii) recorded his reasons in writing for his refusal to grant or renew a licence. These are the conditions precedent to the exercise of his jurisdiction. There are clear averments in the petition that the order in question was passed without giving any opportunity of hearing to the petitioners and that the impugned action is, therefore, violative of the mandatory provisions contained in Clause 7 of the Order, besides being in breach of the rules of natural justice. These allegations have not been controverted. Neither the State Government nor the Collector, Jabalpur or the Food Officer have cared to file any return or a counter-affidavit denying the facts alleged in the petition. It is now well settled that, while considering the

question of breach of the principles of natural justice, Courts should not proceed as if there are any inflexible rules of natural justice of universal application. Rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act. See, *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.*, AIR 1957 SC 232 and *Bharat Barrel and Drum Mfg. Co. v. L. K. Bose*, AIR 1967 SC 361. In the instant case, the language of Cl. 7 of the Order, however, clearly enjoins that, in making an order of refusal of a grant of a licence or its renewal, the Collector is obliged to act quasi-judicially. That the matter does not rest on the subjective satisfaction of the Collector is clear from the consideration that Cl. 10 provides for an appeal to the State Government against such refusal of grant of a licence or its renewal. See, *Sukhlal v. Collector, Satna*, AIR 1969 Madh. Pra. 176.

11. The result is that the petition succeeds and is allowed. The impugned order dated 13th December 1968 made by the Collector, Jabalpur, under Section 7 of the Madhya Pradesh Foodgrains Dealers Licensing Order, 1965 is quashed, and he is directed to renew the Foodgrains Licence No. 30/65 held by the petitioners' firm for the year 1969 on the usual terms, as before. The respondents shall bear their own costs and pay those incurred by the petitioners, to whom the security deposit shall be refunded. Hearing fee Rs. 100/-, if certified.

Petition allowed.

AIR 1970 MADHYA PRADESH 74
(V 57 C 18)

FULL BENCH

BISHAMBHAR DAYAL C. J., SHIV
DAYAL AND A. P. SEN, JJ.

Balkrishna Bihari Lal, Applicant v.
Board of Revenue M. P. and others,
Opposite Party.

Misc. Civil Case No. 132 of 1955
D/- 11-8-1969.

(A) Stamp Duty — Stamp Act (1899),
Ss. 38 (2), 36, 61 — Court admitting document in evidence — Admissibility of document cannot subsequently be challenged in the same suit on ground of its being not duly stamped — Only remedy open is under S. 61.

An instrument can be sent to the Collector under S. 38 (2) only when it is impounded under S. 33 but is not admitted in evidence on payment of penalty and/or duty with the aid of S. 35, S. 38(2) has no application to a case where the

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document has been admitted in evidence. Hence, when a document is sent to Collector after admitting it, the Collector acquires no jurisdiction. (Paras 12, 14)

In a case where an instrument is tendered and the Civil Court just admits it in evidence, without its being questioned on the ground that it is not duly stamped, such validity cannot, by virtue of S. 36 be subsequently questioned at any stage of the same suit or proceeding on the ground that it is not duly stamped. The only course then open is the one provided in S. 61 of the Act. Under that section, it is the Court, to which appeals lie from, or references are made by, the Court which admitted the instrument in evidence, which may, on its own motion or on the application of the Collector, take into consideration the order of the subordinate Court admitting the instrument in evidence. And, if such (appeal or reference) Court is of the opinion that such instrument should not have been admitted in evidence without payment of duty and penalty under Section 35, or that higher duty and penalty should have been paid, such court may order the instrument to be produced and may impound it when produced. Such Court shall then send the instrument, along with its declaration, to the Collector. (Para 11)

(B) Stamp Duty — Stamp Act (1899), Ss. 29, 40 — Partition deed — Stamp duty — Recovery of — Collector can recover it from any of the executors of deed.

S. 29 and S. 44, in effect, only regulate the liabilities as between the parties inter se. The Collector can proceed to recover the entire duty and penalty from any one or from all those parties in his discretion. This is because the liability to pay stamp duty as between the parties to an instrument on the one hand and the State on the other is joint and several. The parties to an instrument between themselves may have the right to contribution. The Collector is not bound to collect pro rata shares from all the parties. AIR 1956 Mad. 454, Rel. on. (Para 15)

(C) Stamp Duty — Stamp Act (1899), S. 2(15) — Partition deed — Construction of.

In determining stamp duty, the substance of the transaction as disclosed by whole of the instrument has to be looked to, and not merely the operative part of the instrument. The nature of the document can be determined only from the language it employs and the purpose which it is intended to serve. Although it is permissible to look behind the form and at the substance of the transaction, this can be done only by construing the instrument itself and not by taking into consideration any collateral or other evidence de hors the instrument. Hence, where

in a document, there is not the slightest indication of any partition having taken place earlier and in fact in so many words it is recorded in it that by that document itself a partition was being effected, it is a deed of partition and not merely a record or acknowledgment of past fact. (1903) 5 Bom. L. R. 103, Rel. on. (Para 6)

(D) Stamp Duty — Stamp Act (1899), S. 40 — Imposition of penalty under — Power of Collector as to, is discretionary. (Para 16)

Cases Referred: Chronological Paras

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| (1964) Misc. Petn. No. 318 of 1964, D/- 16-9-1964=1965 M. P. L. J. (Note) 23, Balkrishna v. Board of Revenue, M.P. | 4 |
| (1961) AIR 1961 SC 1655 (V 48)=1962-2 SCR 333, Javerchand v. Pukhraj Surana | 10 |
| (1961) AIR 1961 Mad. 504 (V 48)=ILR (1961) Mad. 926 (FB), Board of Revenue v. Narsimhan | 7 |
| (1961) 1961-1 Ch. 210=1961-2 WLR 25, Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commrs. | 7 |
| (1956) AIR 1956 Mad. 454 (V 43)=ILR (1956) Mad. 1074, Subramanian v. Revenue Divisional Officer | 15 |
| (1940) AIR 1940 P.C. 183 (V 27)=67 Ind. App. 394, Bank of Chettinad v. I. T. Commr. | 7 |
| (1936) 1936 A.C. 1=104 LJKB 383, Inland Revenue Commrs. v. Duke of Westminster | 7 |
| (1911) 1911-2 KB 1001=81 LJKB 75, Deddington Steamship Co. Ltd. v. Commr. of Inland Revenue | 7 |
| (1909) 1909 A.C. 427=101 L.T. 140, Inland Revenue v. James Jones Oliver | 7 |
| (1903) 5 Bom. L. R. 103=14 W. R. O. C. 38, Chandrakant v. Kartickcharam | 7 |
| (1889) 23 Q. B. D. 579=61 L. T. 882, Commr. of Inland Revenue v. Angus | 7 |
| (1888) 21 Q.B.D. 352=57 LJ Q. B. 630, Mortgage Insurance Corp'n. v. Commr. of Inland Revenue | 7 |
| (1869) 4 H. L. 100=21 L. T. 370, Partridge v. Attorney-General | 7 |

R. S. Dabir, for Applicant; Ku. Rama Gupta, Govt. Advocate, for Opposite Party.

SHIV DAYAL, J.:— This is a reference under Section 57(1)(a) of the Stamp Act. The questions referred have arisen on the following facts. Balkrishna instituted a suit against Nimasingh in the Court of the Civil Judge, Class I, Khargone, for the recovery of Rs. 1057.50 on foot of four promissory notes executed by him on May 26, 1957, in favour of Balkrishna Biharilal, a joint family firm. By amendment of the plaint, the plaintiff averred that in 1959 there was a partition between

him and his sons under which the amount to be recovered on those promissory notes was allotted to him in his share. An issue was framed on July 16, 1962, whether the plaintiff alone had the right to sue. Balkrishna (plaintiff) was examined on July 2, 1963. He produced his Rokad Bahi (cash book) for Samvat 2016 in which there is an entry dated November 5, 1959, purporting to effect a partition and showing the shares allotted to the coparceners. Balkrishna proved this document and it was marked Ex. P-5.

2. When Hiralal (P. W. 2) was in the witness-box on the same day, and the document (Ex. P-5) was put to him, an objection was raised by the counsel for the defendant that it was a deed of partition and, as it did not bear the prescribed stamp, it was not admissible in evidence. There is a "note" saying that the document (Ex. P-5) has not been admitted in evidence and the objection was raised at the appropriate stage. It is not known whether this "note" was the defendant's contention or the Court's observation. After hearing both the parties, the learned trial Judge held that this document is a deed of partition and it requires stamp duty. The plaintiff's counsel then sought 15 days' time to get the document validated by the Collector on payment of such duty or penalty as would be demanded from him. The trial Court accepted the plaintiff's request and gave him time.

3. Then the learned Civil Judge himself wrote a letter to the Collector of Khargone (No. 3743 dated July 5, 1963) with which he sent the document (Ex. P-5) with his remark that it effected a partition of the property worth about rupees one and a half lacs; that the plaintiff's share was Rs. 27,000/-; that it required stamp duty; and that a penalty was also liable to be imposed. He said in his letter that this was his opinion. In conclusion he said that the document (Ex. P-5) was being sent to him (Collector) for taking proceedings for its validation with the request that it be returned after the needful was done.

4. The Collector, purporting to exercise his powers under Section 40(1)(b) of the Stamp Act, passed an order directing the petitioner to pay Rs. 1,350/- as stamp duty and Rs. 13,500/- as penalty for validating the document. Aggrieved by this order, Balkrishna filed a revision before the Board of Revenue, which was dismissed. The plaintiff then moved this Court by a petition in Balkrishna v. The Board of Revenue, M. P. Misc. Petn. No. 318 of 1964, D/- 16-9-1964 (M. P.), under Article 226 of the Constitution. A Division Bench of this Court (Dixit, C. J. and Pandey, J.) held that in its view important questions of law arose and the Board had unreasonably declined to make a

reference under Section 57(1) of the Stamp Act. The order of the Board of Revenue was quashed and it was directed to state the case and to refer to this Court the following questions with its opinion thereon:—

"(i) Whether, after admitting Exhibit P-5 in evidence, the Civil Judge was competent to send it to the Collector under Section 38(2) of the Stamp Act?

(ii) Whether the Collector, who had not received Ex. P-5 under the provisions of Section 61 of the Stamp Act, had jurisdiction to pass the order dated 25th March, 1964?

(iii) Whether the plea that Ex. P-5 is merely a record or acknowledgment of a past fact can be shown by evidence aliunde?

(iv) Whether, on the facts and in the circumstances of the case, Ex. P-5 is an instrument of partition within the meaning of Section 2(15) of the Stamp Act?

(v) Whether, in the case of an instrument of partition, the entire stamp duty and penalty can be recovered from any one of the executors or whether only the pro rata share of the amounts can be recovered from each executant?

(vi) Whether the quantum of penalty leviable in a given case is entirely a matter of the Collector's discretion?" Accordingly, this reference was made.

5. We propose to answer the fourth question first. In the entry, Ex. P-5, the names of the coparceners are stated. They are Balkrishna and his five sons. It is stated that they carry on business in the name and style of "Balkrishna Biharilal"; that besides the joint family business, the joint family is possessed of moveable and immoveable properties; that all the coparceners have equal shares; that they are desirous of effecting a partition, which will also be beneficial to Ramakant a minor coparcener, and that according to their books of account, the total assets amount to Rs. 1,77,655/15/3. Then the shares allotted are described. In conclusion it is stated that by these entries they have effected a partial partition of the family assets; that the remaining property would continue to be joint; and that they have effected this partition of their free will and accord and have affixed their signatures in token thereof:

"Uparokta jama kharch dwara hamane hamari abhishta batware ki ichcha ko murtroop pradan kar diya hai. Ewam pariwarik poonji ka anshik batwara kar diya hai. Shesh sampati bhawishya men vibhajan hone tak purwawat sammilit hi rahegi. Yah batwara hamane apni su-ichcha se kiya hai. Iski swikruti ewam pushti apane hastakshar dwara niche mujab kar dete hai."

The contents of the document (Ex. P-5) leave no manner of doubt that it is an

instrument of partition within the meaning of Section 2(15) of the Stamp Act.

6. Shri Dabir's contention was that a partition had already taken place a few days earlier, that is, on October 31, 1959, and that the document (Ex. P-5) was merely a record or acknowledgment of a past fact. This argument is wholly untenable, having regard to the language of the document. There is not the slightest indication of any partition having taken place earlier. In fact, in so many words it is recorded in it that by this document itself a partition was being effected.

7. The following principles govern the application of the Stamp Act to instruments:—

(i) The first is that duty is payable on the instrument and not on the transaction. The leading case on this point is Commissioner of Inland Revenue v. Angus (1889) 25 Q.B.D. 579 at p. 589. In that case, Esher, M. R., observed thus:—

"The first thing to be noticed is, that the thing which is made liable to the duty is an 'instrument' It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at."

It is not open to the revenue to say that the instrument should be deemed to be that which it is not on the record and that the object of the transaction was to achieve a purpose not disclosed in the instrument.

(ii) The second rule is that the Court is not (sic) by the apparent tenor of the instrument; it is the real nature of the transaction which will determine the stamp duty. See, for instance, Mortgage Insurance Corporation v. Commissioner of Inland Revenue, (1888) 21 Q.B.D. 352; Inland Revenue v. James John Oliver, (1909) A.C. 427 and Deddington Steamship Company, Ltd. v. Commissioners of Inland Revenue (1911) 2 K.B. 1001. But the true meaning of this rule is really this that the recitals in the instrument should not be lost sight of merely because the parties gave a particular description of its nature. But the rule does not go beyond this. Here may be recalled the weighty observations of Lord Cairns, who said many years ago in Partington v. The Attorney-General (1869) 4 H. L. 100 at p. 122:—

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

It was observed in Bank of Chettinad v. I. T. Commissioner AIR 1940 P.C. 183:—

"Their Lordships think it necessary once more to protest against the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position." Their Lordships then referred to Inland Revenue Commissioners v. Duke of Westminster, 1936 A.C. 1. See also Board of Revenue v. Narsimhan, AIR 1961 Mad. 504 (FB).

(iii) The third rule is that the Court must look at the document itself as it stands and it is not permissible to show, by evidence, any collateral circumstances. The nature of the document can be determined only from the language it employs and the purpose which it is intended to serve. Although it is permissible to look behind the form and at the substance of the transaction, this can be done only by construing the instrument itself and not by taking into consideration any collateral or other evidence de hors the instrument. In Chandrakant v. Kartickcharam, (1903) 5 Bom. L. R. 103, Peacock, C. J., said:—

"It appears to me that in applying the stamp law the stamp must be paid upon what is stated in the instrument and cannot depend upon collateral evidence....." Thus, the question must be decided essentially with reference to the contents of the instrument and to the intention of the parties which is gathered from the contents.

(iv) The fourth rule is that in determining stamp duty, the substance of the transaction as disclosed by whole of the instrument has to be looked to, and not merely the operative part of the instrument.

(v) The fifth rule is that stamp duty is payable on an instrument according to its tenor and it does not matter that it cannot be given effect to for some independent cause.

(vi) The sixth rule is that there can be no objection to a device effectuating a transaction in a manner that lower rate of duty is attracted. See, for instance, Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners, (1961) 1 Ch. 210.

8. The answer to the third question is to be found in the third and fourth rules enunciated in the foregoing paragraph.

9. We shall now advert to the first question. Having perused the record of the civil suit and the proceedings of the Court recorded in the order sheet, we have no doubt that the document was admitted in evidence. When Balkrishna was examined and cross-examined as P.W. 1, no objection was taken, either by the defendant or by the Court. Exhibit number was put on the document over

the signature of the Presiding Officer of the Court. Objection was taken, for the first time, when Hiralal (P.W. 2) was being examined and the document was put to him in examination-in-chief. But, by virtue of Section 36 of the Stamp Act, admission of an instrument cannot be called in question on the ground that the instrument was not duly stamped.

10. It was an argument that there was no conscious admission of the document by the Court. It was mechanically produced when Balkrishna was in the witness-box and it was mechanically marked as an exhibit. The learned Judge of trial Court also wrote a remark to that effect when objection was taken to the admissibility of the document during the course of recording of Hiralal's evidence. But the law is quite clear on the point. When a document is tendered in evidence and before it is marked as exhibit in a case, the trial Court has to judicially determine whether it is properly stamped or not. Once it has been marked as exhibit in a case and has been used by the parties in examination-in-chief or cross-examination of a witness, Section 36 steps in. See *Javer Chand v. Pukhraj Surana*, AIR 1961 SC 1655.

11. The scheme of the Act is abundantly clear.

(i) Once an instrument chargeable with duty is tendered in a civil court, it shall impound it, if, after examining it, the Court is of the opinion that it is not duly stamped: Section 33 of the Act. The Court has, however, power under Section 35 of the Act to admit it (barring certain instruments) in evidence on payment of duty with which the instrument is chargeable, or the amount required to make up the deficiency, together with a penalty, limits of which are prescribed in the section. There is no third course open to the Court, once it finds that an instrument tendered in evidence is not duly stamped. The next step, which the Court has then to take, is provided in Section 38. If the Court has admitted in evidence an instrument upon payment of penalty and/or duty, it shall send to the Collector an authentic copy of such instrument together with a certificate stating the amount of duty and penalty levied in respect of that instrument, and shall send such amount to the Collector. This is provided in sub-section (1) of Section 38.

(ii) Then sub-section (2) of Section 38 enacts thus:—

"In every other case, the person so impounding an instrument shall send it in original to the Collector."

This sub-section, therefore, clearly refers to a case where an instrument has been impounded under Section 33 of the Act but has not been admitted in evidence on payment of penalty and/or duty. The

Collector has then to follow the procedure as specified in Sections 39 and 40 of the Act, according as the instrument is sent to him by the Civil Court under sub-section (1) or sub-section (2) respectively of Section 38.

(iii) But when the Civil Court is of the opinion that an instrument is duly stamped, it does not impound it under Sec. 33 of the Act but admits it in evidence.

(iv) In a case where an instrument is tendered and the Civil Court just admits it in evidence, without its being questioned on the ground that it is not duly stamped, such validity cannot, by virtue of Section 36 of the Act, be subsequently questioned at any stage of the same suit or proceeding on the ground that it is not duly stamped. The only course then open is the one provided in Section 61 of the Act. Under that section, it is the Court, to which appeals lie from, or references are made by, the Court which admitted the instrument in evidence, which may, on its own motion or on the application of the Collector, take into consideration the order of the subordinate Court admitting the instrument in evidence. And, if such (appeal or reference) Court is of the opinion that such instrument should not have been admitted in evidence without payment of duty and penalty under Section 35, or that higher duty and penalty should have been paid, such Court may order the instrument to be produced and may impound it when produced. Such Court shall then send the instrument, along with its declaration, to the Collector.

12. On the above analysis, it is abundantly clear that an instrument can be sent to the Collector under Section 38(2) of the Stamp Act only when it is impounded under Section 33, but is not admitted in evidence on payment of penalty and/or duty with the aid of Section 35. Section 38(2) has no application to a case where the document has been admitted in evidence.

13. The second question referred to us relates to the vires of the order passed by the Collector on March 25, 1964. The opening paragraph of the order makes it abundantly clear that the order was passed on a misconception of the situation which existed in the eye of law. He says:—

"This case emanates out of a reference by the Civil Judge First Class, Khargone, who has impounded the document said to be a deed of partition. The Civil Judge impounded this document which was produced before him in Civil Suit No. 11 of 1960 (M. P.), *Balkrishna v. Nemasingh* on behalf of one of the co-sharers of the said property. The Civil Judge has observed that this document has not been properly stamped and therefore action under the Indian Stamp Act for recovery of stamp

duty with penalty as provided under the Stamp Act be taken.

A notice was given to the non-applicant to show cause why the proper stamp duty and penalty may not be recovered from him."

He then says that after hearing the parties and for the reasons stated by him, he reached the conclusion that the instrument was chargeable under Article 45 of the Stamp Act. He directed a duty of Rs. 1350/- and penalty of Rs. 13500/-, total Rs. 14850/- to be paid for validating the instrument.

14. It is clear from the order of the Collector, dated March 25, 1964, that he had not received the instrument under the provisions of Section 61 of the Stamp Act. From what we have said in answer to the first question referred to us, it follows that the second question must be answered in the negative.

15. Adverting to the fifth question, Section 29 of the Stamp Act enacts that, in the absence of an agreement to the contrary, the expense of providing the proper stamp in the case of an instrument of partition, shall be borne by the parties thereto in proportion to their respective shares in the whole property partitioned. Accordingly, all the parties to Ex. P-5, in proportion to their respective shares, had to bear the stamp duty. But this section and Section 44, in effect, only regulate the liabilities as between the parties inter se. The Collector can proceed to recover the entire duty and penalty from any one or from all those parties in his discretion. This is because the liability to pay stamp duty as between the parties to an instrument on the one hand and the State on the other is joint and several. The parties to an instrument between themselves may have the right to contribution. The Collector is not bound to collect pro rata shares from all the parties. This was also the view taken in *Subramanian v. Revenue Divisional Officer*, AIR 1956 Mad. 454.

16. Turning now to the sixth question, the powers of the Collector under Section 40 of the Stamp Act are discretionary in respect of imposition of penalty. There are no provisions in the Stamp Act to guide his discretion. That being so, the general principle of law, that discretion must be exercised according to reason and justification, must be followed.

17. On the above discussion, we answer questions Nos. 1 and 2 in the negative, and questions Nos. 4 and 6 in the affirmative. We answer the first part of question No. 5 in the affirmative and the second part in the negative. Our answer to question No. 3 is as follows. The Court must look at the document itself as it stands and it is not permissible to show by evidence any collateral circumstances.

The nature of the document can be determined only from the language it employs and the purpose which it is intended to serve. The substance of the transaction as disclosed by whole of the instrument has to be looked to and not merely the operative part of the instrument.

The case shall now go back to the Board of Revenue, along with the entire record received from it. No order for costs.

Order accordingly.

AIR 1970 MADHYA PRADESH 79 (V 57 C 19)

SHIV DAYAL AND S. M. N. RAINA, JJ.

Nathuram Arjun, Appellant v. Siyasharan Harprasad, Respondent.

Letters Patent Appeal No. 8 of 1964, D/- 28-11-1968, against Order of K. L. Pandey, J. in Civil Second Appeal No. 146 of 1964, D/- 30-10-1964.

(A) M. P. Land Revenue Code (1959), Ss. 131 and 257 — Scope of S. 131 (1) — Provisions deal with a right of limited nature and for limited purpose namely private right of way of cultivator through the field of another for access to his field — Dispute under the section is to be decided on the basis of convenience of the parties and not on the basis of perfection of right by prescription — Decision of revenue authorities under this section is exclusive and suit to enforce the common law right i.e., under Easements Act, does not lie. AIR 1966 S.C. 1089 & AIR 1965 S.C. 1942 & AIR 1966 S.C. 1738, Rel. on. (Paras 6, 7 and 12)

(B) M. P. Land Revenue Code (1959), S. 131 (1) and (2) — Words "any person" in sub-section (2) are wide enough to include plaintiffs as well as defendants in proceedings under sub-section (1). It is not necessary that only such person who has moved the tahsildar under sub-section (1) can institute a civil suit for establishing his right of easement — Sub-section (2), however, does not enable a person to bring civil suit to establish his right provided for in sub-section (1) — Civil Second Appeal No. 146 of 1964, dated 30-10-1964 (M. P.) Partly Reversed. (Paras 8, 9 and 13)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1089 (V 53)=
1966-2 SCR 229, K. S. Venkata-
raman & Co. (P.) Ltd. v. State
of Madras 12
(1966) AIR 1966 SC 1738 (V 53)=
1966-1 SCR 153, State of Kerala
v. N. Ramaswami Iyer & Sons 12
(1965) AIR 1965 SC 1942 (V 52)=
1963-1 SCR 64, Kamala Mills Ltd.
v. State of Bombay 12

M. L. Gupta, for Appellant; G. P. Patankar, for Respondent.

JUDGMENT:— This is a Letters Patent Appeal from the Judgment of Mr. Justice Pandey.

2. Nathuram has a field, Khasra No. 490, at village Mohana in Datia District. Siyasharan's field, Khasra No. 489, is adjacent to it. Siyasharan made an application before the Tehsildar on the allegation that Nathuram by constructing a Bandhiya blocked his way which he had been using for long. This application was decided by the Tehsildar in favour of Siyasharan. The Tehsildar directed Nathuram to remove the obstruction and clear the way within 10 days. Nathuram appealed but did not succeed. Eventually, he filed a suit in the Civil Court for declaration that he is entitled to maintain the Bandhiya and for a declaration that the orders of the Tehsildar and the Revenue Commissioner are inoperative and ineffective. Siyasharan challenged the maintainability of the suit in the Civil Court and urged that it was barred. This objection found favour with the trial Court, the first appellate Court, and also the learned Single Judge in second appeal. However, the learned Single Judge certified the case fit for Letters Patent Appeal. Nathuram has preferred this appeal.

3. Siyasharan's application before the Tehsildar was under Section 131 of the Madhya Pradesh Land Revenue Code 1959, (hereinafter referred to as "the Code"). That section runs thus:—

"Section 131 — Rights of way and other private easements:—

(1) In the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of the village, otherwise than by the recognised roads, paths or common land, including those roads and paths recorded in the village Wajib-ul-Arz prepared under Section 242 or as to the source from or course by which he may avail himself of water, a Tehsildar may, after local enquiry, decide the matter with reference to the previous custom in each case and with due regard to the convenience of all the parties concerned;

(2) No order passed under this section shall debar any person from establishing such rights of easement as he may claim by a civil suit."

Then Section 257 of the same Code provides exclusion of the jurisdiction of civil court in these words:—

"Except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board or any Revenue Officer, is by this Code, empowered to determine,

decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters:—

(a)

(b)

(c) etc. etc."

In the clauses that follow under the main part of Section 257, Section 131 does not find a place.

4. It is urged for the appellant that this suit was maintainable under subsection (2) of Section 131 of the Code. Alternatively, it is urged that apart from that provision the plaintiff (Nathuram) can enforce his common law right in the Civil Court.

5. As we read Section 131(1) it is clear to us that the Tehsildar has jurisdiction under this section in cases of disputes relating to 'route' by which a cultivator shall have access to his field or to the waste or pasture land of the village; and (ii) to the source from or course by which he may avail himself of water". This Section applies to private rights in contradistinction to public rights, i.e., by the recognised roads, paths and common land including those recorded in the village Wajib-ul-Arz. So far as the right of way is concerned, this section is confined to the private right of way of an individual cultivator through the field of another for the purpose of having access to his field, or to the waste or pasture land of the village. Secondly, it is conspicuous from the scope of enquiry provided in the section that the matter is to be decided with reference to previous custom and with due regard to the convenience of the parties concerned. Thus although the heading of the Section is "Rights of way and other private easements," the section does not speak of rights of easement as are enforceable under the general law i.e., the Easements Act. Under the general law, to establish a right of easement under Section 15 of the Act, for instance, it has to be proved *inter alia* that the right has been exercised for 20 years as of right and without interruption. But under Section 131 of the Code the Tehsildar is not to enter into an enquiry whether the plaintiff's right has been perfected by prescription. He has merely to decide the dispute with reference to the previous custom and he has to have regard to the convenience of the parties concerned. When a dispute is to be decided on the basis of convenience it is an unperfected right.

6. From the above discussion it will be seen that, irrespective of the fact that the plaintiff has a perfected right of way under the Easements Act or not, he is entitled to approach the Tehsildar under Section 131 of the Code for a decision in his favour on the basis of custom and

of the partnership in Malaya; (2) it does not deal with any specific immoveable property and allot it to one or the other of the parties and (3) the Indian Registration Act of 1908, and in particular S. 17 (1) (b) would apply only to India and cannot apply to immoveable properties situate in Malaya.

21. It will be convenient to take up reasons (1) and (2) together. In *Bageshwari Charan Singh v. Jagarnath Kuari*, ILR 11 Pat 272 = 59 Ind App 130 = AIR 1932 PC 55, their Lordships of the Privy Council approved the view of West, J. in an early Bombay case that the word "declare" occurring in Section 17 (1) (b) will apply only to those instruments which bring about a definite change of legal relation to the property by an expression of will embodied in the document referred to and will not apply where it merely recites the pre-existing facts. In the case before West, J. in *Sakharam Krishnaji v. Madan Krishnaji*, (1880) ILR 5 Bom 232, the document in question acknowledged the pre-existing title of the eldest brother of M of the executants to the sites on which the brother M was putting up houses. West J. in holding that it did not require registration observed—

"Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by Section 17. There 'declare' is placed along with 'create', 'assign', 'limit', or 'extinguish' a 'right' 'title or interest' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section." Their Lordships of the Privy Council observed—

"Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West, J., is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title. . . . In the present case, the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was therefore no necessity for registration".

The above decision was followed with approval by their Lordships of the Supreme Court in 1960-2 SCR 209 = 1960 SCJ 416 = (AIR 1960 SC 307) and 1966-2 SCJ 490

= (AIR 1966 SC 1300) already referred to, where the document was construed as merely relating to a fact which had taken place earlier. It will be seen that in the present case there was no dispute at the time of the compromise in O. S. 33 of 1948 about the shares of the parties. Clause 4 there merely recited what was common ground between the parties, and did not bring about any change in the legal relation of the parties with respect to the properties.

22. Secondly Ex. A.5 did not allot any specific item of immoveable property to any of the parties. It does not even say that the properties have necessarily to be divided in specie in the respective shares. It contemplated that the properties might have to be sold and accounts finalised which is the normal mode of working out the rights of partners, as pointed out in 1966-2 SCJ 490 = (AIR 1966 SC 1300) already referred to. According to Ex. A.5, even if it should become necessary to divide the properties in specie, that had to be done by an instrument which has to come into existence later when the accounts were finally settled. It did not therefore create or declare any interest in any particular item of property in any of the parties.

23. Thirdly, it is clear that the Indian Registration Act of 1908, cannot apply to immoveable properties in Malaya. Section 1 (2) of the Act says that the Act extends to the whole of India except the State of Jammu and Kashmir, and it is provided that the State Government may exclude any districts or tracts of country from its operation. The Act therefore does not purport to apply to any immoveable properties outside India. The Scheme of the Act also confirms this. Sec. 17 says that the documents specified therein shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, the Registration Acts of 1864, 1866, 1871, 1877 or 1908 came or comes into force. Section 5 of the Act says that for the purposes of the Act the State Government shall form districts and sub-districts. Sections 28 to 31 contain important provisions about the place of registration. In the case of documents relating to immoveable properties, they shall normally be presented for registration in the office of the Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates, is situate. Sections 64 and 65 contemplate that the Sub-Registrar, on receiving a document relating to immoveable property, shall send copies of the registered deed to every other Sub-Registrar in whose jurisdiction any part of such property may lie. The idea is obviously to make the registration complete to anybody who wants to inspect the title. These provisions are reinforced by Sec. 49 which says that no document required by Sec. 17 or by any provision of the Transfer

of Property Act 1882, to be registered, shall affect any immoveable property comprised therein, etc. These provisions particularly the provisions about the place of registration, are totally inappropriate in the case of a document like Ex. A.5 dealing with immoveable properties in Malaya. The Indian Registration Act of 1908 does not and cannot prescribe in which place such documents can be registered. The importance of the place of registration can be recognised from the fact that if no part of the properties lies in the jurisdiction of the Sub-Registrar to whom the document is presented, the document cannot be registered by that Sub-Registrar and, if for the purpose of securing registration some property is fictitiously mentioned, the registration will be void. This has been held by the Privy Council in *Harendralal Roy v. Haridasi Debi*, ILR 41 Cal 972 = 41 Ind App 110 = (AIR 1914 PC 67). See commentary in Mullah's Registration Act under Section 28. In short, the object of the legislation is only to provide for compulsory registration in respect of immoveable property in India so that the title may be clear, and it is no concern of the Indian Legislature to legislate with respect to the title to immoveable properties in Malaya.

24. This position is also settled in *Private International Law*. In 36 Halsbury, page 430, the law is stated thus—

"Statutes relating to land are presumed to have been intended to bind all land within the territory to which they extend, but not land situated elsewhere".

As authority for the latter position it has quoted the decision of the House of Lords in *British South Africa Co. v. Companhia de Mocambique*, 1893 AC 602 HL. There a suit was brought in England by the plaintiff to recover damages for a trespass said to have been committed by the defendant company to the plaintiff's mines situate in South Africa. The reliefs of declaration of title and injunction which had been originally prayed for were given up. The House of Lords held that the question of title to properties situate in South Africa was involved and that the English Court could not try such a suit. Their Lordships quote Story's *Conflict of Laws*. Story himself quotes the following language of Vattel:

"In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends".

We have seen that this is also what has been stated in 7 Halsbury at pages 30, 31, etc.

The same position is reiterated in the other leading text books: *Craies on Statute law*; *Maxwell*; *Dicey's Conflict of laws*; and *Cheshire's Private International law*. Thus

in *Craies on Statute law*, Chapter XVII, page 448, 6th Edn., it is stated—

"All the authorities in England and the United States recognise in its fullest import the principle that real estate or immoveable property is exclusively subject to the laws of the Government within whose territory it is situate. It is subject to the *lex situs*". Similarly in *Maxwell*, in Chapter VI it is stated—

"Another general presumption is that the legislature does not intend to exceed its jurisdiction. Primarily legislation of a country is territorial". (see pages 138 etc.) The same position is stated in *Dicey's Conflict of Laws*, in several places; for instance, (7th Edn.), Introduction page 4, Rule 18, (pages 147 to 152), Rule 85, (page 512 etc.).

In *Cheshire*, 7th Edn., the law is to be found in pages 503 to 505, among other pages.

It is unnecessary to refer to the other English decisions. Turning to the decisions in India, there seem to be only a few. In *Venkatapayya v. Venkataranga Rao*, ILR 43 Mad 288 = (AIR 1920 Mad 763), the plaintiffs sued for the recovery of the zamindari of Munagala situated in Krishna District, from the 2nd defendant who was in possession claiming to be the duly adopted son of the daughter of the late zamindar who represented the eldest branch, marked A in the genealogical tree. On the question of adoption it was found by the learned District Judge who tried the suit that there was a written authority to adopt given to the widow of the late zamindar. The late Zamindar and his widow were domiciled in the then Nizam's dominions. The law of Hyderabad did not require registration of the authority to adopt, but it was contended on behalf of the plaintiffs that nevertheless it had to be registered under Section 17 (b) of the Indian Registration Act, 1908, because claim was made to immoveable property in Krishna District in British India on the basis of that written authority to adopt. The learned District Judge found that the authority to adopt was registered in British India within 4 months of its being brought into British India, under the provisions of Section 26 of the Registration Act. The learned District Judge decreed the suit. The plaintiffs preferred the appeal. It was heard by Wallis, C. J., and Sadasiva Aiyar, J. Wallis, C. J., held that the authority to adopt in that case did not require registration under the Indian Registration Act. He observed—

"The first question which arises is, whether the provisions of Section 17 of the Indian Registration Act, which requires authorities to adopt not contained in a will to be registered has any application to an authority to adopt given in Hyderabad, outside British India, by a subject of that State domiciled there. If not, such an authority is not a 'document required by Section 17 to be registered' within the meaning of

Section 49 of the Act, and is not affected by the provisions of that section. Now the limits of legislative authority are territorial, and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. Prima facie, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects".

At page 302 he observed—

"That Section 17 (3) is a provision affecting status. The Indian Legislature has no authority to legislate as to the status of the subjects of Native States domiciled in such States and this provision cannot in my opinion on the well established rules of construction be read as extending to an authority to adopt conferred in Hyderabad by a subject of that State domiciled there, whose only connection with British India was that his wife owned property there. Questions of validity of adoptions made outside British India by persons who are not British subjects may arise in our Courts, not only in connection with claims to succeed to immoveable properties situate in British India, but also in other ways too numerous to mention, and it would in my opinion be altogether opposed to the accepted canons of construction to attribute to the Indian Legislature when it inserted in the Registration Act what is now Section 17 (3), an intention to interfere in any way with the question of such adoptions which is a matter outside its competence. For these reasons, I am of opinion that the provisions of the Indian Registration Act did not apply to the authority to adopt the second defendant; and that it is unnecessary to consider the further question whether these provisions were in fact complied with."

Sadasiva Aiyar J. also was of the opinion that Section 17 (3) of the Act could not apply to the document in that case and that primarily Section 17 (3) would only apply in respect of authorities to adopt executed by persons domiciled in British India. He further observed—

"As regards the concession given in Section 26 to have certain documents, including an authority to adopt executed out of British India, presented for registration within 4 months after it is brought into British India, it was, in my opinion intended to meet the case of a person domiciled in British India travelling abroad (in Europe or America etc.) or even in a British State on a pilgrimage and suddenly finding himself in a bad state of health, executing an authority to adopt in favour of his wife to be used by her".

25. Though on the above view it would seem to have been unnecessary to consider the further question, the learned Judge considered the further question and agreed with the learned District Judge that the document was presented for registration within British India within 4 months after its arrival

in India and that the presentation of the document by the natural father of the second defendant who was then a minor was proper presentation by a representative of the minor for the purpose of the Act (Sections 32, 40).

26. The decision on the last point was affirmed by their Lordships of the Privy Council. The decision is reported in Venkatapayya v. Venkataranga Rao, ILR 52 Mad 175 = 56 Ind App 21 = (AIR 1929 PC 24). The appeals of the plaintiffs were dismissed by the Privy Council on that basis. Because the appeals could be dismissed on that short ground, their Lordships did not think it necessary to discuss the further question whether really the authority to adopt did not require registration in India. They observed—

"Neither is it necessary to discuss the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, can rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption". From this it cannot be urged that their Lordships meant to throw any doubt on the findings of Wallis C. J. and Sadasiva Aiyar J., that the Indian Registration Act had no extra-territorial jurisdiction. In any case, it is clear that the Indian Registration Act could not prescribe for the registration of a document like Ex. A-5 in so far as it deals with immoveable properties situate in Malaya.

Sukritibala v. Hemantakumar, AIR 1957 Assam 153, was a case where in execution of a money decree, the decree-holder agreed to accept a lesser sum of Rs. 9000 and on behalf of the judgment-debtor, his wife the appellant offered security of her immoveable property. The decree-holder sought to proceed against the appellant in respect of her property. Objection was taken on the ground that the charge created by the compromise had not been registered. The objection was repelled on the ground that the provisions of the Indian Registration Act did not apply to the area where the decree in question was passed or the adjustment was recorded, because that area was the Khasi and Jaintia hill tracts. This is a direct decision on the point.

In Ramanathan v. Somasundaram, ILR (1964) 1 Mad 611 = (AIR 1964 Mad 527), the question was one of limitation in a suit on a mortgage executed and registered in Burma in respect of properties there by persons who were of Indian domicile (Ramana-thapuram Dist.) The creditors gave up their security and claimed only personal relief against them in the District Court of Ramana-thapuram. One of the acknowledgments by the debtors was dated 12-6-1941, and the next acknowledgment was dated 31-3-1947. If

Article 115 applied the limitation was three years. But if Article 116 applied, the limitation would be six years. That turned on the question whether the mortgage document could be deemed to be registered within the meaning of Article 116. Ramachandra Iyer C. J. and Ramamurti J. held that the word 'registered' occurring in Article 116 meant 'registered' under the law in force in India and since the document was not registered according to the law, in India, Article 116 would not apply and so the suit was time-barred. This may be taken to be a converse of the case before us, but the underlying principle is of some relevance in the present case.

27. In the result we hold that Ex. A-5 does not require registration. It is admissible and creates a binding contract, namely, that there was a partnership between Ayyachami, Perianna and the 1st defendant, from 19-1-1946 upto 5-4-1949, at any rate. We shall consider the question of limitation on the assumption more favourable to the first defendant, namely, that there was no partnership after 5-4-1949. Article 106 will apply. The suit would normally have to be brought within three years from 5-4-1949, but the suit was filed on 5-4-1957. Section 13 of the Limitation Act will, however, come to the rescue of the plaintiff. It says that the time during which the defendant has been absent from India shall be excluded. Paragraph 25 of the plaint says—

"The plaintiff understands that the 1st defendant has been absent from India in Malaya from 17-3-1947 to 19-5-1948, 25-8-1948 to 29-6-1952, and from 20-1-1955 to 24-12-1956 both days inclusive."

The written statement does not specifically traverse this and hence under Order VIII, Rules 3 to 5 the first defendant must be deemed to have admitted the periods of his absence. Apart from this, the learned Subordinate Judge finds in his judgment, with reference to the several exhibits, as follows (page 10) —

"...the 1st defendant was in Malaya from 17-3-1947 to 19-5-1948. He again left India on 13-8-1949 and returned to India on 29-6-1952. He again went to Siramban on 23-1-1955 and returned to India on 24-12-1956. These particulars are available from Exs. A-30, A-31, A-32, A-20, A-63, A-84 and A-85".

This finding was not challenged before us by the first defendant's learned counsel. We accept it, though the periods are somewhat shorter than the periods mentioned in the plaint. Even taking these reduced periods, it will be seen that they work out to a period of five years, eleven months and nineteen days of absence from India. If this is excluded, the suit is in time, even taking 5-4-1949 as the starting point. Of course, a fortiori the suit would be in time if the partnership had continued till 30-3-1950. We would add

that the benefit of this reasoning on the question of limitation will enure for the benefit of the 2nd defendant as well, if she has a share.

28. A minor contention of the learned counsel for the first defendant is that letters of administration have not been taken out for the deceased Solayappa as contemplated in Ex. A-5 and that, till they are taken out, the suit cannot proceed in the Subordinate Judge's Court, Devakottai. Sri Sundara Iyer for the appellant stated that letters of administration had been taken out to the estate of the late Solayappa by the 1st defendant himself. We do not think it necessary to go into that question, because in our view, even if letters of administration have not been taken out so far, that will not be an impediment to the jurisdiction of the Subordinate Judge's Court, Devakottai. If necessary, letters of administration can be taken from the Malaya Court in due course.

29. A more substantial contention, however, of the learned counsel for the first defendant, is that, even if we should find, on the basis of Ex. A-5, that there was a partnership between Ayyachami, Perianna and the 1st defendant, from 19-1-1946 to 5-4-1949, we should not further find straightway that the first defendant was liable to account. He submits that Ayyachami and Perianna also took part in the management and shared the proceeds. This question has not yet been gone into and must also be remitted for trial by the learned Subordinate Judge.

30. The learned counsel further contends that, as a matter of construction, Ex. A-5 itself provides that the partnership between 19-1-1946 to 5-4-1949 should be wound up by all the parties being in management of the properties without any one being liable to account exclusively. He submits that factually also each of the parties was in possession of some property or the other and that consequently the first defendant is not liable to account. This is contested by the learned counsel for the appellant. This question again is left open.

31. Accordingly, we set aside the judgment and decree of the learned Subordinate Judge and we record our findings as follows—

1. The suit is maintainable in the Subordinate Judge's Court of Devakottai.

2. Ex. A-5 constitutes a valid contract on the basis of which the parties must proceed, namely, that there was a partnership between Ayyachami, Perianna and the first defendant even from 19-1-1946 upto 5-4-1949, and that the shares are as indicated in Ex. A-5. Since the first defendant has settled the matter with defendants 3, 4 and 5, the dispute will be outstanding only as between the plaintiff and the second defendant on the one hand, and the first defendant on the other.

3. We find the suit is within time.

The suit is remitted for trial on the further points of dispute between the parties and in particular the following—

1. Whether the partnership continued from 5-4-1949 to 30-3-1950?

2. Which of the parties are liable to account; in particular whether the first defendant is liable to account and if so, from what date?

3. What are the shares of the plaintiffs and the second defendant?

4. To what relief will the parties be entitled?

32. Besides the evidence already on record, the parties will be entitled to adduce further evidence. The suit must be disposed of expeditiously. The parties will bear their own costs in the appeal. The court-fee paid on the memorandum of appeal will be refunded to the appellant. Costs in the trial Court will abide the result of the suit. In the meanwhile the first defendant, who is said to have collected the costs from the plaintiff, may pay back the costs to the plaintiff.

Order accordingly.

AIR 1970 MADRAS 133 (V 57 C 35)

VEERASWAMI AND
ALAGIRISWAMI, JJ.

Madras Motor and General Insurance Co. Ltd., Madras, Appellant v. Commissioner of Income-tax, Madras, Respondent.

Tax Case No. 75 of 1965 (Ref. 24), D/-12-9-1968.

Finance Act (1951), Sch. I, Part B, Proviso (1) — Words “no order has been made under S. 23-A (1) Income-tax Act” — Words do not merely mean physical fact of there being no order under that provision in existence — Rebate may be allowed only after considering applicability of Sec. 23-A, Income-tax Act (1922) and of propriety of making order under that section — Rebate granted without applying mind to the question — Assessment can be reopened on ground that it had been made at too low a rate — (Income-tax Act (1922), Ss. 23-A, 34).

The second condition in Sch. I Part B, Proviso (1) of the Finance Act, 1951, that “no order has been made under S. 23-A (1) of the Income-tax Act, 1922” very really bears on the quantum of the total income with reference to which rebate is allowed. Whether or not sixty per cent of the total income as reduced by the reductions permissible under Sec. 23-A of the Income-tax Act, 1922 has been distributed as dividends, the absence of an order under the provision in the particular circumstances leads to precise date by which the amount eligible for rebate is fixed. It stands to reason, therefore, that a rebate may be allowed only after the Income-tax

Officer has considered the applicability of Sec. 23-A and of the propriety of making an order under that section. The words “No order has been made under sub-section (1) of Section 23-A” do not merely mean the physical fact of there being no order under that provision in existence: (1963) 38 ITR 76 at p. 82 (SC), Rel. on. (Para 3)

If the Income-tax Officer in granting rebate made a mistake in assuming that the physical fact of there being no order under Sec. 23-A will suffice or because of the character of the company as he thought it to be that provision would be inapplicable, it would not disentitle him from reopening the assessment on the view that it had been made at too low a rate. So long as the Income-tax Officer had not applied his mind to the question whether it would not be unreasonable to call upon the company to declare a further dividend, but nevertheless he granted rebate under the proviso, it would be a case where he wrongly understood the scope of the proviso in relation to that matter or ignored the requirement of his applying his mind and took it merely for granted that there has been no order under Sec. 23-A in a physical sense. Where this has resulted in assessing the income at too low a rate, the case will squarely fall within the ambit of Sec. 34 of the Income-tax Act, 1922: AIR 1968 SC 124, Rel. on; (1963) 48 ITR 182 (SC), Ref. (Para 6)

Cases	Referred:	Chronological	Paras
(1968) AIR 1968 SC 124 (V 55) = 66 ITR 604, Sundaram and Co. (P.) Ltd. v. Commr. of I. T.			6
(1968) AIR 1968 SC 883 (V 55) = 68 ITR 630, Commr. of I. T. v. Jubilee Mills Ltd.			7
(1963) 48 ITR 76 = (1963) Supp I SCR 766, Commr. of I. T. v. Afco (Pvt.) Ltd.			4
(1963) 48 ITR 182 = (1963) Supp 2 SCR 162, P. S. Subramania v. Simplex Mills Ltd.			6

S. Swaminathan and K. Ramagopal, for Appellant; V. Balasubramaniam and J. Jayaraman, for Respondent.

VEERASWAMI, J.: This is a consolidated reference relating to assessment years 1953-54 and 1954-55. The assessee has been described to be a public limited company, carrying on business in General Insurance. In respect of the said years, the Income-tax Officer originally allowed rebates in the sums of Rs. 4,989-84 and of Rs. 7708-11-0 at the rate of one anna in the rupee on the undistributed profits of the company. On 8-3-1958 the Income-tax Officer, however, passed orders under Section 23-A (1) by which the entire undistributed profits were deemed to have been distributed as dividends to the shareholders. As a consequence, the assessment orders were reopened under Section 34 with the result the rebates granted earlier were withdrawn. The assessee was unsuccessful before the Revenue as well as the Tribunal in his challenge as to the propriety of

the order. The Tribunal's view was that Section 23-A created a fiction in respect of distribution of deemed dividends and it was, therefore, clear that the order passed under Section 23-A on 8-3-1958 related back to the anterior period and that further a logical extension of this view would be that at the time of the original assessment, an order under Sec. 23-A (1) had been passed and so the grant of rebate was improper. The assessee has moved for this reference under Sec. 66 (1) of the Indian Income-tax Act on the following question—

“Whether, by reason of an order passed on 8-3-1958, under Section 23-A (1) on the assessee company subsequent to the original assessment made on the company, for the years 1953-54 and 1954-55, the rebate of one anna in the rupee on the undistributed profits granted in the original assessment in accordance with Schedule I Part B, Proviso (1) of the Finance Act, 1951 could be withdrawn by a revised assessment?”

We may at the outset state that we do not accept the correctness of the reasoning of the Tribunal above referred to. Nevertheless, we are of opinion that its conclusion should be sustained, though entirely for different reasons. In arriving at that decision, our minds have to a certain extent oscillated from one end to the other, but at the end, we are firmly of the view, that the order of the Income-tax Officer reopening the assessment and withdrawing the rebate was competent and in order.

2. Mr. Swaminathan's argument which undoubtedly has been persuasive, is that grant of rebate under proviso (1) to Part B in Schedule I of the Finance Act postulates that the requisite conditions therefor have, in the opinion of the Income-tax Officer, been satisfied and that if, therefore, he proceeded on the basis that there has been no order made under Section 23-A, it was to that extent, conclusive and could not be reopened or reviewed in exercise of his powers under Section 34. Learned counsel urges that Sec. 23-A does not belong to the realm of assessment, unlike Sec. 34, and it followed, therefore, that when rebate was granted, the decision of the Income-tax Officer that there has been no order under Sec. 23-A should stay, whatever may be the validity of an order passed subsequently under Sec. 23-A. He adds that such a subsequent order will be entirely innocuous for purposes of reopening the assessments under Section 34 and will be futile in withdrawing the rebate. On the other hand, the Revenue, equally persuasively, contends that the application of the proviso in Part B of Schedule I entirely covers the realm of assessment and, therefore, the whole range of it is within the purview of Sec. 34. On that basis, Mr. Balasubramaniam contends that, if the Income-tax Officer on a wrong view of the proviso proceeded merely on the physical fact of there being no order under Section 23-A when he passed the assessment order, and

later on he found that he was wrong in doing so and actually made an order under Sec. 23-A, that is a matter which could be reopened under Sec. 34. In applying Sec. 34, to such a situation, the Income-tax Officer is not to be taken as interfering with any order passed under Section 23-A.

3. In order to assess the rival contentions, it is first necessary to notice what precisely is the scope of the proviso. Its particular objective appears to be to encourage retention with the company of the amount that remains of the total income as reduced by the outgoings in the nature of taxes and dividends declared, without that amount also being distributed as dividends, by granting a rebate of one anna in the rupee. Where, however, such amount has also been distributed as dividend, the second clause of the proviso charges additional tax subject to certain limits. In our view, this objective should be kept in mind in delimiting the scope and applicability of the proviso. The body of the proviso visualises that before the question of allowance of rebate is considered, the company concerned has made the prescribed arrangements for the declaration and payment of dividends payable out of the relative profits and has deducted super tax from the dividends in accordance with the provisions of sub-section (3-D) or (3-E) of Sec. 18 of the Act. It is then one can examine whether the conditions for allowance or rebate in clause (1) of the proviso have been satisfied. The conditions are two-fold:

(1) The total income as reduced by seven annas in the rupee and the amount exempt from income-tax exceeds the amount of dividends declared in respect of the whole or part of the previous year and (2) no order has been made under sub-sec. (1) of S. 23-A of the Income-tax Act.

It is on the second condition, the argument on either side has centered. It seems to us to be obvious that this condition very really bears on the quantum of the total income with reference to which rebate is allowed. Whether or not sixty per cent of the total income as reduced by the reductions permissible under Sec. 23-A has been distributed as dividends, the absence of an order under the provision in the particular circumstances leads to precise data by which the amount eligible for rebate is fixed. It stands to reason, therefore, that a rebate may be allowed only after the Income-tax Officer has considered the applicability of Sec. 23-A and of the propriety of making an order under that section. The words “no order has been made under sub-section (1) of Sec. 23-A” do not merely mean the physical fact of there being no order under that provision in existence.

4. In *Commissioner of Income-tax v. Afco (Pvt) Ltd.*, (1963) 48 ITR 76, 82 (SC), the Supreme Court in considering the proviso has made certain observations which appear to support our view:

"The right to rebate arose under those Finance Acts if no order under S. 23-A was made. The Income-tax Officer had therefore to decide even before completing the assessment of the company whether the circumstances justified the making of an order under Sec. 23-A and unless an order under Sec. 23-A was made the assessee became entitled automatically to the rebate of one anna in the rupee. Such a provision led to delay in the disposal of assessment proceedings and caused administrative inconvenience. It appears that the legislature modified the scheme of granting rebate in enacting the Finance Act of 1953, with a view to simplify the procedure and avoid delays".

5. Pitching himself on that position, Mr. Swaminathan urges that once rebate has been granted, it presupposes that a decision has been arrived at by the Income-tax Officer earlier or simultaneously under Sec. 23-A of the Income-tax Act and if that be so, there is no power vested in him under the Act to go back upon that view.

6. The assessment order for the assessment year 1953-54 began by stating that the assessee was a public limited company carrying on business of accident insurance. It was evidently on this view which is not now maintained, the Income-tax Officer thought that Sec. 23-A was inapplicable and, therefore, took it for granted that no order has been passed under that proviso. We are inclined to think that if the Income-tax Officer made a mistake in assuming that the physical fact of there being no order will suffice or because of the character of the company as he thought it to be that provision would be inapplicable, it would not disentitle him from reopening the assessment on the view that it had been made at too low a rate. As has been held by the Supreme Court in *Sundaram and Co. (P.) Ltd. v. Commissioner of Income-Tax*, 66 ITR 604 = (AIR 1968 SC 124), where by reason of wrong allowance of rebate, there has been escapement of tax, it may be considered that the assessment had been at too low a rate and Section 34 would be available in such a case.

But Mr. Swaminathan invites our attention to *P. S. Subramania v. Simplex Mills Ltd.*, (1963) 48 ITR 182 (SC), and contends that the order made under Sec. 23-A subsequent to the assessment orders, would not and could not relate back to the time when the assessments were made and led to an assumption that dividends had been declared to the extent of the amount with reference to which rebate had been given. On that reasoning, he says that Sec. 34 would not be attracted to the situation. We do not think that the authority cited supports him. All that was held in that case was that excess interest paid by the Revenue could not be recovered by an order under Sec. 34 on the strength of an amendment with retrospective effect because it did not relate to a charge

of the income and, therefore to an assessment of the income. We do not think that the analogy has application to the instant case. Section 34 is invoked in the present case not to reopen or reconsider an order under Sec. 23-A but to set right an assessment which has been made at too low a rate. If the Income-tax Officer had applied his mind to the conditions necessary for making or not making an order under Section 23-A and then allowed a rebate, whether the position would be different, we are not called upon to consider in this case. There is nothing in the record to show that the Income-tax Officer, before or at the time of making the assessment order applied his mind to the provisions of Sec. 23-A in order to make an order under that provision. It is no doubt true that he proceeded on the basis that the assessee was a public limited company which possibly weighed with him in taking it for granted for purpose of the proviso that there has been no order under Sec. 23-A. But so long as the Income-tax Officer had not applied his mind to the question whether it would not be unreasonable to call upon the company to declare a further dividend, but nevertheless he granted rebate under the proviso, it would be a case where he wrongly understood the scope of the proviso in relation to that matter or ignored the requirement of his applying his mind and took it merely for granted that there has been no order under Section 23-A in a physical sense, and this resulted in assessing the income at too low a rate. Such a case will, in our opinion, squarely fall within the ambit of Sec. 34.

7. We may add that in view of the decision in *Commissioner of Income-tax v. Jubilee Mills Ltd.*, 68 ITR 630 = (AIR 1968 SC 883), there is no substance in the preliminary objection raised by the Revenue to the competence or validity of the reference.

8. In this view, we answer the question against the assessee with costs. Counsel's fee Rs. 250.

Reference answered.

AIR 1970 MADRAS 135 (V 57 C 30)

RAMAPRASADA RAO, J.

S. P. Krishna Rao, Petitioner v. Thimurshakhan and another, Respondents.

Civil Revn. Petn. No. 240 of 1968, D/-28-3-1969, against order of Dist. Munsif, Coimbatore, D/-5-1-1968.

(A) Civil P. C. (1908), S. 60 (1) Proviso (h) — Bonus should form part of wage — AIR 1957 Mad 773 not followed in view of AIR 1969 Mad 440. (Para 1)

(B) Civil P. C. (1908), S. 60 (1) Proviso (h) and S. 115 — Question whether person is labourer or not has to be ascertained as a question of fact. (Para 2)

IM/JM/E31/69/AKJ/P

Cases Referred: Chronological Paras
 (1969) AIR 1969 Mad 440 (V 56) =
 C. R. P. No. 1952 of 1965, D/-
 2-2-1968, Ganpathi Pillai v. Swami-
 natha Pillai

(1959) AIR 1959 Mys 96 (V 46) =
 ILR (1958) Mys 132, P. Nathmal
 v. Dasarath

(1957) AIR 1957 Mad 773 (V 44) =
 1957-2 Mad LJ 400, Munuswamy
 v. Viswanathan Nair

S. Ramasubramaniam, for Petitioner; P. S. Ramachandran, for Respondent No. 1.

ORDER: The learned Additional District Munsif, Coimbatore, relying upon the decision in Munuswami v. Viswanathan Nair, (1957) 2 Mad LJ 400 = (AIR 1957, Mad 773), allowed a petition under Section 60 (h) of the Civil Procedure Code in execution of a decree for money by attaching the bonus of the respondent who is reported to be a mechanic. But Mr. Ramasubramaniam, brought to my notice the latest judgment of Veeraswami, J., in C. R. P. No. 1952 of 1965 = (AIR 1969 Mad 440), Ganapathi Pillai v. Swaminatha Pillai who held that payment of bonus is a method of payment of wages. He also observed:

"No doubt, payment of bonus is conditional upon payment of wages. But once bonus is paid, it has the true attribute of wages."

Here, he relied upon a decision of the Mysore High Court reported in P. Nathmal v. Dasarath, AIR 1959 Mys 96. It has to be noted that this judgment was rendered after the passing of the Madras Payment of Bonus Act of 1965. There has been chameleonic changes in the law of bonus having regard to the various economic and social strains to accord industrial peace in our country. In this view, the learned Judge, with whom I respectfully agree, was of the opinion that bonus should form part of wage. The order of the Court below cannot stand.

2. Mr. P. S. Ramachandran, however, contended that the petitioner is a mechanic and therefore not a labourer within the meaning of Section 60 (1) proviso (h) of the Civil Procedure Code and the bonus paid to him cannot be deemed to be beyond the pale of attachment. But whether he is a mechanic or a labourer has not been gone into by the Court below, and this has to be ascertained as a question of fact. Both the parties, therefore, agree that there is no material on which I can base my decision whether he is a mechanic or a labourer. It is advisable that this matter is remitted after setting aside the order of the lower Court for a further consideration in the light of the observations made above. Accordingly, the order of the lower Court is set aside and the matter remitted to the file of the District Munsif of Coimbatore for fresh disposal in accordance with law and in the light of my judgment. No costs.

Order accordingly.

AIR 1970 MADRAS 136 (V 57 C 37)

FULL BENCH

M. ANANTANARAYANAN, C. J.,
 RAMAKRISHNAN AND NATESAN, JJ.

R. Lakshminarayanan, Appellant v. V. A. Maruthappa Nainar and others, Respondents.

Writ App. No. 458 of 1967, and 32 of 1968, etc., D/-20-1-1969, against order of Kailasam, J., D/- 16-2-1967 in W. P. No. 2298 of 1966.

Constitution of India, Article 226 — Certiorari. — Who may apply for — Grant of permit to new entrant under Rice Milling (Regulation) Act for establishment of new rice mill — Licensee of existing rice mill is entitled to apply for writ of certiorari. W.P. 2298 of 1966, D/-16-2-1967 (Mad) Reversed. W. P. No. 2332 of 1966 (Mad) and ILR (1964) 2 Mad 869, Overruled — (Rice Milling Industry (Regulation) Act (1958), Section 5).

An existing rice mill owner who has objected to the installation of a fresh rice mill in the locality and contends that he has been prejudicially affected by the grant of permit under the Rice Milling Industry (Regulation) Act for installation of a fresh rice mill, has sufficient interest to give him locus standi to make an application for certiorari under Article 226. The Act may or may not provide for appearance and representation by existing rice mill owners in the locality. But the authority under the Act is constrained by the law and rules made thereunder, to have due regard to certain considerations. There is nothing to preclude an existing rice mill owner suo motu placing before the authority these considerations, as failure to have regard to them may affect him prejudicially. An adverse order need not necessarily be against a person, who as of right, is entitled to make representation. W. P. 2298 of 1966, D/- 16-2-1967 (Mad), Reversed. W.P. 2332 of 1966 (Mad.) and ILR (1964) 2 Mad 869, Overruled. W. A. 195 of 1962 (Mad), Expl. and Dist. AIR 1957 Mad 551, Approved; Case law discussed.

(Paras 5, 9)

When certiorari is sought, the Court generally looks for some personal interest of the applicant in the matter, something more substantial and related to the applicant than due observance of law by authorities, and do not countenance a mere excess of zeal in the observance of law by others. A person who is denied a permit or one who is wrongfully deprived or refused something to which he is entitled, or on whom a legal burden is cast are obvious cases. But that does not exhaust the list. Other persons may be affected and genuinely aggrieved by excess or abuse of powers. The requirements as to the standing of an applicant for certiorari cannot be circumscribed by any narrow limitation. Of necessity it would vary according to the law administer-

ed, the illegality alleged, and the grievance suffered. The right to apply for relief deeming himself aggrieved, if that is the test, is one thing, making out a case for the issue of a certiorari is a different thing. That would depend on the judicial scrutiny of the record in relation to and his establishing one or other of the recognised grounds for quashing. The necessity for judicial scrutiny, when a person comes to Court complaining against an act of commission or omission of an administrative authority regulating trade, business or occupation under law which prejudicially affects him, springs from the concept of the supremacy of the rule of law and the authority of the Court to determine the legality of the Act. The fact that the licencing law vests the authority with some discretion in the matter, does not take the act of the authority out of judicial scrutiny. When an authority is entrusted with discretion, the authority must direct himself properly in law. He must direct his attention to matters which he is bound to consider and he must exclude from consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, then he oversteps the bounds of his jurisdiction. In matters that could vitally affect citizens in their normal avocations, trade and business, there is no such thing as absolute discretion in administrative authorities. The law on these matters, to be valid, has to provide guide-lines and the discretion has to be controlled by the guide-lines. (Para 6)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 410 (V 55) = 1968-1 SCR 635, Lakshminarain v. State Transport Authority, U. P. 5
 (1968) W. A. 150 of 1968=1969-1 Mad LJ 143, Thiruvengada v. Muthu Chettiar I, 8
 (1968) 1968-3 WLR 999, Reg. v. Russel Ex parte Beverbrook Newspapers Ltd. 5
 (1967) AIR 1967 Mad 332 (V 54) = ILR (1965) 2 Mad 388, Valliamma v. State of Madras 5
 (1967) W. A. 87 of 1967 (Mad), Paramasiva v. Pannerselvam 7
 (1967) W. P. 1042 of 1967 (Mad), Veerappa Counder v. State of Madras 7
 (1966) AIR 1966 SC 828 (V 53) = 1966-2 SCR 172, Venkatswara Rao v. Govt. of A. P. 5
 (1966) W. P. 2332 of 1966 (Mad), Kuppusami Pillai v. State of Madras I, 7
 (1965) AIR 1965 Madh Pra 247 = 1965 MPLJ 578, Maina Bai v. State of M. P. 8
 (1964) 1964-2 QB 362 = 1964-2 WLR 715, Maurice v. London County Council 5
 (1964) 1964 AC 40 = 1963-2 All ER 66, Ridge v. Baldwin 6

- (1963) 1963-2 Mad LJ 320 = ILR (1964) 1 Mad 151, Ramanathan Chettiar v. Board of Revenue 6
 (1962) AIR 1962 SC 1044 (V 49) = 1963-1 SCJ 106, Calcutta Gas Co. Ltd. v. State of W. B. 5
 (1962) AIR 1962 Andh Pra 363 (V 49) = 1962-2 Andh WR 156, Venugopala Reddi v. Amra Venkata Narsimhalu 8
 (1962) W. A. 195 of 1962 (Mad), Lakshmi Ammal v. Vaithialingam I, 7
 (1962) W. P. 1091 of 1962 = ILR (1964) 2 Mad 869, Lakshmiamma v. Commr. of Land Revenue 7
 (1961) AIR 1961 Mad 180 (V 48) = ILR (1961) Mad 110 (FB), S. M. Transport v. Raman & Raman 5, 8
 (1961) W. P. 644 of 1961 (Mad), Ramasundara Nadar & Co. v. State of Madras 6
 (1961) 1961 AC 617 = 1961-2 WLR 845, Attorney General of Cambia v. N'jie 6
 (1957) AIR 1957 Mad 551 (V 44) = 1957-2 Mad LJ 1, Abdul Majid v. State of Madras I, 6, 7
 (1954) AIR 1954 SC 440 (V 41) = 1955 SCR 250, Basappa v. Nagappa 5
 (1953) AIR 1953 SC 210 (V 40) = 1953 SCR 1144, Election Commission, India v. Saka Venkatarao 5
 (1931) 285 US 262 = 78 L Ed 747, New State Ice Co. v. Liebmann 3
 (1927) 1927-1 KB 765 = 96 LJKB 322, R. v. Minister of Health Ex. P. Dore 5
 (1921) 1921-1 KB 248 = 90 LJKB 413, Rex v. Richmond Confirming Authority Ex parte Howitt 5
 (1901) 1901-2 KB 157 = 70 LJKB 636, Rex v. Groom; Ex parte Gobbald 5
 (1899) 2 QB 455 = 68 LJQB 1034, Reg. v. Nicholson 5
 (1870) LR 5 QB 466 = 39 LJMC 145, R. v. Surrey JJ. 5

V. K. Thiruvenkatachari, for G. Ramaswami and M. Kalyanasundaram, for Appellant; K. Parasaran, for Respondent No. 1 (in W. A. No. 458/67); N. T. Vanamamalai and B. Ramamurthi, for Appellant; T. S. Srinivasan, for 3rd Respondent (in W. A. 32/68); V. P. Raman and N. R. Chandran, for Appellant; R. Natesan, for Respondents Nos. 3 and 4 (in W. A. 66/68); V. Vedantachari, for K. Parasaran and T. Vadivel, for Appellant (in W. A. 193/68); K. K. Venugopal, for Appellant; V. V. Raghavan, for 2nd Respondent (in W. A. 197/68); V. P. Raman and N. R. Chandran, for Appellant; V. Srinivasan, for 3rd Respondent (in W. A. 302/68); V. P. Raman and N. R. Chandran, for Appellant; K. K. Venugopal, for 1st Respondent (in W. A. 328/68); V. P. Raman and N. Chandrasekharan, for Appellant; V. Sridevan, for 3rd Respondent (in W. A. 457/68); P. Balakrishnan,

for Appellant; M. V. Krishnan, for 3rd Respondent (in W. A. 458/68); V. P. Raman and S. Thamotharan, for Appellant; V. Vedantachari and T. Rangaswami Iyengar, for Respondents Nos. 3 to 6 (in W. A. 486/68); Govt. Pleader, for Respondents.

NATESAN, J.: The short question for consideration by the Full Bench in this batch of writ appeals is, whether a licensee of an existing rice mill has locus standi to apply for a writ of certiorari to quash the grant of a permit for the establishment of a new rice mill in the locality, under the Rice-Milling Industry (Regulation) Act, Act 21 of 1958 (hereinafter referred to as the Act.) The appeals have been preferred from the dismissal of petitions for certiorari on the ground that an existing rice mill owner is not a person aggrieved by the grant of permit to another, and has no standing to apply for certiorari. In *Kuppusami Pillai v. State of Madras*, W. P. 2332 of 1966 (Mad), Kailasam, J., observed that the mere fact that a person who has a mill in close proximity to the one to which licence has been granted is likely to suffer financial loss is not sufficient to make him an aggrieved person entitling to maintain a writ petition challenging an order of the licensing authority granting permit to a new applicant. In taking this decision, the learned Judge considered that the matter was not *res integra* but governed by the decision of a Division Bench of this Court in *Lakshmiammal v. Vaithilingam* W. A. 195 of 1962 (Mad). Proceeding the learned Judge held that the decision of Rajagopalan, J., in *Abdul Mazid v. State of Madras*, 1957-2 Mad LJ 1 = (AIR 1957 Mad 551), taking a contrary view could not, in view of the decision of the Division Bench, be said to be good law. But the contrary view finds confirmation in the observations by another Division Bench in *Thiruvengada v. Muthu Chettiar* W. A. 150 of 1968 (reported in 1969-1 Mad LJ 143).

2. The Rice Milling Industry (Regulation) Act 1958, is an Act to regulate the rice milling industry in the interests of the general public. Manifestly, it is a restriction in the carrying on of business of rice milling. Section 8 of the Act prohibits the establishment of any new rice mill by any person or authority after the commencement of the Act except under and in accordance with a permit granted under Section 5 of the Act. The permit has to be followed by securing a licence under Sec. 6 for carrying on rice milling operation. There is a prohibition against an owner of a rice mill changing the location of the whole or any part of the rice mill, and against expansion of the rice mill except with permission. Severe penalties, imprisonment and fine, are provided by Section 13 for contravention of provisions of Section 8. Section 5 (1) requires an application to be made to the Central Government for the grant of a permit for the establishment of a new rice mill or for re-commencing rice

milling operation in a defunct rice mill. Under statutory powers, the Central Government has delegated its functions to the State Board of Revenue.

Section 5 (4) requires a full and complete investigation to be made in the manner prescribed, before the grant of a permit. The investigation should have due regard to the number of rice mills operating in the locality, the availability of paddy in the locality, the availability of power and water supply for the rice mill in respect of which a permit is applied for and the type of the rice huller type, sheller type or combined sheller huller type. The investigation has also to be directed to ascertain whether the functioning of the rice mill would cause substantial unemployment in the locality and other matters that may be prescribed. The rules made under the Act bring out more clearly the object of the Regulation. They emphasise that the investigation shall be made with a view to ascertaining whether the grant of a permit is necessary for ensuring adequate supply of rice. Information has to be gathered as to the pattern of trade and commerce in rice in the locality, the effect that the operation of the new or the defunct rice mill may have on the local economy, and the necessity or otherwise for an addition to the productive capacity of the existing rice mills in the locality. The enquiry *inter alia* must be directed to ascertain whether hand pounding industry in the locality is already well organised and whether the establishment of a new rice mill is likely to affect adversely that industry.

The object of the Act, it is manifest, is not to give monopoly in rice mill business, but to regulate the rice milling industry in the interests of the general public. At the same time, it emerges from the statutory provisions and rules that the grant of a permit is not arbitrary, but should have due regard to the local potential for entertaining a new rice mill or what may be called local economic expediency, namely, the availability of paddy in the area to be hulled, the existing number of rice mills which serve the public need, the availability of power and water supply for the efficient running of the rice mills and the adverse effect a new rice mill may have on allied industries like hand pounding industry. Rice milling industry is thus a controlled business and there is a restriction on the citizen's right to carry on the business or occupation of rice milling. The regulation purports to impose reasonable restrictions in the interests of the general public. In the cases before us, the existing rice mill owners carrying on business under the Regulation complain that the regulation or rules made thereunder have been violated by the administrative agencies, authorised to grant permits, by granting fresh permits when not warranted under the regulation and rules made thereunder. This contravention of the regulation or rules, it is their

case, prejudicially affects them, the local economy being disturbed.

3. The Full Bench reference is confined to a very narrow question; but counsel would raise other points. *Inter alia* Mr. V. K. Thiruvengkatachari, learned counsel appearing for the respondent in one of the cases, would contend for invalidating the Act itself. It is said that the Act unreasonably restricts the carrying on of a common occupation and is, therefore, violative of the rights guaranteed under Art. 19(1) (g) of the Constitution. Reference is made to the opinion of the Supreme Court, United States, expressed in *New State Ice Co. v. Liebmann* 285 US 262 at 277, 279=78 L Ed 747; that a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as manufacturing ice, cannot be upheld consistent with the Fourteenth Amendment. It is urged that, if Act 21 of 1958, and rules made thereunder could be utilised by an existing rice mill owner to prevent a competitor from entering into the business, the Act should be struck down as not regulating the rice milling industry, but as precluding persons from engaging in the industry. In view of the limited nature of the question under consideration in this reference, we leave open the question of vires of the Act. Nor is it necessary for us to examine whether existing rice mill owners are entitled to notice on an application for a permit to instal a new rice mill in the locality and whether the authority, when overruling objections raised by existing rice mill owners who intervene must give reasons for doing so.

4. It is not contended for the existing rice mill owners that any of their fundamental rights is violated. They say "we do not have and we are not claiming any monopoly in the business. We are carrying on business under the restrictions imposed by the Act and rules made thereunder. When, without due regard to local economy, availability of paddy and the capacity of existing rice mills, a permit is granted to another person, the grant prejudicially affects our business. But we are not free to adjust our economy. We cannot shift elsewhere at our convenience to maintain the required turnover for profitable business. We are constrained to carry on the business under the Act and the rules thereunder. Even so, let the new entrant be permitted to enter business, if that can be done subject to the same conditions, that is in accord with the Act and rules. Arbitrary grants in breach of the law in a business activity regulated by the statute injures our business. Constrain the authority administering the Act to apply the law and rules current to all and at all stages with an even hand, so that the rule of law may prevail."

The question is whether, when that is the prayer, it is correct for this Court to say, without examining whether in fact there is

breach of any rule or the Regulation and whether there is reasonable cause for feeling aggrieved, that the grievance of an existing rice mill owner, if any, is not one which the Court should take cognisance of and grant redress under Article 226 of the Constitution, and turn him away at the threshold. Our answer, as will be presently seen, has to be 'no'.

5. Article 226 of the Constitution confers powers on High Courts in language of the widest amplitude to issue to any person or authority, including in appropriate cases any Government orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, not only for enforcement of fundamental rights but also for any other purpose. The Article does not, in terms, provide as to who can apply for writs or orders thereunder. It is pointed out by the Supreme Court in *Calcutta Gas Co. Ltd. v. State of West Bengal*, AIR 1962 SC 1044 at p. 1047:

"It is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right... The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified".

In *Election Commission, India v. Saka Venkatarao*, AIR 1953 SC 210, 212, the Supreme Court observed that power of High Courts for issuing directions, orders or writs for purposes other than fundamental rights was conferred with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England. In *Basappa v. Nagappa*, AIR 1954 SC 440 at p. 443 the Supreme Court said:—

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

In the light of the above observations, when on the question as to who may legitimately apply for certiorari, it may not be out of place to examine the broad principles on which the standing of an applicant for certiorari is viewed in English Courts. We are assuming that there is good ground for the remedy. No serious problem of locus standi can properly arise, when a judicial or quasi-judicial order of a *lis inter se* between parties is sought to be quashed. In such a case manifestly a party could be aggrieved by an adverse decision, and, so,

would have status to attack it. Again, if an authority has power to do an act under a statute which will prejudicially affect a citizen, then, even though there are no two parties apart from the authority and the person affected, and the contest is between the administrative authority and a citizen opposing it, clearly the citizen, would be a person aggrieved if the order passed is against him. The question of locus standi acutely arises for consideration, when third parties who oppose such orders are affected by them. Is it open to them, because they have been prejudicially affected, to question the legality of the orders passed on one or other ground on which a writ of certiorari could be issued? The citizen affected may not be able to aver infringement of any common law right or direct violation of his individual right yet the citizen's interests might have been adversely affected by an unreasonable or arbitrary determination of the administrative authority. Keir and Lawson in *Cases in Constitutional Law*, 5th Edn, page 406, have this to say on the question:

"As has already been said, the direct control of public authorities becomes especially necessary when a subject cannot show that he has suffered the infringement of an actual right. The question therefore arises, what sort of locus standi an applicant for relief must have. The matter has been mainly discussed of recent years in relation to the prerogative orders and the view is generally held that, although the older decisions seem to apply different tests to the various orders, at the present day the matter is entirely in the hands of the Judges, except where the Crown applies for an order and probably also where the applicant, though a subject, can show that an actual right of his has been infringed. This discretionary power of the Judges, since it allows them to refuse an order on general grounds, also makes it unnecessary for them to insist on any proof of locus standi in the applicant; they can in a proper case say that his interest is too remote without giving any special reasons. Thus the prerogative orders can be granted at the instance of any person who has an interest sufficient to satisfy the Judges that he has reasonable grounds for his application; and, for instance, it was once a matter of course for a brewery company to apply for certiorari to quash a licence granted to a rival company. This freedom from strict rules of locus standi would seem to be one of the most valuable characteristics of the prerogative orders."

In our view, this sums up the position in England neatly. To examine some of the leading cases; in *R. v. Surrey JJ* (1870) LR 5 QB 466, Justices had made an order that the repair of certain unnecessary roads by the parishes should cease and be stopped up. An appeal against the order failed. The statute concerned had provided that notices of the stopping-up should appear at each end of the roads to be stopped up. But

notices had appeared only at one end of each of the roads. On certiorari being sought by an inhabitant, to have the order quashed, a question arose as to who should apply for the writ. The following observations of Cockburn C. J. governed the case:

"I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiae*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of party aggrieved, who is entitled to relief *ex debito justitiae*, if he suffers from the usurpation of jurisdiction by another Court."

The expressions certiorari "of right" or "*ex debito justitiae*" mean only certiorari that cannot be had until due grounds are shown, but then will not be refused unless the grounds shown are answered. In *Reg v. Nicholson* (1899) 2 QB 455, 471, Vaughan Williams L. J. remarked that, besides the case of an aggrieved person who applies as of right for the writ, there is another case in which the Court has regard to the question whether the applicant is an aggrieved person, and that is where the Court has to exercise its discretion as to the issue of the writ. "In such a case" it is observed, "the Court will consider whether the interest of the applicant is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to have no sufficient ground for the issue of a writ." A. L. Smith L. J. observed that as a matter of discretion the certiorari ought not to go, as the applicants should have shown that they have a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public. In *Rex v. Groom Ex parte Cobbald*, 1901-2 KB 157, 162, a case under the Licensing Act relating to sale of intoxicating liquors, Lord Alverstone C. J. after observing that if he could see his way to decide against the applicants for certiorari who were only rivals in trade of the person to whom the licence had been granted and were taking a purely technical objection he should be glad to do so, made the rule absolute as he had to recognise their locus standi. He observed:

"As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a certiorari are required to be persons aggrieved. It is sufficient if they have a real interest in the decision of the justices, and they have in this case. They took the point now raised before the Justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they

had not a sufficient interest in the matter to enable them to apply for the rule."

In *Rex v. Ex parte Howitt*, 1921-1 KB 248, 255, another case under the Licensing Act in respect of sale of liquors, setting out the true principle on which Courts act in the matter of certiorari, the Earl of Reading C. J. observed:

"Here the applicant had an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered."

It was further observed:

"The question whether a person has a particular interest in the subject matter as distinguished from the interest which the general public has must always be a question of degree. Of course, it may be that a person's interest is so slight that the Court will not act upon it, but where, as here, it is substantial the Court is bound to issue the writ when it appears on the face of the order that there has been a wrongful exercise of jurisdiction in the sense of an excess of jurisdiction."

The applicant in that case, it is remarked, did not stand in the same category as a member of the public who could be said to have only a general interest in seeing that the law was properly carried out; but he had a particular interest in the subject matter and that was shown by the fact that he incurred the expense of instructing Counsel to secure if he could, the refusal of the confirmation, and to contend that the confirming authority had no jurisdiction. The applicant for writ in that case was only a licensee of other premises in the same borough. We may here notice that the principle, enunciated in the foregoing two decisions, was accepted by a Full Bench of this Court in *S. M. Transport v. Raman and Raman*, AIR 1961 Mad 180 at p. 184 (FB). Referring to these decisions, the Full Bench observed—

"The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered."

In *Maurice v. London County Council*, 1964-2 QB 362, 378, interpreting the words "persons aggrieved" in a statute, Lord Denning M. R. observing that the narrow view that had been given to the words in the Court that it meant a person who had suffered a legal grievance must be rejected adopted the following observations of the Judicial Committee in *Attorney General of the Cambia v. N'Jie*, 1961 AC 617, 634:—

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

A wide interpretation has been given to the words "persons aggrieved", even when they are found in a statute. When an order is passed against a person prejudicially affecting his interest, he may have cause for genuine grievance. The determination need not have arisen between him and the authority; it would be sufficient if he had intervened to protect his interests. In the English cases under licensing Acts cited above, an existing licensee, as a person concerned with the grant or withholding of licence to another public house, was held to have sufficient interest to be a person aggrieved. Another illustration case where the interest was not considered remote to give locus standi is the decision in *R. v. Minister of Health ex p. Dore* 1927-1 KB 765. There, an auditor had surcharged Borough councillors for overpaying or expending and when the Minister of Health without jurisdiction remitted the surcharge, a person who was only a rate-payer from the District which the Councillors, represented, applied for and had certiorari. In a recent case *Reg v. Russell Ex parte Beverbrook Newspapers Ltd.*, 1968-3 WLR 999 at p. 1003, the question arose whether the proprietors of a newspaper have sufficient standing to apply for certiorari to quash an order in committal proceedings, which lifted the restrictions against publication of the proceedings imposed under the Criminal Justice Act, 1967 to a limited extent only. The Act permitted removal of the restrictions on an application by a person charged, and on the application of one of the five persons involved, the Magistrate lifted the ban limiting its effect to those parts of the proceedings relating to the applicant. The proprietors of the newspapers contended that, in law, in the circumstances, they were entitled to an unlimited order and applied for orders of certiorari and mandamus. On the question whether the newspaper proprietors had a standing to make the application, Parker C. J. observed that the standing of the proprietors of the newspaper to apply for the order was perfectly clear and they were certainly "a person aggrieved" so as to be able to make the application. S. A. De Smith in his *Judicial Review of Administrative Action*, at p. 313, sums up the position thus:

"...in strict law any member of the public may apply for certiorari to quash an order; in practice no application is likely to succeed except one made by a person aggrieved; the meaning of a person aggrieved is, for this purpose, much wider than in most other branches of the law; but an applicant's personal interest in the subject-matter of an impugned order may be too slight or too remote for him to be tested as a person aggrieved by it."

The broad principles are well established. The interest of the applicant need not be proprietary, but as a claim for certiorari implies a grievance, there must be a grievance — a grievance that the Court would take cognisance of. Having regard parti-

cularly to the amplitude of the power of the Court that may be invoked under Art. 226, a scrutiny of the locus standi of an applicant for certiorari is clearly necessary to keep off meddlesome interlopers and professional litigants invoking the jurisdiction of the Court in matters that do not in the least concern them. In Venkatswara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828, 833, the Supreme Court observes:

"This Court held in the decision cited supra, (AIR 1962 SC 1044) that 'ordinarily' the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect to a proprietary interest; it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression 'ordinarily' indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof."

An existing rice mill owner who contends that he is prejudicially affected by the grant of a permit for installation of another mill in the locality contrary to law would, manifestly under the principles discussed above, be entitled to apply for relief under Article 226. A case where a business rival was held to be a person aggrieved is the recent decision of the Supreme Court in Lakshminarain v. State Transport Authority U. P., AIR 1968 SC 410, 413, a case under the Motor Vehicles Act. Section 47 (3) of that Act provides for determination by the Regional Transport Authority of the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in a region or in any specified area or route within the region. There is no specific provision for representations to be made at an enquiry in the matter by persons already providing transport facilities. A revision is provided for from the order at the instance of a person aggrieved. While answering in the affirmative the question whether a revision would lie at the instance of an existing operator as a person aggrieved, the Supreme Court observed:

"We are unable to say that no existing operator can be aggrieved by an order made under Section 47 (3), increasing or decreasing the number of stage carriages; it would depend on the facts and circumstances of each case. In a particular case it may be to his advantage and he then would not file a revision against it, but if he files a revision when an order made under Section 47 (3) is prejudicial to his interests, there is no ground for denying him the right to approach the revisional authority and seeking its order. An order under Section 47 (3) affects the future working on a route and we are of the view that such an order would have repercussions on the working of the existing operators, whether for their good or not."

Even so the installation of a fresh rice mill would have its repercussions on the working of existing rice mills in the locality. Existing rice mill owners may be affected by the installation of a new rice mill, if the paddy available in the locality is not sufficient to go round for all the mills. It is thus clear, on the legal principles involved and on the authorities, that an existing rice mill owner will have locus standi to approach this Court for certiorari, if he is aggrieved by the grant of a permit for a fresh rice mill in the locality. The Act may provide for appearance and representation by existing rice mill owners in the locality. The Act may not provide for appearance and representation by existing rice mill owners in the locality. But the authority is constrained, by the law and rules made thereunder, to have due regard to certain considerations. There is nothing to preclude an existing rice mill owner suo motu placing before the authority these considerations, as failure to have regard to them may affect him prejudicially. An adverse order need not necessarily be against a person, who, as of right, is entitled to make representation. In Lakshminarain's case, AIR 1968 SC 410, 413, the existing operator had been given no statutory right to make representation. S. A. De Smith in his Judicial Review of Administrative Action at p. 307, referring to authority, states:—

"It would seem that one who has no right to appear or to be represented at a hearing may nevertheless be a person aggrieved by the determination made in consequence of that hearing."

It is relevant, in this connection, to refer to the decision of a Division Bench of this Court in Valliamma v. State of Madras, AIR 1967 Mad 332, 333, where a person applied for certiorari to quash proceedings under the Land Acquisition Act in respect of a land adjacent to his land. When the question of locus standi of the applicant was raised, it was observed by this Court:

"It is not in dispute that the writ appellant has a site immediately adjoining the site proposed to be acquired as a burial and burning ground; if the writ appellant builds a house thereon, and other houses also spring up in the locality, the inmates of those houses may very well claim as the Kala Kshetra authorities previously did, that the proximity of this cremation and burial ground is an injury to health and hygiene. In that sense, the writ appellant is a person affected and it is in accordance with the principles of equity and law, that too rigid an interpretation of that term ought not to be adopted by Courts."

The Court proceeded in the view that the applicant had, by reason of his local situation, a peculiar grievance of his own entitling him to a writ *ex debito iustitiae*.

6. The decided cases show that when certiorari is sought, the Court generally looks for some personal interest of the applicant in the matter, something more substan-

tial and related to the applicant than due observance of law by authorities, and do not countenance a mere excess of zeal in the observance of law by others. A person who is denied a permit or one who is wrongfully deprived or refused something to which he is entitled, or on whom a legal burden is cast are obvious cases. But that does not exhaust the list. Other persons may be affected and genuinely aggrieved by excess or abuse of powers. The requirements as to the standing of an applicant for certiorari cannot be circumscribed by any narrow limitation. Of necessity it would vary according to the law administered, the illegality alleged, and the grievance suffered. The right to apply for relief deeming himself aggrieved—if that is the test—is one thing; making out a case for the issue of a certiorari is a different thing. That would depend on the judicial scrutiny of the record in relation to and his establishing one or other of the recognised grounds for quashing. The necessity for judicial scrutiny, when a person comes to Court complaining against an act of commission or omission of an administrative authority regulating trade, business or occupation under law which prejudicially affects him, springs from our concept of the supremacy of the Rule of law and the authority of the Court to determine the legality of the act. The fact that the licencing law vests the authority with some discretion in the matter, does not take the act of the authority out of judicial scrutiny. When an authority is entrusted with discretion, the authority must direct himself properly in law. He must direct his attention to matters which he is bound to consider and he must exclude from consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, then he oversteps the bounds of his jurisdiction. In matters that could vitally affect citizens in their normal avocations, trade and business, there is no such thing as absolute discretion in administrative authorities. The law on these matters, to be valid, has to provide guide-lines and the discretion has to be controlled by the guide-lines. We may here adopt the observations of Lord Reading in *Ridge v. Baldwin*, 1964 AC 40, where the learned Law Lord said—

“...nothing short of a decision of this Court (House of Lords) directly in point would induce me to accept the position that, although an enactment expressly requires an official to have reasonable grounds for his decision, our law is so defective that a subject cannot bring up such a decision for review however seriously he may be affected and however obvious it may be that the official acted in breach of his statutory obligation.”

Of the decisions of this Court on the question under consideration, the earliest directly on the question is that of Rajagopalan J. in 1957-2 Mad LJ 1 = (AIR 1957 Mad 551). It was given under the Rice Mills Licensing Order, 1955, which was replaced by the Rice

Milling Industry (Regulation) Act, 1958. It is not contended that the replacement of the licensing order by the Act makes any difference. The applicant for certiorari in that case was an existing rice mill owner who objected to the grant of a fresh licence in the locality. On the question of locus standi of the applicant, the learned Judge observed—

“In my opinion a statutory right to object to the grant of licence or permission may not be the exclusive test to apply in deciding whether an applicant for a writ of certiorari is an ‘aggrieved’ person entitled to challenge the validity of the order which he seeks to avoid....the petitioner before me certainly had an interest of his own in the question, whether the third respondent should be granted a licence to work a rice mill in close proximity to the petitioner’s. That the statutory rules in the Rice Mills Licensing Order did not specifically confer a right on a trade rival, situate as the petitioner was, to object to the grant of a licence under that order may not in my opinion, affect the real principle to apply in such cases.”

In the next case, *Ramasundara Nadar and Co. v. State of Madras*, W. P. 644 of 1961, Jagadisan J. having found against the applicant on the merits, considered it unnecessary to examine the question whether the applicant had any locus standi. In *Ramanathan Chettiar v. Board of Revenue*, 1963-2 Mad LJ 320, when the question of locus standi of existing rice mill owners was raised, Veeraswami J., observed that, as the records established that the authority was satisfied about the surplus position of paddy, before the issue of the new permits, the petition for certiorari need not be dismissed for want of locus standi. There is no express decision on the question of locus standi.

7. W. A. 195 of 1962 (Mad), which *Kailasam J.* purported to follow and is relied on before us, does not, on our reading of the judgment (one of us was a party to it), decide the question of locus standi. The writ appeal was dismissed, at the admission stage, on an examination of the case on merits. It is observed therein:

“There are no materials to assume that the Commissioner did not consider the relevant matters. Further we are by no means satisfied that by granting the licence to the first respondent any right of the appellant had been affected so as to entitle him to approach this Court by way of a writ of certiorari.”

The reference to ‘right of the appellant’, it is apparent from the context in which the above observation was made is to the factual aspect. Referring to the argument that the productive capacity of the village being limited the running of more than four rice mills for the locality would entail a lessening of the business of the appellant in that only less paddy would come to his mill for husking, it was observed:—

“That argument is based upon several speculative hypothesis, none of which has

been made out by the materials available on record."

We are unable to take this decision as determining that an existing rice mill owner has no locus standi to question the grant of a permit for a fresh rice mill in the locality. In *Lakshmiamma v. Commissioner for Land Revenue*, W. P. 1091 of 1962 = ILR (1964) 2 Mad 869, Veeraswami J., declined to entertain the writ petition, filed by an existing rice mill owner who had opposed the grant of a permit to instal a new rice mill in the area, on the ground that the applicant could not be deemed to be a person aggrieved. On writ appeal, therefrom, ILR (1964) 2 Mad 869 at 871 = W. P. 1091 of 1962, the dismissal of the writ petition was confirmed, but on other grounds on the merits. On the question of locus standi, the learned Judges observed—

"The conclusion reached by the learned Judge can, in our opinion, be supported on the merits of the case as well."

The question of locus standi was not discussed. All the same the learned Judges were not inclined to differ from the view taken by Veeraswami J. The question was not specifically left open. The question of locus standi was the subject of specific discussion and consideration by Kailasam J., in W. P. 2332 of 1966 (Mad), referred to already. The learned Judge proceeded in the view that the mere fact that a person who has a mill in close proximity to the one to which licence has been granted is likely to suffer financial loss is not sufficient to make him an aggrieved person in law. The learned Judge thought that the decision of the Division Bench in W. A. 195 of 1962 (Mad), has held that the grant of a new licence to a person will not entitle an existing rice mill licence holder to approach this Court for a writ of certiorari. In this view, the learned Judge would hold, as already stated, that the decision in 1957-2 Mad LJ 1 = (AIR 1957 Mad 551), cannot be said to be good law. The learned Judge observed that, as the petitioners before him (existing rice mill owners) were not aggrieved persons, they were not entitled to move this Court and 'challenge the orders on any ground'. It may be observed that the learned Judge, however, examined the records produced by the Government, and was satisfied that an elaborate enquiry had been made by the authorities in compliance with the requirements of the Act and rules. The learned Judge, it may be pointed out, in *Veerappa Gounder v. State of Madras*, W. P. 1042 of 1967 (Mad), quashed an order granting permit, on the application of an existing rice mill licence holder observing:—

"It is no doubt true that this Court has held that an existing rice mill licence holder is not a person aggrieved. But the Court has the discretion to grant a writ at the instance of even a stranger who brings to the notice of the Court that statutory requirements have not been complied with.... This, in my

opinion, is a fit case for the issue of a writ, even though the petitioner cannot be called an aggrieved person."

The decision of Kailasam J. (in W. P. 2332 of 1966 etc. batch) was taken up in appeals, *Paramasiva v. Pannerselvam* batch, W. A. 87 of 1967 (Mad). The writ appeals were dismissed at the admission stage itself. On the question whether existing rice mill owners who had objected to the grant of new permits are aggrieved persons, it was observed that it was not necessary to examine the matter at any length for disposal of the writ appeals. The point particularly pressed in the writ appeals was the absence of reasoning in the order granting a permit and the Court was satisfied that there was an elaborate enquiry, at which all objections of the objectors were duly considered. The Court was inclined to agree with the contention of the objectors that the authorities, while granting the permit, were exercising 'some kind of a quasi-judicial function, if for no other reason, for the sufficing reason that to refuse a permit, may be to abridge or curtail a fundamental right.

8. In the appeal in W. A. 150 of 1968 (reported in 1969-1 Mad LJ 143), Veeraswami O. C. J. and Ramaprasada Rao, J. from a decision of Kailasam J., dismissing an application for certiorari questioning the grant of a permit for installation of a rice mill by the representative of a temple on the ground that the order granting the permit was an administrative order and that in any case the applicant could not be considered to be an aggrieved person, the learned Judges examined the records and felt satisfied that the licensing authority, in making the impugned order under Sec. 5 of the Act, had applied its mind to all the relevant matters enjoined by the statutory provision to be taken into account. On the contention of the Government that the applicant in any case cannot be regarded as an aggrieved person, the Court, while observing that the question did not call for consideration in the case, affirmed the principle laid down by this Court in AIR 1961 Mad 180 (FB) at p. 184, already set out, that the applicant must have interest distinct from the general inconvenience which may be suffered by the law wrongly administered. The learned Judges were inclined to the view that an existing rice mill owner would be a person aggrieved, for they observe, when examining the locus standi of the appellants before them:

"He is not a rival applicant for a rice mill permit, nor is he the owner of a rice mill, nor, as far as we are able to see, is he interested in the matters, specified in Section 5 (4) of the Act."

The decision of the Andhra Pradesh High Court in *Venugopala Reddi v. Amara Venkata Narasimhalu*, AIR 1962 Andh Pra 363, 368, does not help the respondent, as the grant of permit in that case was found to be in conformity with the licensing provision. It

was observed that an existing rice mill owner could not object merely on the ground that there was likelihood of his profits in the trade being diminished, as he had no exclusive monopoly to do the rice milling business in the area though he was entitled to his fundamental right under Art. 19 (1) (g) to carry on his trade or business. Manifestly there was no ground for quashing. The decision of the Madhya Pradesh High Court in *Maina Bai v. State of Madhya Pradesh*, AIR 1965 Madh Pra 247, to which reference was made for the respondent, has no relevancy in the context of the issue now under consideration. The application for certiorari in that case was against an order rejecting an application for the grant of rice milling permit. The question of locus standi as such was not raised and considered.

9. It is not contended for the existing rice mill owners that they have monopoly in their area. Nor do they claim a right to question in certiorari proceedings the installation of a fresh rice mill in their area, if there is no violation or infringement of the rules and regulations governing the grant of fresh permits, merely on the ground that their own trade or business may go down. Clearly if the law is wrongly administered and an existing rice mill owner is prejudicially affected in consequence, his interest in due observance of the law is personal and sufficiently substantial. We are of opinion, that an existing rice mill owner who has objected to the installation of a fresh rice mill in the locality and contends that he has been prejudicially affected by the grant of permit for installation of a fresh rice mill, has sufficient interest to give him locus standi to make an application for certiorari under Article 226. In our view, cases taking the contrary view are not correctly decided. The rejection of the applications for certiorari in the cases now before us on the ground of want of locus standi cannot be sustained. The writ appeals are allowed. The writ petitions will have to be disposed of on merits. Petition for leave to raise additional grounds are dismissed.

10. No order as to costs.

Appeals allowed.

AIR 1970 MADRAS 145 (V 57 C 38)

KAILASAM, J.

Antiseptic Employees Unit, represented by the 'Tamilnad Press Workers' Union, Madras-2, Petitioner v. State of Madras, represented by its Secy., Dept. of Industries, Labour and Housing, Madras and another, Respondents.

Writ Petn. No. 2205 of 1966, D/-17-6-1968.

(A) Industrial Disputes Act (1947), Section 10 (1) — Payment of Bonus Act (1965), Section 34 (1) — Settlement arrived at

GM/HM/C879/69/LGC/T

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between management of Pressand Workers union on 27-3-1962 relating to dearness allowance, bonus and gratuity — Regarding claims made by union failure report made on 20-1-1966 — Bonus issue — Order of Government declining to make a reference on ground that bonus issue is covered by settlement dated 27-3-1962 held an obvious error — Question as to whether payment of Bonus Act was applicable or not had to be considered with regard to demand made.

(Para 3)

(B) Industrial Disputes Act (1947), Sections 10 (1), 12 (5) and 19 (2) — Settlement arrived at between management of press and workers' union relating to dearness allowance and conditions of service etc. — Demand for enhancement of dearness allowance and revision of grades — Government refusing to refer demand on grounds that the management was prepared to pay same dearness allowance as agreed with other union and that rate compared favourably with rates in other presses and that the existing grades and wages also compared favourably with those in similar establishments — Held, Court could not canvass order of reference closely to see if there was any material before Government to support its conclusion, as if it was a judicial or quasi-judicial determination — Government had the discretion to make a reference or not — Further, there being failure to give notice under Section 19 (2), which goes to root of the matter, order of Government can be supported on that ground also. Case law discussed.

(Paras 6, 8)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 SC 585 (V 55) = 1968-1 Lab LJ 555, Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. Workmen | 8 |
| (1968) 1968 Lab IC 832 = 1967-2 Lab LJ 407 (Mad), Coimbatore Dt. Textile Mill Staff Union v. State of Madras | 4 |
| (1964) AIR 1964 SC 1617 (V 51) = 1964-1 Lab LJ 351, Bombay Union of Journalist v. State of Bombay | 5 |
| (1964) AIR 1964 Mad 468 (V 51) = 1964-1 Lab LJ 228, Govt. of Madras v. Workmen of South India Saiya Sidhanta Works Publishing Society | 4 |
| (1960) AIR 1960 SC 1223 (V 47) = 1960-2 Lab LJ 592, State of Bombay v. K. P. Krishna | 4 |
| (1958) AIR 1958 SC 1018 (V 45) = 1958-2 Lab LJ 634, State of Bihar v. D. N. Ganguly | 4 |
| (1953) AIR 1953 SC 53 (V 40) = 1953-1 Lab LJ 174, State of Madras v. C. P. Sarathy | 4, 6 |
- G. Venkataraman, for Petitioner; T. Selvaraj, for Govt. Pleader and S. Swaminathan and K. Ramagopal, for Respondents.

ORDER:— This petition is filed by the Antiseptic Employees Unit, represented by the Tamilnad Press Workers Union, for the issue of a writ of Mandamus, directing the State Government to refer the dispute relating to all the demands contained in the Order of the State Government in G. O. Rt. 1306 dated 7-7-1966 for adjudication under Section 10 of the Industrial Disputes Act. The second respondent is a Journal represented by its partner one Sri Vyasa Rao. The journal is English medical monthly with a circulation of 14,000 copies under the name and style of 'Antiseptic'. Besides this, a monthly medical journal known as 'Health' is also printed and published by the second respondent with a circulation of 3400 copies monthly. There are 13 clerical staff and about 22 workers employed by the Management. A settlement was arrived at between the management of the Press on the one hand and the clerical staff and the workmen on the other on 27-3-1962, relating to service conditions of the staff, dearness allowance, bonus and gratuity. The agreement provided that the staff and the labourers should be provided with 2½ months bonus a year. The agreement was to be in force for three years. The Madras Press Labour Union on 22-4-1965 made certain claims and the Tamilnad Press Workers Union also came out with certain claims on 7-6-1965. On 13-8-1965, an agreement was reached by the Management with the Madras Press Labour Union for two years regarding the annual increment, dearness allowance, bonus and gratuity. The petitioner Union was not a party to this agreement. Regarding the claims made by the petitioner Union, a failure report was made on 20-1-1966, and the Government declined to make a reference on 7-7-1966. Hence this writ petition is filed for a direction to refer the dispute for arbitration.

2. The impugned order is dated 7-7-1966. It relates to six demands. The petitioner Union confines its relief to demands 1 to 3 in this petition and the other demands, therefore, need not be considered in this petition.

3. Demand (3) refers to payment of bonus. The reason given by the Government for not referring the dispute is stated as follows—

"The bonus issue for the years 1962-63, 1963-64 and 1964-65 is covered by the settlement dated 27-3-1962 entered into by the Management with the Madras Press Labour Union under Section 12 (3) of the Industrial Disputes Act."

Mr. Dolia, the learned counsel for the petitioner submitted that the Bonus Ordinance was passed on 31-5-1965 and the payment of Bonus Act came into force on 20-5-1965. Section 34 (1) of the Act enacts that the provisions of the Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in

force and or in the terms of any award, agreement, settlement or contract of service made before the 29th May 1965. If the Act is applicable, no agreement, settlement or contract of service made before 29th May 1965, can be relied on but the provisions of the Act will have to be applied. Section 22 of the Act enacts that where any dispute arises between an employer and his employees with respect to the bonus payable under this Act or with respect to the application of the Act to an establishment in public sector, then such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act.

Section 3 of the Act provides that where an establishment consists of different departments or undertakings or has branches, whether situated in the same place or in different places, all such departments or undertakings or branches shall be treated as parts of the same establishment for the purpose of computation of bonus under the Act. The proviso states that where for any accounting year a separate balance sheet and profit and loss account are prepared and maintained in respect of any such department or undertaking or branch, then, such department or undertaking or branch shall be treated as a separate establishment for the purpose of computation of bonus under the Act for that year, unless such department or undertaking or branch was immediately before the commencement of that accounting year treated as part of the establishment for the purpose of computation of bonus. The Government have declined to make a reference on the ground that the bonus issue is covered by the settlement dated 27-3-1962. As pointed out, Section 34 (1) of the Payment of Bonus Act makes it clear that an agreement, settlement or contract of service made before 29th May 1965, will not be effective and the provisions of the Act will govern the issue relating to bonus, if the Act is applicable. The Government have not refused to refer the demand relating to payment of bonus on the ground that the Act is not applicable.

The question as to whether the Payment of Bonus Act, 1965 is applicable or not has to be considered with regard to the demand made by the petitioner Union. The reliance on the settlement deed dated 27-3-1962 is an obvious error. The order of the Government refusing to refer the demand for payment of bonus will have to be set aside and is accordingly set aside. The Government is directed to consider the question whether the Payment of Bonus Act, 1965 is applicable or not to the demand and decide the question as to whether a reference should be made or not.

4. Demand (1) relates to enhancement of dearness allowance, and demand (2) relates to revision of grades and wages scales. The Government declined to refer the demand for enhancement of dearness allowance on the ground that the manage-

ment was prepared to pay the staff the same dearness allowance agreed to be paid under the settlement dated 13-8-1965 under Section 12 (3) of the Act, entered into with the Madras Press Labour Union, and that that rate compared favourably with the rates in other presses. The Government declined to refer the demand for revision of grades and wages scales on the ground that the existing grades and wages compared favourably with those in similar establishments. The law relating to the power of the Government to make a reference has been laid down by the Supreme Court in *State of Madras v. C. P. Sarathy*, 1953-1 Lab LJ 174 = (AIR 1953 SC 53), *State of Bihar v. D. N. Ganguly*, 1958-2 Lab LJ 634 = (AIR 1958 SC 1018) and *State of Bombay v. K. P. Krishna*, 1960-2 Lab LJ 592 = (AIR 1960 SC 1223), and by a Bench of this Court in *Govt. of Madras v. Workmen of South India Saiva Sidhanta Works Publishing Society*, 1964-1 Lab LJ 228 = (AIR 1964 Mad 468). The above decisions were considered by this Court in *Coimbatore Dt. Textile Mill Staff Union v. State of Madras*, 1967-2 Lab LJ 407 at page 408 = (1968 Lab IC 832) (Mad) and the position was summed up thus:

"A consideration of the authorities cited above makes it clear that the High Court cannot sit as a Court of appeal on the order passed by the Government. The Government in passing an order under Section 10 (1) read with Section 12 (5), is acting in an administrative character (capacity) and it has the option to make a reference or not to make a reference on the facts, taking into consideration the expediency in each case; the decision is for the Government to take and not for the Courts to interfere. The Government will be justified in refusing to make a reference where the dispute is inconsistent with the agreement between the parties. But the Court will be justified in issuing a writ of Mandamus if the Government did not act bona fide or base its conclusions wholly on irrelevant or extraneous materials or materials which were not germane for deciding the question whether a reference should be made or not."

5. Mr. Dolia, the learned counsel for the petitioner strongly relied on a decision of the Supreme Court in *Bombay Union of Journalist v. State of Bombay*, 1964-1 Lab LJ 351 = (AIR 1964 SC 1617), where the Supreme Court held—

"It is true that if the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly on disputed questions of fact the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the industrial tribunal."

This passage is later explained by their Lordships as meaning that the appropriate Gov-

ernment is not precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10 (1) read with Section 12 (5) or not, and that it must be held that a prima facie examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under S. 10 (1).

6. Mr. Dolia submitted that the order relating to demand (1) is unsustainable on two grounds, namely, that the staff had not consented to accept the dearness allowance as agreed to by the Labour Union and therefore the settlement dated 13-8-1965 is not binding on the labourers. The Government has said that the management was prepared to pay the staff the same dearness allowance agreed to be paid under the settlement dated 13-8-1965, and that that rate compared favourably with that in other presses. The statement that the rate compared favourably with the rates in other presses was vehemently challenged on the ground that there is no material on record to show that the Government compared the rates prevailing in other presses. I do not think this question can be gone into by this Court, for, as observed by the Supreme Court in 1953-1 Lab LJ 174 = (AIR 1953 SC 53), the Court could not canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was judicial or quasi-judicial determination. The Government has the discretion to make a reference or not. Considering the circumstances of the case there is no material for coming to the conclusion that the Government was not right in coming to the conclusion that the dearness allowance agreed to be paid compared favourably with the rates in other presses.

7. Regarding the second demand for revision of grades and wages scales also, the Government on a consideration of the facts have come to the conclusion that the existing grades and wages compared favourably with those in similar establishments. I do not think in the circumstances, the Court will be justified in examining the materials that were available before the Government for coming to the conclusion. Suffice it to say that there is no material to hold that the Government was in any way influenced by any extraneous material for coming to that conclusion. On these grounds, the order of the Government declining to refer demands 1 and 2 for arbitration should be upheld.

8. Mr. Swaminathan, learned counsel for the respondent, submitted that the order of the Government should be upheld on legal grounds also. He submitted that under Section 19 (2) of the Industrial Disputes Act, 1947, a settlement arrived at shall be binding for such period as is agreed upon by the parties and shall continue to be binding on

the parties, after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party to the settlement. On record, there is no material for holding that any such notice as required under Section 19 (2) of the Act was given to the management. In a recent decision of the Supreme Court in Management of the Bangalore Woollen Cotton and Silk Mills Co., Ltd. v. Workmen, AIR 1968 SC 585, it has been held that the Tribunal had no jurisdiction to adjudicate upon any claim unless a notice under Section 19 (2) had been given. The Court observed that when there is no notice as required under Section 19 (2), it would follow that there is a subsisting award binding on the parties and the Tribunal will have no jurisdiction to consider the same in a reference.

Mr. Dolia, learned counsel for the petitioner, submitted that the decision will not be applicable to a case where the absence of notice under Section 19 (2) was not raised at the earliest point of time. I am unable to find any support for this contention in the judgment. As seen from the decision, it is clear that if the agreement is not validly terminated under Section 19 (2), it continues to be subsisting and binding on the parties. Learned counsel for the petitioner submitted that the order of the Government cannot be sought to be supported on any ground not mentioned in the order itself, and therefore this ground cannot be taken into account. Even accepting this contention, I find that the order of the Government refusing to reter demands 1 and 2 cannot be interfered with. I am also of the view that as the failure to give notice under Section 19 (2) of the Act, goes to the root of the matter, the order of the Government can be supported on that ground also.

9. In the result, the writ petition is allowed with regard to demand (3), namely, demand for payment of bonus. The Government will consider the question whether the Payment of Bonus Act, 1965 is applicable or not and decide as to whether the demand should be referred to adjudication or not. With regard to demands 1 and 2, the writ petition is dismissed; there will be no order as to costs.

Order accordingly.

AIR 1970 MADRAS 148 (V 57 C 39)

RAMAKRISHNAN, J.

Ama Stores represented by its Partner M. T. M. Abubacker, Petitioner v. Collector of Madras and another, Respondents.

Writ Petn. No. 4369 of 1965, D/- 29-7-1968.

(A) Stamp Duty — Stamp Act (1899), Section 56 (1) and (2) — Collector

EM/FM/C182/69/TVN/D

holding the document to be a sale deed — Party aggrieved invoking power of Revenue Board under Section 56 (1) — Personal hearing also sought — Board confirming Collector's decision without giving personal hearing to party — Board directed to rehear appeal after hearing party, AIR 1951 Mad 276 held doubtful after AIR 1962 SC 1217 — (Constitution of India, Article 226 — Quasi-judicial tribunal — Natural justice.)

The Collector of Madras construed the terms of the document in question and came to the conclusion that it was a sale deed and not a mere agreement regarding a prior completed sale as contended by the party. In an appeal under Section 56 (1) of the Stamp Act, before the Board of Revenue as the Chief Controlling Revenue Authority. The Board of Revenue in an elaborate order agreed with the decision of the Collector and dismissed the appeal without giving the party an opportunity of being heard, though the party in the memo. of appeal had asked for it. By a writ petition the order was challenged on the ground that the personal hearing ought to have been given especially when it was asked for and that therefore there had been non-compliance with the principles of natural justice. The Revenue pleaded that under Section 56 (1) of the Act, the Authority was not exercising quasi-judicial function and therefore, it was not necessary to give a personal hearing before making the order:

Held, that under the circumstances of the case, what was exercised by the Authority was not an administrative function but a quasi-judicial function invoked for the purpose of modifying the orders of the Collector in favour of the aggrieved party. In such a case the authority has to act quasi-judicially, just as in the case under Section 56 (2). This carried with it an obligation to give opportunity to the party of being heard, especially when a large amount of duty and penalty was involved. In the present case the party himself had also asked for a personal hearing in his memorandum of appeal. The Authority was directed to rehear the appeal giving the petitioner opportunity of being heard.

(Para 7)

The more reasonable view was that after the Collector had exercised his power under Chapters IV and V by levying stamp duty, and the power of the Chief Controlling Revenue Authority was invoked by the aggrieved party under Section 56 (1) and if thereafter, that Authority proceeded to exercise that power, it must also be viewed as the exercise of a quasi-judicial function. It was immaterial for this purpose whether that power was invoked at the instance of the aggrieved party or at the instance of the Revenue, AIR 1962 SC 1217 and AIR 1966 Mad 36, Foll.; Correctness of AIR 1951 Mad 276 held doubtful after AIR 1962 SC 1217; (1950) 2 Mad LJ 564, Ref. (Para 8)

(B) Stamp Duty — Stamp Act (1899), S. 56 — Sub-sections (1) and (2) compared — (Constitution of India, Art. 226 — Quasi-judicial power).

Sub-sections (1) and (2) of Section 56 of the Stamp Act vest quasi-judicial power in the Chief Controlling Revenue Authority with this difference, that Section 56 (2) is made applicable when the Collector feels himself a doubt as to the amount of duty payable on the instrument, draws up a statement of the case and refers it with his own opinion for the decision of the Chief Controlling Revenue Authority. Under Section 56 (2) Chief Controlling Revenue Authority is moved to act by the Collector before he takes a decision; under Section 56 (1) he is moved to act by the aggrieved party after the Collector has taken a decision. AIR 1951 Mad 276 and AIR 1966 Mad 36 and AIR 1962 SC 1217, Rel. on. (Para 7)

(C) Stamp Duty — Stamp Act (1899), S. 57 — Nature of power conferred by section—In a proper case, the officer is bound to make a reference — Compulsion by issue of writ possible — (Constitution of India, Art. 226).

The power in Section 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation, and can be demanded to be exercised also by the party affected by the assessment of stamp duty. The Authority is obliged to make such a reference when an important and intricate question of law in respect of the construction of the document arises. As a public officer it is his duty to make the reference. If he omits to do so, the Court can direct him to discharge the duty in an application under Article 226 of the Constitution. AIR 1962 SC 1217, Rel. on. (Para 7)

Cases Referred: Chronological Paras

(1966) AIR 1966 Mad 36 (V 53) =
(1965) 1 Mad LJ 431, Annamalai
and Co. v. District Registrar,
Madras 3, 7, 8

(1962) AIR 1962 SC 1217 (V 49) =
(1962) Supp 3 SCR 50, Board of
Revenue v. Vidyawati 3, 7, 8, 9

(1951) AIR 1951 Mad 276 (V 38) =
1950-2 Mad LJ 399, In re Shan-
muga Mudaliar 6, 7

(1950) 1950-2 Mad LJ 564, Chief Con-
trolling Revenue Authority v. Maha-
rashtra Sugar Mills 8

T. Martin, for Petitioner; J. Kanakaraj, for
Govt. Pleader, for Respondents.

ORDER: The Petitioner, Ama Stores, represented by its partner M. T. M. Abubacker, has filed this writ petition under Article 226 of the Constitution of India praying for the issue of a writ of certiorari quashing respectively the orders of the Collector of Madras, the 1st Respondent, and the Commissioner of Land Revenue, Prohibition, Excise and Settlement of Estates, Board of Revenue, Madras, the 2nd Respondent. The petitioner contended that a certain document executed by him on 25-10-1963 was an agreement, which merely recited the facts of an already

completed sale and also the conditions under which the sale took place. Hence he pleaded that it would suffice, for the purpose of paying the appropriate court-fee under the Stamp Manual, if the document was stamped as an agreement, for which the duty payable is Rs. 2¼. This was the duty actually paid on the document, viz., Rs. 2¼. The petitioner had to bring this agreement before the Registrar of Trade Marks for the purpose of transferring the trade mark; but that officer was of the opinion that the document in question was really a sale deed and sent it to the Collector of Madras for impounding.

For the levy of proper stamp duty the 1st respondent, the Collector of Madras, construed the terms of the document and came to the conclusion that it was a sale deed and not a mere agreement regarding a prior completed sale. The decision of the Collector was that as a sale deed a stamp duty of Rs. 1460-25 should be levied, and in addition a penalty of Rs. 250 should be paid. Aggrieved against the above decision the petitioner filed an appeal to the Board of Revenue, the 2nd respondent, who as the Chief Controlling Revenue authority, has got certain powers conferred under Sec. 56 (2) of the Act. It was this power that was invoked by the petitioner in his appeal against the order of the Collector. The Board of Revenue in an elaborate order passed on 8-10-1965 came to the conclusion that the levy of stamp duty and penalty by the Collector was proper and dismissed the appeal petition of the petitioner.

2. It is contended by the learned counsel for the petitioner in this writ petition, and that is the main ground for the relief that he seeks, that the Board of Revenue as the Chief Controlling Revenue-Authority, whose appellate power the petitioner invoked, ought to have given the petitioner an opportunity for making a personal representation, especially, since in his appeal petition, he had specifically asked for that relief. It is urged for the petitioner that when the Board of Revenue disposed of the appeal only on the grounds set forth by the petitioner in the appeal memo ignoring the specific request made by the petitioner that he should be heard, there was non-compliance of the principles of natural justice.

3. Reliance was placed by the learned counsel for the petitioner on the decision of the Supreme Court in Board of Revenue v. Vidyawati, AIR 1962 SC 1217 and the decision of Srinivasan, J., in Annamalai and Co. v. District Registrar, (1965) 1 Mad LJ 431 = (AIR 1966 Mad 36), for the stand taken that a proper compliance with the duties imposed by the statute on the Board of Revenue as the Chief Controlling Revenue Authority in such a case should be viewed as involving a duty to hear the petitioner in person, especially when a large financial commitment would be imposed on him if his contentions are to be overruled. In the Supreme Court decision cited above the

matter came up before the Board of Revenue on a reference by the Collector under Section 56 (2) of the Stamp Act. Such a reference is made by the Collector when without taking a decision himself he feels doubt as to the amount of duty payable. The Supreme Court held:

"The question before the Board under Section 56 (2) being one of construction of an instrument and the application of the Act to it being a pure question of law which may result in payment of large amounts by the executants of the document, it would not in our opinion be improper to hold that for the determination of such a question the Legislature intended that the party affected by the decision of the Board of Revenue should be given a hearing, and that the Board should Act judicially in deciding a pure question of law".

4. The Supreme Court also observed at page 1220 of the judgment:

"It seems to us, considering the nature of the duty cast on the Board of Revenue under Section 56 (2) requiring it to construe instruments submitted to it thereunder and the application of the Act to them which may result in payment of heavy amounts of deficit duty and even heavier amounts as penalty, that the Legislature intended that the Board of Revenue should hear the person executing the document before saddling him with large pecuniary liability."

5. Srinivasan, J., in the second of the decisions cited above had before him a case where the District Registrar, who has got the powers of a Collector under the Stamp Act, construed a certain document and levied a stamp duty of Rs. 1138-80. The executant of the document feeling aggrieved against the District Registrar's Order moved the Board of Revenue under Section 56 (1) of the Act. At the same time the Inspector General of Registration had perused the order of the District Registrar levying duty in that case, and as the matter involved some loss of revenue he referred it to the Board of Revenue under Section 56 (2). Both the petitioner's appeal and the reference were dealt with by the Board of Revenue, and the appeal of the executant of the document was dismissed and the levy made by the District Registrar was confirmed. Srinivasan, J., who dealt with the case in the writ petition observed:

"It is true that the authority is not required under the Madras Stamp Act to furnish his reasons for the conclusion that he reached, and where the matter is put in issue and a dispute is raised and the adjudication is certainly a quasi-judicial one and imposes an onerous liability on the party, one would have expected at least brief reasons in support of the conclusions reached. More than all, as I have pointed out, no opportunity whatsoever was given to the party to make his representations before any of the authorities who dealt with the matter" *italics* (here in ") mine".

6. There was a decision of this Court given much earlier in 1950 and reported in Shanmuga Mudaliar In re, (1950) 2 Mad LJ 399 = (AIR 1951 Mad 276). Mr. P. V. Rajamannar, the learned Chief Justice, speaking for the Bench observed:

"The only ground on which this writ is sought is that the Board did not give any opportunity to the petitioner to be orally heard. There is nothing in the Act or in the Rules framed thereunder which enjoins on the Board the duty to give an oral hearing to a person who invokes their revisional jurisdiction. All that quasi-judicial Tribunal like the Board of Revenue have to do is to give sufficient opportunity to the persons who approach them for the exercise of their jurisdiction to state their case.....This opportunity has been given to the petitioner, because presumably he has stated all his grounds of objection to the order of the Revenue Divisional Officer in his revision petition."

7. The decision of the Bench of this Court was given in 1950 long prior to the decision of the Supreme Court in AIR 1962 SC 1217. The learned Government Pleader, however submits that the decision of the Supreme Court will not apply to this case because that case dealt with a reference by the Collector under Section 56 (2) of the Act, whereas the present case is an appeal petition by the party to the Board of Revenue under Section 56 (1). In such a case it is urged that the principles laid down by the Bench of this Court in (1950) 2 Mad LJ 399 = (AIR 1951 Mad 276), will apply. I am unable to agree. Section 56 (1) does not mention specifically about any right of appeal or revision to the aggrieved party in such cases. It vests in the Chief Controlling authority a power of control over the decision of the Collector. But both the judgment of this Court in (1950) 2 Mad LJ 399 = (AIR 1951 Mad 276) as well as that of Srinivasan, J. in (1965) 1 Mad LJ 431 = (AIR 1966 Mad 36), have construed that this power of control of the Chief Controlling Revenue authority under Section 56 (1) is a quasi-judicial power which could be invoked at the instance of the aggrieved party. Section 56 (2) also vests a quasi-judicial power in the same authority, namely the Chief Controlling Revenue Authority but with this difference, that Section 56 (2) is made applicable when the Collector feels himself a doubt as to the amount of duty payable on the instrument, draws up a statement of the case and refers it with his own opinion for the decision of the Chief Controlling Revenue Authority. Under Sec. 56 (2) the Chief Controlling Revenue Authority is moved to act by the Collector before he takes a decision; under Section 56 (1) he is moved to act by the aggrieved party after the Collector has taken a decision. But in either case the power exercised by the Chief Controlling Authority is the power of a quasi-judicial tribunal for deciding an issue between the subject on the one hand and the

Revenue on the other regarding the interpretation of a document. That interpretation has been held by the Supreme Court as involving a substantial question of law.

The point that arose for decision by the Supreme Court is somewhat different, namely whether on a reference by the party the Chief Controlling Revenue Authority will be obliged to make a reference to the Court under Section 57 of the Stamp Act for its determination of the proper duty payable on instrument. The Supreme Court held that the power in Section 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation, and can be demanded to be exercised also by the party affected by the assessment of stamp duty. The Authority is obliged to make such a reference when an important and intricate question of law in respect of the construction of the document arises. As a public officer it is his duty to make the reference. If he omits to do so, the Court can direct him to discharge the duty in an application under Article 226 of the Constitution.

8. Srinivasan, J., in (1965) 1 Mad LJ 431 = (AIR 1966 Mad 36), had before him an application by the aggrieved party under Section 56 (1) for collecting the levy of stamp duty and penalty by the Collector, who happened to be the District Registrar in that case. The Inspector General of Registration, the superior officer of the District Registrar, had also applied to the Board of Revenue for determination of the correct amount of stamp duty. The decision involved the question whether the Collector had levied the proper duty, and the learned Judge observed:

"When the Board was thus called upon to ascertain the amount of duty, particularly as there had been a dispute between the petitioner and the registering authority in that regard, the decision which the Board proceeded to render would undoubtedly have been more valuable had it been given after hearing what the affected party had to say in the matter."

Then the learned Judge proceeded to examine the gist of the document and found that the result of the decision of the Board was that the party would have to pay a duty of nearly Rs. 7000. The learned Judge referred to an earlier decision of the Supreme Court in Chief Controlling Revenue Authority v. Maharashtra Sugar Mills, (1950) 2 Mad LJ 564; but the later decision referred to above in AIR 1962 SC 1217, was not cited before the learned Judge. The learned Judge, however, observed:

"...where the matter is put in issue and a dispute is raised and the adjudication is certainly a quasi-judicial one and imposes an onerous liability on the party, one would have expected at least brief reasons in support of the conclusion reached. More than all, as I have pointed out, no opportunity

whatsoever was given to the party to make his representations before any of the authorities who dealt with the matter."

9. It is urged by the learned Government Pleader that the Supreme Court in AIR 1962 SC 1217 at p. 1219, proceeded on the footing that they were dealing with the matter under S. 56 (2) and not under S. 56 (1) "on the application filed by the respondents inviting it to exercise its power of control thereunder". The Supreme Court left the question open, as to whether the Chief Controlling Revenue Authority, whose power of control is invoked by the aggrieved party, is exercising a quasi-judicial power or only an administrative power. But it is difficult to hold that the scheme of the Stamp Act leaves the aggrieved party without a right of appeal especially in cases where he is ordered to pay a heavy amount of stamp duty and penalty, on the basis of the interpretation of the nature of a document for the purpose of the stamp law by a Collector, and that the only occasion when the Chief Controlling Revenue Authority is called upon to exercise quasi judicial powers, is when the Collector who feels a doubt as to the amount of duty payable on an instrument asks for his decision under Section 56 (2).

On the other hand, the more reasonable view seems to me to be that after the Collector has exercised his power under Chapters IV and V by levying stamp duty, and the power of the Chief Controlling Revenue Authority is invoked by the aggrieved party under Section 56 (1) and if thereafter, that Authority proceeds to exercise that power, it must also be viewed as the exercise of a quasi-judicial function. It is immaterial for this purpose, whether that power is exercised at the instance of the aggrieved party or the instance of the Revenue. In the present case the Chief Controlling Revenue Authority has taken up the application of the party for disposal as an "appeal" against the orders of the Collector. It has written out an elaborate order canvassing the grounds set out by the party in his "petition of appeal". From the circumstances of the case it has to be held that what was exercised by the Chief Controlling Revenue authority in this case was not an administrative function but a quasi-judicial function invoked for the purpose of modifying the orders of the Collector in favour of the aggrieved party. In such a case it is clear that the authority has to act quasi-judicially, just as in the case under Section 56 (2). This carries with it an obligation to give opportunity to the party for being heard, especially when a large amount of duty and penalty is involved. In the present case the party himself has also asked for a personal hearing in his memorandum of appeal. For the aforesaid reasons I am of the opinion that the requirements of natural justice had to be followed in this case where the Chief Controlling Revenue authority was requested by the aggrieved party to interfere in a

quasi judicial capacity. That requirement carried with it an obligation to give the party a personal hearing. I therefore allow the writ petition and quash the order of the second respondent, the Commissioner of Land Revenue dismissing the appeal of the petitioner. The second respondent is directed to restore the appeal to his file and dispose it of after giving an opportunity to the petitioner for a personal hearing. No order as to costs.

Petition allowed.

AIR 1970 MADRAS 152 (V 57 C 40)
RAMAKRISHNAN, J.

A. M. S. and Brothers, represented by A. M. Dawood Shah, Partner, Petitioner v. Union Territory of Pondicherry represented by the Chief of Contribution at Pondicherry and another, Respondents.

Writ Petn. No. 1088 of 1967 (P.) D/-21-3-1969.

(A) Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act (5 of 1966), Art. 5—Enhancement of Consumption Duty Act falls within Entry 51 and therefore within competence of State Legislature — Constitution of India, Sch. VII, List II, Entry No. 51.

Where the enhancement of consumption duty on all foreign liquors imported into the territory of Pondicherry was made by way of an amendment called the Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act, 1966 to the Pre-Constitution Act, viz. the resolution of the General Council in 1906.

Held, the levy was within the competence of the State Legislature. At the relevant period alcoholic liquor was manufactured in Pondicherry also and there was consumption duty on such liquor, what the Amendment provided for was a countervailing duty falling within Entry 51 of List II of the Seventh Schedule of the Constitution: AIR 1966 SC 1686, Ref. (Para 3)

(B) Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act (5 of 1966), Article 5 — Transport of liquor mentioned in permit effected within time granted without violation of permit — Further duty is not to be paid at time of actual movement of goods in carrier across State's frontier.

Where the authorities, under the resolution passed by the General Council in 1906, gave a period of three months for the validity of the "import duty paid permit" thus issued, one can reasonably infer that they intended to consider that the "time of entry" for the purpose of Article 5 of the Amendment Act, 1966 will be a period which could be expected to cover a period of three months commencing from the contract of sale with the foreign dealer or foreign

supplier, and ending with the arrival of the goods in the limits of Pondicherry. Because of this period of three months and because of the insistence that duty should be paid before the permit is granted, "the time of entry" has to be given an extended meaning to cover the period of three months from the date of the issue of import duty paid permit without laying stress upon the exact point of time when under the carrier in which the goods are transported crossed the State frontier. The entire period of validity of the permit, namely three months, must be viewed as time of entry for the purpose of the payment of consumption duty. The period must be treated as the estimated period to cover all incidents of actual transport of goods. If the transport is made within the time prescribed in the permit, payment of duty will be valid.

(Paras 5, 7)

Further, there may be violations which fall within the scope of non-compliance with the permit. But when such violations have not taken place, and the transport of the liquor mentioned in the permit is effected within the time granted in the permit, there is no scope of holding that a further duty has to be paid with reference to the law in force at the time of the actual movement of goods in the carrier, across the State's frontier: AIR 1962 SC 1006,, Disting.; AIR 1961 SC 41, Ref. (Para 6)

Cases Referred:	Chronological	Paras
(1966) AIR 1966 SC 1686 (V 53) =		
(1966) 1 SCR 865, Kalyani Stores v. State of Orissa		3
(1962) AIR 1962 SC 1006 (V 49) =		
1962 Supp (2) SCR 1, M/s. Chotabhai v. Union of India		11
(1961) AIR 1961 SC 41 (V 48) =		
(1961) 1 SCR 305, Universal Imports Agency v. Chief Controller		5

R. Kesavan Iyengar and K. Yamunar, for Petitioner; Govt. Pleader, for Pondicherry, for Respondents.

ORDER :— The petitioner, A. M. S. and Brothers, is engaged in the business of importing liquors into the Union Territory of Pondicherry from other States in India. Under a resolution passed by the "General Council" in 1906, which has the force of law, the Pondicherry Government was given power to levy tax called "Consumption Duty" on all foreign liquors imported into the territory of Pondicherry as well as on locally manufactured liquor. After the merger of the former French Territory of Pondicherry in the Indian Union, the above consumption duty was collected in advance from importers under a scheme called "Import Duty paid permits". Only after they had obtained such Import Duty paid Permits, were they allowed to import liquor from other parts of India into Pondicherry limits. In other words, advance payment of consumption duty was made as a condition precedent to the issue of the Import Duty paid Permit. The permit so issued was

valid for three months from the date of issue, and the transport of the liquor mentioned in the permit should be made within the three months.

2. The petitioner obtained three such Import Duty paid permits on 19-3-1966 for importing specified quantity of Brandy from a Bangalore Dealer. The rate of consumption duty which was at that time prevalent under the resolution was Rs. 675 per hectolitre. The petitioner paid this duty and obtained the permit. By a subsequent amendment called the Pondicherry Alcoholic Liquors (Consumption Duty) Amendment Act, 1966, (Act No. 5 of 1966), the rate of consumption duty payable on imported liquors was increased by 100 per cent with effect from the date when the Amending Act came into force, namely, 1-6-1966. Though the petitioner had entered into an arrangement with the Bangalore manufacturer for getting the consignments under the three aforesaid Import Duty paid Permits, the goods in question reached Pondicherry only after 1-6-1966. It may be mentioned that the period of three months which the party had under the above Import Duty paid Permits ended on 19-6-1966. The goods were transported before that date, but after 1-6-1966. Taking advantage of the doubling of the duty by Act 5 of 1966, in the interval, the respondent in this petition, the Union Territory of Pondicherry insisted that this extra duty should be paid in addition to the duty already paid; in other words insisted on a payment of the consumption duty which was the double of what was already paid. The petitioner demurred to the payment and he has filed this Writ Petition under Article 226 of the Constitution for a Writ of Certiorari for quashing the above demand for extra duty.

3. It was urged by the learned Counsel appearing for the petitioner, Thiru Kesava lyengar, that the levy of this duty itself as a consumption duty is ultra vires, after the Indian Constitution was extended to Pondicherry territory with effect from the date of the de jure transfer of the territory to the Indian Union, in 1962. According to him, the enhancement of the levy was made by way of an amendment to the pre-Constitution Act, namely the resolution of the General Council in 1906, above mentioned. If such levy of consumption duty was beyond the competence of the State Legislature, the effect is that the amendment providing for the enhancement, will be ultra vires even though the pre-Constitution Act for levy of consumption duty at the lower rate may be intra vires. The argument proceeds thus. Entry No. 51 in the State List (List II) of the Seventh Schedule of the Constitution gives power to the State Legislature to levy duties of excise on the goods specified against the entry, manufactured or produced in the State and countervailing duties at the same or lower rates on similar

goods manufactured or produced elsewhere in India: The entry includes "alcoholic liquors for human consumption". It is urged by the learned counsel that levy of consumption duty is permitted under this entry only if a countervailing duty for the goods in question are levied on the local manufactured product. Learned counsel also placed reliance upon the decision of the Supreme Court in *Kalayani Stores v. State of Orissa*, AIR 1966 SC 1686 first of all for explaining the meaning of the term "countervailing duty"; secondly for laying down the principle that the protection given under Article 372 of the Constitution to a pre-Constitution Act will not protect the amendment of a pre-Constitution Act if that Act is ultra vires the Constitution if it were to be passed after the Constitution came into force. While the pre-Constitution Act might be saved under Article 372 of the Constitution, the post-Constitution amendment if it is beyond the constitutional power of the State Legislature, will have pro tanto to be struck down. The Supreme Court decision is relied upon for these two principles. As against this it is pointed out by the learned Govt. Pleader of Pondicherry that this is a case really where there is a countervailing duty, because alcoholic liquor is also manufactured in Pondicherry, besides import, and it also suffers consumption duty. The scope of a countervailing duty is explained in the Supreme Court decision above cited, thus:—

"Countervailing duties in Entry 51, List II of the Seventh Schedule of the Constitution meant a duty levied with a view to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. It meant that countervailing duties could only be levied if similar goods were actually produced or manufactured in the State on which excise duties were being levied."

In view of the statement of the learned Government Pleader that at the relevant period alcoholic liquor was manufactured in Pondicherry also and there was consumption duty on such liquor, there is no doubt that what the Amendment provided for was a countervailing duty falling within Entry 51 of List II of the Seventh Schedule of the Constitution and therefore, within the competence of the State Legislature.

4. The further question is whether the enhancement of the duty on the goods which were actually brought inside the Pondicherry territory after 1-6-1966 and before the expiry of the permit on 19-6-1966 is in accordance with the Act. What is relied on by the respondent for the purpose of bringing the consignments within the scope of the higher duty, is that the date of the entry of the consignments into the territory of Pondicherry will decide the rate of duty payable, and not the date when

the Import Duty was paid in advance before the Import duty, Paid Permit was granted. In other words what the learned Government Pleader wants to say is that the same principles which are applied to an import duty must be held applicable to a consumption duty under the Act. He also urges that what was paid for the grant of import duty permit was only a provisional payment of duty, subject to actual levy at the time of import.

5. A perusal of the relevant provisions of the Act, shows that it really provides a consumption duty and not an import duty. The other provisions which prescribe for the method of collection, are intended only to enable effective collection of the duty. Article 5 which is relied upon for this purpose by the respondent, mentions that taxes are collected for imported beverages "at the time of unloading or entry through land" and for alcohols, liquors, liquor wines and duplicate beverages made in the colony at the time of leaving the producing factories. It may be noted that no provision is made for collecting the duty at the exact point of time when the customs frontier is crossed as in the case of an import duty. It appears to me that "the time of entry" prescribed in the Article for the purposes of levy of consumption duty is intended to prescribe in general terms that the levy should be made in the course of import. In other words "Import" for this purpose will include all the integrated transactions that go with the import. The learned counsel Thiru Kevasa Iyengar quotes the analogy of tax on a sale in the course of import. The Supreme Court in *Universal Imports Agency v. Chief Controller*, AIR 1961 SC 41 at page 47 has given a wider interpretation to 'import' in such terms:

"Applying the said principles to an import sale it may be stated that a purchase by import involves a series of integrated activities commencing from the contract of purchase with a foreign firm and ending with the bringing of the goods into the importing country and that the purchase and resultant import form parts of a same transaction. If so, in the present case the bringing of the goods into India and the relevant contracts entered into by the petitioners with the foreign dealers form parts of a same transaction. The imports, therefore, were the effect of the legal consequence of the 'things done', i.e., the contracts entered into by the petitioners with the foreign dealers."

The authorities when they insisted that a permit should be obtained before the actual import and that the prescribed customs duty should be paid at the time the permit is obtained were obviously intending to levy the customs duty from the point of view of Article 5 of the Act. The permit thus issued was described as "import duty paid permit". When they gave a period

of three months for the validity of the "import duty paid permit" thus issued, one can reasonably infer that they intended to consider that the "time of entry" for the purpose of Article 5 will be a period which could be expected to cover a period of three months commencing from the contract of sale with the foreign dealer or foreign supplier, and ending with the arrival of the goods in the limits of Pondicherry. Because of this period of three months given for the validity of the permit and because of the insistence that duty should be paid before the permit is granted, I am inclined to hold the view that "the time of entry" for the purpose of Article 5 has to be given an extended meaning to cover the period of three months from the date of the issue of import duty paid permit without laying stress upon the exact point of time when under the carrier in which the goods are transported crossed the State frontier. Stress on the exact point of time of crossing the frontier would be relevant for the levy of customs duty. But from the way in which a longer period has been incorporated at the time of granting of import duty paid permit, it appears to me that no importance was attached to the exact time of crossing the frontier, in the scheme of levy of consumption duty in such cases. If a different view is to be taken, it will lead to different duty paid permits issued on the same date depending upon the State of Law before 1-6-1966 and after 1-6-1966. This result of an invidious distinction, was not visualised when the import duty paid permit was granted in these cases.

6. Further, the permit itself states that the duty had been paid. It is not described as "Provisional duty" subject to alteration with reference to the circumstances existing at the time of the actual crossing of the State frontier. It is possible on the other hand of the import being in violation of the permit either because the goods imported were larger in quantity, or were of a different description. But such violations will fall within the scope of non-compliance with the permit. But when such violations have not taken place, and the transport is effected within the time granted in the permit, there is no scope for holding that a further duty has to be paid with reference to the law in force at the time of the actual movement of goods in the carrier, across the State's frontier.

7. The decision cited by the learned Government Pleader in *M/s. Chotabhai v. Union of India*, AIR 1962 SC 1006 dealt with an entirely different state of affairs. It dealt with the validity of the levy of excise duty by a provision in the Finance Act, with retrospective effect. It was held that in such a case, the vires of the Act could not be attacked nor its constitu-

tionality, and for that purpose, the ultimate incidence of the duty was not of importance or relevance. The question that arises here for decision is not a question about retrospectivity or a question of ultimate incidence. It is a question of the interpretation of the provision in Article 5 of the Act for the levy of consumption duty. The question is whether with reference to the terms of the import duty paid permit granted, a restricted view should be taken of the time of entry of the goods as the point when the carrier which transported the goods crossed the State frontier, or whether the time of entry should be interpreted so as to have a larger meaning to include the integrated activities that go with the commencement of the contract entered into and ending with the actual removal of the goods across the State frontier, within a reasonable time which is fixed in the permit the period for that purpose being restricted to the three months mentioned. In my opinion the entire period of validity of the permit, namely three months, must be viewed as time of entry for the purpose of the payment of consumption duty. The period must be treated as the estimated period to cover all incidents of actual transport of goods. If the transport is made within the time prescribed in the permit, payment of duty will be valid.

8. For the above reasons, the writ petition is allowed as prayed for and a writ of mandamus will issue directing the refund of excess duty collected from the petitioner.

Petition allowed.

AIR 1970 MADRAS 155 (V 57 C 41)

M. ANANTANARAYANAN, C. J. AND
NATESAN, J.

The State of Madras, Appellant v. K. A. Joseph, Respondent.

Writ Appeal No. 45 of 1969, D/-30-1-1969, from judgment of Kailasam J., D/-3-1-1969.

Constitution of India, Articles 226, 311 — Principle of natural justice — Officer cannot be placed under suspension for indefinite period.

There is a very clear and distinct principle of natural justice, that an Officer is entitled to ask, if he is suspended from his office because of grave averments or grave reports of misconduct, that the matter should be investigated with reasonable diligence, and that charges should be framed against him within a reasonable period of time. If such a principle were not to be recognised, it would imply that the executive is being vested with a total, arbitrary and unfettered power of placing its officers under disability

and distress, for an indefinite duration.

(Para 2)

Govt. Pleader, for Appellant.

M. ANANTANARAYANAN, C. J.: In our view, the learned Judge (Kailasam, J.) had every justification to make an interim order in C. M. P. No. 17995 of 1968 in W. P. No. 4637, of 1968, cancelling the suspension of the concerned Officer, under the circumstances. It is sufficient for us to observe that a period of nearly ten months had elapsed since the Officer was first placed under suspension, and that, on an earlier representation, the Court directed that charges should be framed within three months, and that, if that was not done, the petitioner could approach the Court, again, for redress, and, the outcome is the order from which the writ appeal is sought to be filed.

2. Quite apart from the broad principle that we have reiterated so often in the past, that this Court will not ordinarily interfere by way of appeal, from the exercise of an interlocutory discretion by a learned Judge of this Court, by virtue of his jurisdiction under Article 226 of the Constitution, there is a graver and more basic principle involved, upon which this writ appeal has to be dismissed. If the argument of the learned Government Pleader is to be accepted by us, it would imply that there is no principle of natural justice, under which the executive could be inhibited from indefinitely placing an Officer in the agony and disability of suspension from his office, while the question of the charges is being adumbrated in a most leisurely fashion, and years might elapse before a decision is taken. On the contrary, in our view there is a very clear and distinct principle of natural justice, that an Officer is entitled to ask, if he is suspended from his office because of grave averments or grave reports of misconduct, that the matter should be investigated with reasonable diligence, and that charges should be framed against him within a reasonable period of time. If such a principle were not to be recognised, it would imply that the executive is being vested with a total, arbitrary and unfettered power of placing its officers under disability and distress, for an indefinite duration. We cannot accept this, nor is any such claim supported by any precedent or authority.

3. Under the circumstances, the writ appeal is dismissed. The learned Judge observes that the Officer "will be allowed to resume his post". The learned Government Pleader submits that there may be great difficulty in permitting the Officer to resume duties in the very post, when the performance of those duties by him in the past, had led to the imputation of grave irregularities, we are unable to see any real difficulty in the matter. We clarify the position by stating that it is open to the Government to permit the Officer to resume duty in that identical

post, or, any post of equal grade and emoluments, which may be available for making an order of resumption of duty.

Appeal dismissed.

**AIR 1970 MADRAS 156 (V 57 C 42)
VENKATARAMAN, J.**

B. S. Ramappa and another, Appellants v.
B. Monappa and another, Respondents.

A. A. O. No. 95 of 1965 and C. M. P. No. 989 of 1968, D/-17-6-1968, from order of Asst. Registrar of Trade Marks, Madras, D/- 20-3-1965.

Trade Marks Act (1940), Ss. 10 (2), 14 (1), 31, 32, 39 — Permission to use trade mark is not assignment of the mark — Partial assignment hit by Ss. 31 and 32 — For registration under S. 10 (2) the claimant should be the proprietor — Under special circumstances of case, Court can suggest further alterations in the mark to make it distinct from the original and to direct registration of such mark — (Trade and Merchandise Marks Act (1958), Ss. 12 (3), 18, 39, 40, 48 and 49).

One B. Ramappa was the founder of a trade mark and was using the same in respect of tiles manufactured in two factories viz., Jayaram Tile Works and Indian National Tile Works. On 17-1-1950, B. Ramappa executed a registered settlement deed in favour of his elder son Monappa whereby he gave away the Indian National Tile Works to the settlee, with all the equipment and implements, movables and immovables, contained in the factory for the manufacture of tiles. The movables included wooden frames and iron press for manufacturing tiles. The presses contained the disc on which was imprinted the trade mark which was not removed by the founder. Monappa claiming to be the owner of the trade mark in respect of tiles manufactured in his factory, began using the above trade mark with slight alterations, which, however, did not sufficiently distinguish the mark from the original as invented by the founder. The founder who retained the Jayaram Tile Works continued to use the trade mark in its original form and that factory subsequently came under the ownership of the founder's younger son B. S. Ramappa who got the trade mark specifically conveyed to him. Whereas B. S. Ramappa and his son Chandrasekhar applied for registration of the trade mark in their favour in 1961, the elder son Monappa applied in 1963. Monappa claimed registration under Section 12 (3) as the owner of the trade mark by virtue of the assignment on 17-1-1950 and stated that he had been honestly and concurrently using the same with the alterations from that time.

Held, (1) that from the facts an intention to pass the trade mark to Monappa under

the settlement deed dated 17-1-1950 could not be spelt out especially that the father continued to make use of the same in respect of tiles manufactured in the other factory retained by him. Even the fact that father had expressly permitted Monappa to use the trade mark would not necessarily amount to assignment. Under Section 39 of 1940 Act (Corresponding to Sections 48 and 49 of 1958 Act) the user, in such a case, by the person permitted to use would be user by the proprietor himself.

(Paras 25, 26 and 31)

(2) That even assuming that right to use the trade mark in question was assigned to Monappa, the resulting position, viz., that the father being entitled to use it in respect of his own tiles manufactured in Jayaram Tile Works, stood prohibited by Sections 31 and 32 of the Trade Marks Act of 1940 which applied to the case, the corresponding provisions in the 1958 Act being Ss. 39 and 40.

(Paras 26, 28 and 31)

and (3) that Monappa was not entitled to registration even under Section 10 (2) in that he was not the proprietor of the trade mark sought to be registered. Monappa could not also claim to have honestly adopted any mark which would virtually be a replica of the mark of the founder in view of the prohibition contained in Sections 31 and 32.

(Para 32)

and (4) that the circumstances of the case being special and because it would be unjust to deprive Monappa of the right to registration of any mark, the Court could, in exercise of the power conferred by the concluding portions of Sections 10 (2) and 14 (1) of 1940 Act (which correspond to Ss. 12 (3) and 18 (4) of the 1958 Act), suggest further alterations in the mark which was being used by Monappa so as to make it sufficiently distinct from the original trade mark and to direct registration of such altered mark in favour of Monappa.

(Para 36)

Section 10 (2) and Section 14 of 1940 Act should be construed so as to harmonise with Sections 31 and 32 of that Act and similarly Sections 12 (3) and 18 of the 1958 Act should be construed so as to be in harmony with Sections 39 and 40 of that Act. If really the Court could say that the variation sufficiently distinguished the mark of Monappa from the founder's mark, the Court would be justified in saying that the use of the new trade mark of Monappa would not be likely to deceive or cause confusion and therefore the bar of Sections 31 and 32 would not apply and Monappa could legitimately be described as the inventor of the new mark and could be considered as the proprietor of the new mark for the purposes of Sections 10 (2) and 14 of Act of 1940 (the corresponding provisions in the Act of 1958 being Sections 12 (3) and 18). Further, in such a case, the Court could also say that the use of the new mark substantially different from the old mark, could be

considered as honest within the meaning of Section 10 (2) of 1940 Act and Section 12 (3) of 1958 Act, 1956 RPC 1 and AIR 1967 Mad 148 and (1891) 2 Ch D 186 and 38, Halsbury, Para 909; Kerby on Trade Marks, 9th Edn. Para 92; and 492, Foll.; AIR 1956 Mad 184 and AIR 1957 Mad 76 and AIR 1963 SC 1882, Ref. (Paras 33 and 34)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Mad 148 (V 54) =
ILR (1967) 1 Mad 753, Balaji Chettiar v. Hindustan Lever Ltd. 21, 22
(1963) AIR 1963 SC 1882 (V 50) =
(1964) 2 SCR 211, London Rubber Co., Ltd. v. Durex Products Incorporated 19
(1957) AIR 1957 Mad 76 (V 44) =
ILR (1957) Mad 206, Ramappa v. Monappa 8
(1957) 1957 RPC 49, Adrema Werke Maschinenbau GMBH v. Custodian of Enemy Property 29, 30
(1956) AIR 1956 Mad 184 (V 43), Monappa v. R. S. Ramappa 2, 7
(1956) 1956 RPC 1 = (1955) 3 All ER 827, In re Vitamins Application (No. 2) 21, 22
(1953) 70 RPC 235 = 1954 Ch 50, Reuter Ltd. v. Mulhens 29
(1891) 1891-2 Ch 186 = 61 LJ Ch 625, In re Apolinaris Co.'s Trade Marks 22

K. Raja and Habibullah Badhsa, for Appellants; M. P. Rao and B. T. Seshadri, for Respondents.

JUDGMENT: This is an appeal against the order of the learned Assistant Registrar of Trade Marks, dated 20th March, 1965 registering a trade mark in the name of B. Monappa, the first respondent in the appeal. To understand the points in controversy, it is necessary to have an idea of the background and the events which led to the filing of the Application No. 216880 of Monappa. Monappa and the first appellant B. S. Ramappa are the sons of the late B. Ramappa, Monappa being the elder son. The late Ramappa started the business of manufacturing tiles in or about 1921 in Mangalore and invented the trade mark known as the Taj Double Bavta Mark. Bavta means a flag and the mark itself will be described a little later. He was therefore the founder of the trade mark. He registered it in or about 1936 in the Chamber of Commerce, Madras; but at that time there was no statute for registration in this country, and the first statute was passed in the country only in 1940. He was manufacturing tiles in two factories, one called the Jayaram Tile Works in Kudroli, Mangalore-3 and the other the Indian National Tile Works Hoige Bazaar Bolar, Mangalore-1. The premises of the Indian National Tile works had been taken by him on lease. The premises of the Jayaram Tile Works belonged to him absolutely.

2. In 1946, the younger son, B. S. Ramappa (the first appellant) made an appli-

cation, No. 126612 for registration of the Taj Double Bavta mark in his own name under the provisions of the Trade Marks Act (V of 1940) claiming to be the proprietor of the Jayaram Tile Works, Kudroli, and of the trade mark. This was really a false claim because the proprietor was the father B. Ramappa, and the junior son was at best only a manager. However, the mark was registered on 12th May, 1950 but the registration dated back to 18th December, 1946, the date of the application under Section 16 (i) of the Trade Marks Act of 1940. Vide Para. 4 of the decision of Ramaswami, J., in Monappa v. Ramappa, AIR 1956 Mad 184.

3. On 17th January, 1950, the father, B. Ramappa, executed a registered settlement deed of the Indian National Tile Works, Hoige Bazaar, Mangalore-1, on the elder son, B. Monappa, with all the equipment and implements contained in the factory for the manufacture of tiles. The deed purports to be in respect of immovable and moveable properties described therein. It is the claim of Monappa that under this deed the trade mark, Taj Double Bavta mark, of the founder also was settled on Monappa so far as the Hoige Bazaar factory was concerned. The deed itself does not expressly refer to the trade mark, but Monappa contends that as a matter of inference and true construction of the document, the trade mark passed to him. This contention is based on the fact that in the list of moveable properties given in the deed, wooden frames and iron press for manufacturing tiles are also mentioned. It is said that these presses contained the disc on which was imprinted the trade mark and that the discs were not removed by the founder.

4. On the above basis Monappa began using the above trade mark with slight alterations. At this stage I may give a brief idea of the mark registered in the name of B. S. Ramappa in 1946 and the slight alterations made by B. Monappa. The registered mark was the original trade mark of the founder and consisted in the main of a label containing the device of a flag and the word 'flag' inside an outline of a shield. Just on the top of the shield there was the device of a crown flanked on either side by the device of flag. At the bottom of the shield there was the legend "Taj Double Bavta" and the numeral '1596'. The alterations made by Monappa were these. At the top of the Crown and the two flags he added the word 'Monappa's.' He shifted the numeral 1596 from the bottom to a place inside the outline of the shield and just above the device of the flag.

5. The younger son, B. S. Ramappa issued a notice on 27th July, 1951 (vide page 24 of the typed set) to Monappa asking him to desist from using the trade mark. B. S. Ramappa claimed to be the proprietor of the trade mark because of the registration in his name in 1946. B. Monappa countered this claim by urging that the registration

had been obtained by fraud. Thereupon the younger son obtained a registered deed of settlement dated 8th February, 1953 in his own name from the father in respect of Jayaram Tile Works, Kudroli, specifically conveying the good will and the trade mark appertaining thereto—without however specifying the names of the trade marks. B. S. Ramappa then instituted a suit, O. S. No. 14 of 1953, on the file of the District Court of South Kanara against B. Monappa for an injunction restraining Monappa from using the trade mark. B. S. Ramappa relied on the registration of the mark in 1946 and on the assignment of the trade mark by his father by the deed dated 8th February, 1953.

6. Monappa filed a written statement reiterating that the registration of the mark had been obtained by fraud and contending that under the settlement deed of 17th January, 1950 he himself was entitled to use the trade mark on the tiles manufactured by him in the Indian National Tile Works and that in order to distinguish his mark, he had added the word 'Monappa's' and that there was no likelihood of confusion between his mark and the original mark. Monappa did not stop with this. He filed an application, O. P. No. 65 of 1954 in this Court under Sec. 46 of the Trade Marks Act of 1940 for rectification of the Register of Trade Marks by the removal of the trade mark (No. 126612) which had been registered with effect from 1946 in the name of B. S. Ramappa, on the ground that the registration was obtained by fraud. The application came on for hearing before Ramaswami J. The father was examined as a witness by Monappa and his evidence is to be found at pages 27 to 34 of the typed set in L. P. A. No. 76 of 1964 furnished to me. It is enough to state here the main features of the father's evidence. He asserted that he was the founder of the Taj Double Bavta Mark and he pleaded ignorance of the registration thereof in 1946 in favour of B. S. Ramappa, the younger son. He admitted that he permitted the elder son Monappa to use the trade mark on the tiles to be manufactured by him in the Indian National Tile Works.

7. The learned Judge had no hesitation in holding that the registration in 1946 had been obtained by fraud, but at the same time felt that the remedy was not the removal of the registered trade mark, but a joint registration of the mark in the names of B. S. Ramappa and B. Monappa. The decision of the learned Judge is reported in AIR 1956 Mad 184. The learned Judge took the view that each of the sons was entitled to use the mark under the relevant settlement deed pertaining to him and that the intention of the founder was that neither should exclude the other. The learned Judge felt that the circumstances of the case would constitute 'special circumstances' to enable B. Monappa to claim registration under Section 10 (2) of the Trade Marks Act V of

1940 (which corresponded to Section 12 (3) of the Trade and Merchandise Marks Act XLIII of 1958).

8. B. S. Ramappa preferred an appeal, O. S. A. No. 42 of 1955. The appeal was heard by Rajamannar, C. J., and Panchapakesa Ayyar, J., and their decision is reported in Ramappa v. Monappa, (1956) 2 Mad LJ 469 = ILR (1957) Mad 206 = AIR 1957 Mad 76. The learned Judge concurred with the finding of Ramaswami, J., that the registration of 1946 had been obtained by fraud. But they differed from Ramaswami J., in holding that Monappa was entitled to joint registration under Section 10 (2) of the Act of 1940. The learned Judges pointed out that joint registration was dealt with under Section 17 of the Act and expressed the view that before joint registration could be ordered, there should be applications from the two persons, which however was not the case. Regarding Section 10 (2) they observed:

"Section 10 (2) of the Act refers to concurrent user which is honest, that is independent concurrent user, that is, user which cannot be traced to the same source".

9. They accordingly directed that the registration in the name of B. S. Ramappa be cancelled and expunged. They then observed:

"There was an attempt before us to put forward the claims of both the parties to the trade mark but they need not be discussed in this appeal. The parties will be at liberty to seek to enforce their rights and obligations and nothing said in this order will adversely affect the rights of either party."

10. The above decision was rendered on 13th July, 1956. O. S. No. 14 of 1953 on the file of the District Court of South Kanara, which had been stayed and kept pending till then, was taken up thereafter for trial and was dismissed by the District Judge on 7th January, 1957. The learned Judge took the view that besides B. S. Ramappa, the plaintiff in the suit, B. Monappa, the defendant, was also the successor in title of the founder, B. Ramappa in respect of the trade mark by virtue of the deed dated 17th January, 1950. It was on that view that he dismissed B. S. Ramappa's suit.

11. After the above judgment of 7th January, 1957 there was a lull on the part of the younger son, B. S. Ramappa, for nearly three years. On 18th January, 1960 he issued a notice (pages 15 and 16 of the typed set in L. P. A. No. 76 of 1964) to the father stating that he had undertaken the onerous obligations cast on him by the father under the deed dated 8th February, 1953 (payment of Rupees one lakh in a lump and monthly payment of Rs. 1,000) because of the assurance of the father that under the deed he would become the sole proprietor of the trade mark, Taj Double Bavta Mark

and that the elder son, Monappa, had no right to use the trade mark; but contrary to the assurance the father had deposed (in O. P. No. 65 of 1954), that he had permitted the elder son also to use the mark; and the District Court (in O. S. No. 14 of 1953), had held that Monappa was entitled to use the trade mark. B. S. Ramappa further stated that Monappa was freely using the trade mark. Ramappa wanted the father to make good his assurance, and stated that otherwise he would not be able to make the recurring payments.

12. Thereupon the father on 18th February, 1960, executed a rectification deed (pages 7 to 9 of the typed set in L. P. A. No. 76 of 1964) stating that under the deed on 8th February, 1953 he had also conveyed to the younger son the three trade marks, one of them being the Taj Double Bavta Mark, and that he had not given the trade mark to anybody else.

13. Thereafter the father also filed the suit, O. S. No. 34 of 1960, against his two sons, on the file of the Sub-Court of South Kanara, for a formal rectification of the deed dated 17th January, 1950 executed in favour of B. Monappa, by making it clear that the deed did not convey the trade mark (Taj Double Bavta Mark). The learned subordinate Judge took the view that the goodwill and the trade mark had deliberately been left out in that deed because the founder wanted to retain the trade mark. In that view of the matter he thought it superfluous to rectify the deed of 17th January, 1950 and he dismissed the suit. No appeal was preferred therefrom by the father or by the younger son, who was also a party to the suit. The above judgment was delivered on 31st October, 1962.

14. In the meantime, during the pendency of the above suit, the younger son B. S. Ramappa and his son Chandrakanth, filed an application No. 205533 on 29th October, 1961 before the Registrar for registration of the Taj Double Bavta Mark, relying on the deed of 8th February, 1953 and the deed of 18th February, 1960. The father filed an affidavit dated 29th March, 1962 supporting the son stating, "I state here that only B. S. Ramappa has the absolute right to use the mark. No other person has got right over the mark". The application was opposed by B. Monappa. The opposition was overruled and the registration was ordered by order dated 15th December, 1963. During the pendency of the above application No. 205533 B. Monappa filed his own application No. 216880 for registration on 31st July, 1963.

15. It may be mentioned here that in the order dated 15th December, 1963 the learned Registrar observed that the claim of B. Monappa for registration of the trade mark would have to be dealt with separately, in his own application, and would not constitute an impediment to the registration of the

trade mark (Taj Double Bavta) in the names of B. S. Ramappa and his son in their application. Against the above order dated 15th December, 1963, Monappa filed C. M. A. No. 3 of 1964 in this Court. The appeal was dismissed by Venkatadri, J. on 1st January, 1964. L. P. A. No. 76 of 1964 was filed against the decision of Venkatadri, J. It was pending when the Registrar passed the order dated 20th March, 1965 allowing Application No. 216880 of Monappa. L. P. A. No. 76 of 1964 has since been dismissed.

16. The grounds put forward by B. Monappa in his application No. 216880 for registration were two-fold; that he got an assignment of the trade mark from his father under the deed of 17th January, 1950 and that he had been honestly and concurrently using the mark as altered by him from 17th January, 1950 and would therefore be entitled to registration under Section 12 (3) of the Act of 1958.

17. B. S. Ramappa and his son filed an opposition contending that the deed of 17th January, 1950 did not convey the trade mark of the founder to B. Monappa, and that even if as a matter of construction it should be held that the trade mark was conveyed thereunder, the conveyance would be invalid because it offended Section 39 of the Act of 1958 in that even after the deed the father still had a right to use the trade mark on the tiles manufactured by him in the Jayaram Tile Works, Kudroli and such (a partial) assignment was prohibited by Section 39 of the Act. In effect the contention was that B. Monappa was not in law the proprietor of the trade mark. It was further contended that the use of the mark under such circumstances could not be honest and further it was not continuous and not sufficient in volume. The mark of B. Monappa was certain to deceive or cause confusion in view of the existing trade mark of B. S. Ramappa and in view of Section 11 (a) of the Act it should not be registered. Further since the mark had been registered in the name of the opponents, Section 12 (1) also would be a bar.

18. The learned Assistant Registrar held that Secs. 11 (a) and 12 (1) would bar the registration in the name of B. Monappa but held that he was entitled to registration under Section 12 (3). Regarding Section 11 (a) the learned Registrar pointed out that for all practical purposes the mark of Monappa was a replica of the mark of the opponents and was certain to cause deception and confusion. Similarly he was of the view that Section 12 (1) would also be a bar because the registration had been made in the name of the opponents before the date of the hearing of Monappa's application. Regarding Section 12 (3) the learned Registrar first addressed himself to the question whether the applicant B. Monappa was not the proprietor of the mark. He pointed out that the applicant sought to make out his pro-

prietorship on two grounds: (i) deed dated 17th January, 1950 and (ii) lawful, open, extensive and uninterrupted user of the mark and the acquiescence of the opponents. Under the first head, he agreed with the opponents' learned Counsel that the deed of 17th January, 1950 did not as a matter of construction convey the trade mark to Monappa. He held however that even if as a matter of construction the deed was meant to convey the trade mark it would be invalid because of Section 39 of the Act. The learned Registrar thus rejected the first head of the claim of proprietorship of Monappa.

The learned Registrar however held in favour of Monappa on the second ground that the user was lawful, because Monappa used it in the honest belief that he had a right to use the mark, and that the founder had not objected to the user of the mark and in fact had deposed in O. P. No. 65 of 1954 that he had permitted B. Monappa to use the mark. No doubt in 1960 he started protesting but that was evidently at the instigation of the younger son. Secondly, the learned Registrar pointed out that the use of the mark by Monappa was open and not surreptitious. Thirdly, he held that it was continuous. Fourthly, in his view even B. S. Ramappa had acquiesced in the use of the mark by B. Monappa. I shall deal with this later.

19. The learned Registrar then considered the objection that the user by Monappa was not honest. The learned Registrar held that it was honest and that it was continuous enough and the volume of the business was sufficient for the purpose of Section 12 (3), and at any rate amounted to commercial use, the criterion pointed by their Lordships of the Supreme Court in the Durex case, (1964) 2 SCR 211 = (AIR 1963 SC 1882). The learned Registrar also held that it was Monappa who had been more honest of the two brothers and that there was no reason for refusing to exercise the discretion vested in the Registrar against Monappa. In the end he ordered registration under Section 12 (3) of the Act.

20. Sri V. Rajagopalachari, the learned Counsel for the appellants, has, in a powerful argument, contended that the learned Registrar was wrong in holding that Monappa had become the proprietor of the trade mark sought to be registered by long, open, continuous and uninterrupted user. The learned Counsel urges that the user was not lawful because the mark was virtually a reproduction of the mark of the founder and the mark of the founder had not been assigned to Monappa—both as a matter of construction and in view of Section 39 of the Act—as rightly found by the learned Registrar himself. Monappa thus merely adopted with an insignificant variation the mark of the founder and use of the mark could not be honest, particularly as it would offend the provisions of Section 39. The first point made by the learned Counsel is thus: That

in trade mark law, the use of the mark must be lawful even in its origin, and there is no such thing as acquiring a right to the mark by long user adversely to the rightful owner. In this respect there is a difference between the trade mark law and the ordinary law where a man's title to immoveable property becomes perfect by adverse possession over a prescribed period usually 12 years. No doubt if the rightful owner stands by and allows the usurper of the trade mark to use it for a long period, the original owner may be estopped and may be considered as having acquiesced in the use of the mark by the usurper. But in this case the learned Counsel contends that there was no such acquiescence by B. S. Monappa who became the owner of the mark at least from 8th February, 1953, the date of the settlement deed executed by the original founder. The learned Counsel submits that even for claiming the right of registration on the ground of honest user under Section 12 (3) it is necessary for the claimant to make out that he is the proprietor, because the section speaks of the Registrar permitting registration by more than one proprietor of trade marks which are identical or nearly resemble each other in the case of honest, concurrent use or other special circumstances.

Section 18 under which the application has to be made no doubt starts by saying that "any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering shall apply in writing to the Registrar". But the words 'claiming to be the proprietor' can only mean, according to the learned Counsel, that if the claim is challenged, the applicant must make out his claim. To hold otherwise would defeat the whole object of the trade mark law, namely, that a man cannot steal another man's trade mark. A man may become the proprietor in ever so many ways: (a) by inventing the mark; (b) purchase of the mark; (c) gift; (d) by partition; (e) devolution, inheritance or operation of law. But it is necessary that he should be the proprietor in one of such ways. In this case as a matter of construction it has to be held that the deed of 17th January, 1950 did not pass the trade mark, and even if as a matter of construction it should be held that it passed the trade mark it will not be valid because of Section 39. No doubt the founder's evidence in O. P. No. 65 of 1954 showed that he permitted Monappa to use the mark. But permission would not amount to an assignment and the very deposition would show that the founder himself retained the right to continue to use the trade mark on the tiles manufactured by him in the Jayaram Tile Works, and if so, such a partial assignment would offend Sec. 39. Apart from the alleged assignment the only possible ground of title was that Monappa invented the mark. But that again would not be valid because the mark which he adopted was virtually the original mark and the alteration was only slight.

21. In support of the above argument the learned Counsel has cited the Vitamins, Ltd. case, (1956) RPC 1 = (1955) 3 All ER 827, at p. 834 and the decision of Ramamurthi J., in Balaji Chettiar v. Hindustan Lever Ltd., AIR 1967, Mad 148 (Paras 10 and 11) and Halsbury, Volume 38, Paragraph 909 and Kerly on Trade Marks, 9th Edition, paragraph 92. In the matter of Vitamins Ltd.'s Application for a Trade Mark (1956) RPC 1, the relevant facts were these, Vitamins Limited had registered the trade mark Pabavel. A. H. Robins Company incorporated in United States sought to register in England the mark Pabalate, which they had been using in America. They however withdrew their application in order to avoid controversy and expense on account of the opposition of Vitamins Limited. Shortly thereafter Vitamins Limited applied for registration of the mark Pabalate. How they sought to rely on the opening words of Section 17 (1) of the English Act 'any person claiming to be the proprietor of a trade mark.....' corresponding to Section 18 of Act XLIII of 1958, and how the Court rejected their contention will appear from the following passage at page 12 of the report 1956 R. P. C.

"In my judgment the form which an applicant is required to sign wherein he claims to be the proprietor, indicates an assertion of a present proprietary right. The respondent urges that this is merely an assertion that he claims to become the proprietor or to assume proprietary rights as and when application is granted. I do not accept that as the true interpretation of a form intended to be completed before registration can be applied for. A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but in all cases it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated. Where, as here, another party in the same way of business had already put forward a claim to be the proprietor of the identical trade mark and had withdrawn the application for registration merely to avoid controversy and expense, it seems to be impossible to hold that the party who had by opposition secured that result could a few weeks later merely as a result of the withdrawal claim proprietary rights.

The position appears to have been this, that by reason of their possession and user of the mark "Pabavel" the respondents formed the view—a view which they are entitled to hold—that their reputation was such that the use of the mark—"Pabalate" by another would infringe their rights when, as the result of the development of their business, they desired to introduce other marks into commerce beginning with the same first two syllables, they decided to make this application. No explanation has been given why

in the selection of such other 'Paba' marks they condescended upon the one which had been claimed by another as his property."

22. In AIR 1967, Mad 148, Balaji Chettiar applied for registration of the mark 'Surian', claiming to be the proprietor thereof. But it was found that on the date of the application the mark belonged to a partnership of which Balaji Chettiar was only one of the partners. Consequently it was held that he was not the proprietor of the mark. The learned Judge relied on the observations in the Vitamins' case, (1956) RPC 1 (12) and the observations of Fry, L. J., in *In re Apollinaries Co.'s Trade Marks*, (1891) 2 Ch 186 at p. 226, and the observation in 38 Halsbury, Para. 909 "that no person is entitled to put the trade mark of another person on the register."

23. In Kerly, paragraph 92 the following passage occurs with reference to Section 17 (1) of the English Act:

"The words in this section really mean no more than 'claiming that he is entitled to be registered as the proprietor.' Nevertheless, it would seem to be settled that the claim must in some sense be a justified one, if the registration is to stand; whether by virtue of the section or under some general jurisdiction, the Court will expunge a registration if the applicant for it could not in good faith make this claim."

24. The second important point made by the learned Counsel is that on the same reasoning indicated above, it has to be held that the adoption of the mark by Monappa with only a slight variation from 17th January, 1950 could not be said to be really honest. The learned Counsel emphasises that for the use to be honest within the meaning of Section 12 (3) of the Act it is not enough if Monappa believed that he had a right to use it and that it is necessary that in law the belief must be sustainable. The law would not however sustain such a belief because the adoption of the mark virtually resembling the old mark was prohibited by Section 39 of the Act and when it was prohibited by law, the law would not allow the usurper to say that the use of the mark was honest. The learned Counsel submits that even apart from law it should be obvious that this is the position even to a layman.

25. It will be seen that in the above submissions and indeed in the finding of the learned Registrar himself a large part is played by the proposition that the deed of 17th January, 1950 did not pass the trade mark to Monappa and that even if, it was meant to pass, it would be hit at by S. 39. Before proceeding further it is necessary to deal with that point because the proposition is contested by Sri V. Thiagarajan, the learned Counsel for Monappa. The contention of Sri V. Thiagarajan is that though in the deed dated 17th January, 1950 it is not specifically stated that the goodwill or the trade mark passed, yet the Court should hold (as

a matter of necessary inference) that the intention of the settlor was to pass the trade mark to his son. This contention is founded on the fact that in the list of moveable properties mention is made of the implements for making the tiles and those implements included the disc bearing the trade mark and the disc itself had not been removed.

I do not think however that this is sufficient to spell out an intention to pass the trade mark. The undisputed fact remains that the settlor was still using the trade mark in the tiles manufactured by him in Jayaram Tile Works and it is not likely that he meant to part with the trade mark to any extent. One would therefore require very clear and explicit words in the deed before one could accept the contention that the trade mark was meant to be passed. In construing the deed of 17th January, 1950 it is really not permissible to take into account the later deposition of the father in O. P. No. 65 of 1954. But even taking that into account, it would amount only to this that the father permitted Monappa to use the trade mark on the tiles manufactured by Monappa. But permission will not necessarily amount to an assignment.

26. In this connection it is worthy of note that Sections 48 and 49 which deal with a case where the owner, A, permits another person, B, to use the mark and provide for the registration of B as a registered user still go on to enact that the permitted use of the trade mark by B shall be deemed to be used by the proprietor thereof, namely, A. That only emphasises the idea that permission would not constitute an assignment. Assuming, however, for the sake of argument and argument only that as a matter of construction it has to be held that the deed of 17th January, 1950 was meant to pass the trade mark to Monappa, it would still be invalid under Sections 31 and 32 of the Trade Marks Act of 1940, which were the provisions in force on 17th January, 1950, the corresponding provisions in Act XLIII of 1958 being Sections 39 and 40.

27. Section 31 of the Act of 1940, so far as it is material ran thus :

“(1) Notwithstanding anything in Ss. 29 and 30 a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission, there would in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be likely to deceive or cause confusion.”

Section 32 of the Act of 1940, so far as it is relevant, ran as follows :

“Notwithstanding anything in Sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist whether under this Act or any other law, exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in, in any place in India and an exclusive right in another of these persons to the use of a trade mark nearly resembling the first mentioned trade mark or of an identical trade mark in relation to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in any other place in India.....”

28. On the hypothesis that the deed of 17th January, 1950 assigned the right to Monappa to use the trade mark in the tiles manufactured in the Hoige Bazaar factory, the resulting position was that the settlor, Ramappa, himself was entitled to use the trade mark in the tiles manufactured in his own factory, Jayaram Tile Works and Monappa also would have the right to use the trade mark on his own tiles. This is precisely what was prohibited by Sections 31 and 32. That, in my opinion, is an inescapable conclusion on the wording of Sections 31 and 32 of the Act of 1940, though the wording would seem to be involved. Mr. Thiagarajan learned Counsel for the respondent, Monappa, was not able to put forward any contrary interpretation which would avoid this.

29. Both Sri Rajagopalachari and Sri Thiagarajan submitted that there was no exact case decided either in India or in England on this point, the corresponding provision in the English Act of 1938 being Section 22 (4). That is true. But I find that there are observations in English cases which are quoted with approval in Kerly in paragraph 492 and those observations support the interpretation which I have placed. The passage in Kerly is as follows :

“Section 22 (4) invalidates all transactions which would result in concurrent exclusive rights for two or more of those concerned in the transaction to use in the United Kingdom similar or identical marks, on the same or similar goods, if the exercise of those rights, would be likely to deceive or cause confusion. No doubt the primary function of the sub-section is to exclude assignments to different assignees of confusingly similar marks, or assignments of a mark to different assignees for different but similar goods; but it also serves to prevent an assignment which would leave the assignor with an exclusive common law right to the use of the mark. A proviso to Section 22 (4) permits such splitting assignments where the concurrent rights that result are confined to rights to export to different markets; whilst Sec. 22 (5) provides for certification by the Registrar that an assignment will not contravene Section 22 (4).

Section 22 (6) invalidates transaction that would result in concurrent exclusive rights in those concerned in the transaction to the use of a mark in different parts of the United Kingdom. This is subject however to a power for the Registrar to certify that the transaction is not against the public interest and thereby to exempt it from Sections 22 (4) and (6)."

The authorities quoted are per Master of Rolls at page 252 in *Reuter Ltd. v. Mulhens*, (1953) 70 RPC 235 and at p. 57 in *Adrema Werke Maschinenbau G. M. B. H. v. Custodian of Enemy Property*, (1957) RPC 49. In (1953) 70 RPC 235, the facts are complicated, but, for our present purpose, they may be simplified thus. The defendant company was the owner of a business in Cologne, Germany, dealing in the celebrated '4711 Eau-de-Cologne.' *Reuter Co., Ltd.* was a company in England and it claimed to have been rightly registered as proprietors of the trade mark '4711' in England, and brought the action against the defendant for some reliefs based on that allegation. Before the outbreak of the II World War in 1939 between England and Germany, *Reuter Company* or its predecessor were the agents in England of *Mulhens* for the sale of the products and to some extent the product was also manufactured in England. As a result of the legislation enacted during the war period, certain rights of *Mulhens* who had become an enemy were vested in the Custodian of Enemy Property in England who transferred those rights to *Reuter Company Limited*, and it was by virtue thereof that the assignment had been made by the Custodian in the name of *Reuter Company Limited*. One of the defences was that the assignment was invalid under Section 22 (4) of the Trade Marks Act of 1938. The argument on behalf of the defendant was that the common law rights of the defendant had not been affected and still remained intact and the assignment would leave the rights distributed between the defendant and the plaintiff and would therefore offend Section 22 (4). *Evershed, M. R.* was inclined to concede that if really the common law rights still inhered in the defendant, the defence should prevail. But he came to the conclusion that the defendant did not have the common law rights so far as England was concerned. The observations relevant for us occur at page 252 and are as follows:

"It follows, then, says Mr. Mould, (for the defendant) that, if notwithstanding an assignment the assignor retains an exclusive right himself to use the same mark at common law the assignment will be ineffective. That proposition I am prepared, at any rate for the purposes of the assignment, to accept. Thus, to revert to my previous illustration, if upon the sale of the trade mark 'Gold Flake' it was provided by or resulted from the sale agreement that the sellers were still entitled to the use of the name of insignia of 'Gold Flake' upon their own product, the assignment would be ineffective, and obvi-

ously and necessarily so, for the resultant competition would inevitably create deception and confusion."

Romer L. J., also got over the argument by taking the view that even the common law rights of the defendant vested in the Custodian and nothing survived to the defendant.

30. In (1957) RPC 49, the facts, were similar and the same defence was put forward and were repelled for similar reasons. The only additional feature in that case is that an argument was put forward by Mr. Buckley on behalf of the Custodian of Enemy Property in England that Section 22 (4) of the Act would not come into play at all. To put it in simple language, the argument was that Section 22 (4) would apply only where as a result of the assignment itself, there must result a plurality of the right to use the trade mark in two different persons, but that was not the situation in that case, because in 1951 when the trade marks of the German plaintiff-company were vested in the Custodian of Enemy Property in England, the trade marks and the common law rights of the German plaintiff-company became severed, and it was only after such severance the trade marks were sought to be assigned by the Custodian to an English Company called the *Adrema Limited*. Lord Evershed, M. R. declined to go into that argument.

31. We have thus arrived at the conclusion that as a matter of construction, there was no assignment of the trade mark to *Monappa* in the deed of 17th January, 1950 and in any case the assignment would be totally invalid in view of Sections 31 and 32 of Act V of 1940. This was the conclusion reached by the Registrar and I affirm it.

32. I now turn to the argument of *Sri V. Rajagopalachari* which I have already indicated in full. I agree with him that even in order to entitle to registration under Section 12 (3) on the ground of honest concurrent user or other special circumstances it was necessary for *Monappa* to establish that he was the proprietor of the trade mark sought to be registered. This contention is fully supported by the wording of Section 12 (3) and Section 18 and the principles underlying the trade mark law and the authorities cited by learned Counsel. To hold otherwise would mean that if *Monappa* had no right to use the trade mark, he could claim the right of registration on the alleged ground of honest and concurrent use, a position which it is impossible to accept. It seems to me, however, that both the aspects of the argument of *Sri Rajagopalachari*, that *Monappa* could not claim to be the proprietor and that the use was not honest, resolve themselves in the last resort only to one criterion, namely, that *Monappa*, in view of the prohibition contained in Sections 31 and 32 of the Act of 1940 could not claim to have honestly adopted any mark which would virtually be a replica of the mark of the founder. Since the point is important and seems to arise for the first time I shall endeavour to elaborate this to some extent.

33. Suppose for the sake of argument that Monappa in the first place, without making any alteration whatever, had begun to use the trade mark of the founder from 17th January, 1950. It is obvious that in such a case the user would not be honest at all. Even if he claimed that right as a matter of construction of the deed of 17th January, 1950 that claim would be invalid in view of Sections 31 and 32 of the Act of 1940. Hence he could not be considered to be the proprietor of the mark for purposes of Section 12 (3) or Section 18 of the Act of 1958 (the corresponding sections were Sections 10 (2) and 14 of the Act of 1940). Obviously the different provisions of Act V of 1940 would have to be construed in harmony. In other words Section 10 (2) and Section 14 of Act V of 1940 should be construed so as to harmonise with Sections 31 and 32 of that Act and similarly Sections 12 (3) and 18 of the Act of 1958 should be construed so as to be in harmony with Sections 39 and 40 of that Act. If under the latter set of provisions the Court could not recognise a partial assignment the Registrar and the Court would not recognise Monappa as the proprietor of the trade mark. Evidently Monappa and his legal adviser were conscious of this and that was why Monappa sought to vary the original mark of the founder by adding the word 'Monappa's, on the top and transposing the numeral '1596' from the bottom of the shield to a place inside the shield. The idea of Monappa in making this variation was to contend that this variation sufficiently distinguished his mark from the original mark of the founder, so as to avoid the bar of Sections 31 and 32 of Act V of 1940. If really the Court could say that the variation sufficiently distinguished the mark of Monappa from the founder's mark, the Court would be justified in saying that the use of the new trade mark of Monappa would not be likely to deceive or cause confusion and therefore the bar of Sections 31 and 32 would not apply and Monappa could legitimately be described as the inventor of the new mark and could be considered as the proprietor of the new mark for the purposes of Sections 10 (2) and 14 of Act V of 1940 (the corresponding provisions in the Act of 1958 being Sections 12 (3) and 18). Further in such a case the Court could also say that the use of the new mark substantially different from the old mark, could be considered as honest within the meaning of Section 10 (2) of Act V of 1940 and Section 12 (3) of Act XLIII of 1958.

34. Suppose however the Court is to hold that the variation made by Monappa is not significant enough to distinguish the mark from the founder's mark, then the Court would be justified in saying that in view of Sections 31 and 32 of the Act of 1940 (the corresponding provisions in Act XLIII of 1958 being Sections 39 and 40) the use of the mark of Monappa could not be said to be honest within the meaning of Section 10

(2) of the Act of 1940 or Section 12 (3) of the Act of 1958 and further on the same criterion Monappa could not be recognised as the proprietor of the new mark. In a technical sense no doubt Monappa would be the proprietor of the new mark in so far as the new mark was different from the old mark even to some extent and was therefore not the identical mark as the original mark. But surely it is not in this technical sense that the word 'proprietor' is used in the Trade Marks Act because if this technical sense were to prevail there would be a travesty of Sections 31 and 32 of the Act of 1940 and the corresponding provisions, Sections 39 and 40, in the Act of 1958. This is why I stated that both the aspects of the argument of Sri Rajagopalachari resolve themselves ultimately into one criterion, namely, whether the new mark adopted by Monappa sufficiently distinguished itself from the original mark of the founder. If it sufficiently distinguished itself, Monappa would at the same stroke of the pen be considered as the proprietor of the new mark and as the honest user of the new mark. If, however, the new mark is not sufficiently distinguishable from the old mark the result would just be the opposite.

35. In my opinion the above way of looking at the matter would provide one simple criterion and would effect a reconciliation between the different provisions of the Act, namely, Sections 10 (2) and 14 of the Act of 1940 on the one hand and Sections 31 and 32 of the Act on the other, of the corresponding provisions of the Act of 1958. I put forward this approach to the learned Counsel, Sri V. Rajagopalachari and Sri V. Thiagarajan and in order to avoid embarrassment to them in their relationships to their clients, I merely content myself with describing their reaction in negative terms, namely, they are not able to urge anything to shake the validity of this approach.

The matter may also be looked at from a different angle but leading to the same result. Thus in so far as some variations were made to the old mark and the variations were made by Monappa, he could be considered as the proprietor of the new mark, but this would not be sufficient to entitle him to succeed unless he makes out to the satisfaction of the Court that the use was honest. That again would depend on compliance with Sections 31 and 32 of the Act of 1940. In other words, if the variations were not sufficient to distinguish the new mark sufficiently from the old mark, the use of the mark cannot be recognised as honest in view of Secs. 31 and 32 of Act V of 1940. But if the variations would sufficiently distinguish the new mark from the old, the Court could legitimately say that the use of the new mark is honest and would not offend Sections 31 and 32 of Act V of 1940.

36. The question therefore finally resolves itself into the simple one, whether the variations adopted by Monappa to distinguish the new from the old were suffi-

cient, I am not prepared to say that the variations were sufficient to distinguish the new mark from the old, but at the same time I think it will be unjust to Monappa to deprive him of the right to registration absolutely of any mark. The circumstances of the case are special and are such that the proper course for the Court to adopt will be to permit the registration to stand with further alterations in the new mark, so as to distinguish it sufficiently from the old mark. The Court has power to do this under the concluding portions of Sections 12 (3) and 18 (4) of the Act of 1958. Further, on account of the special circumstances of the case, the Court will be justified in taking the view if necessary, that the variations now going to be proposed by me might be considered as having been effected even from 17th January, 1950 so as to cure any defect in the content of honesty and proprietorship on the part of Monappa. The variations which I direct are these. The two flags on the top of the shield (one on either side of the crown) and the numeral '1596' inside should be deleted. The other features may remain, namely, the words Taj Double Bavuta; the device of the shield with the device of the flag and the word 'flag' inside the shield, the device of the crown on the top of the shield and the word 'Monappa's' on the top. In my opinion this will do substantial justice to Monappa.

In the view I have taken of the matter it is unnecessary to discuss in further detail the reasoning of the Registrar. It is however necessary to refer to his finding that the younger brother, B. S. Ramappa, had recognised Monappa's proprietorship of the mark and allowed him to build up the trade. This finding is opposed to the evidence and hardly does justice to the determined efforts made by B. S. Ramappa from 1951 onwards to prevent Monappa from using his mark. In 1951 he issued the notice on 27-7-1951. On 8-2-1953 he got the settlement deed in his own favour and then filed the suit, O. S. No. 14 of 1953. When he lost in O. P. No. 65 of 1954 before Ramaswami J., he carried the matter in appeal. He had to wait for sometime till 1960 because the father had supported the elder brother, Monappa, in his deposition in O. P. No. 65 of 1954 to some extent in stating that he had permitted his elder son to use the mark. On 18th February, 1960 B. S. Ramappa secured a rectification deed from the father. Then he filed the application for registration, No. 205533 supported by an affidavit of the father, dated 29th March, 1962. He entered opposition along with his son in the application of Monappa.

37. In the result I direct modification of the trade mark to be registered in the name of Monappa as indicated above and otherwise, dismiss the appeal. The parties will bear their own costs.

Appeal dismissed.

AIR 1970 MADRAS 165 (V 57 C 43)

K. S. RAMAMURTI, J.

Saleh Bros., Appellant v. K. Rajendran and another, Respondents.

Second Appeal No. 1065 of 1964, D/-5-9-1968, from decree of Addl. City Civil J., Madras in Appeal Suit No. 200 of 1963.

(A) T. P. Act (1882), Ss. 111 (g) and (h), 112, 113 and 116, 105—Waiver of forfeiture and waiver of notice to quit — Law is same in England and in India — Receipt of rent subsequent to notice determining lease and pending ejectment suit — Whether, receipt of rent by itself, amounts to waiver: AIR 1957 Cal 627 and AIR 1926 Cal 763, Dissent. from.

The law relating to waiver of forfeiture and waiver of notice to quit, is the same in England and in India: (1912) 24 Mad LJ 263 and AIR 1968 SC 471, Rel. on; AIR 1957 Cal 627, Dissent. from. (Para 2)

The principle underlying Section 112, that after the landlord had elected to avail himself of the forfeiture and had given notice in writing to the lessee of his intention to determine the lease and followed it up by a suit in ejectment there is no waiver, would equally apply to Section 113 where the landlord has instituted a suit in ejectment, preceded by the issue of notice determining the lease. The absence of a corresponding proviso, in Section 113, is of no significance and does not manifest any intention on the part of the Legislature to make any difference. (Para 3)

Under Section 111 (h) the lease is determined on the expiration of the notice which can be given by the unilateral choice of one of the parties, there being nothing further to be done by the other party. The issue of such a notice, of its own force and without anything more, after the expiry of the period, determines the lease. (Para 4)

Acceptance of rent which has become due since the forfeiture is regarded as waiver of forfeiture under the main operative portion of Section 112, because the acceptance of rent is an affirmation that the lease was subsisting at the time when the rent became due after the forfeiture. But this acceptance of rent, after the suit in ejectment is filed, is not regarded as a waiver, because, once the matter has come to the Court, the election has become irrevocable. The only thing necessary under the second proviso is that there must be an unequivocal demand for possession in a proceeding instituted in the Court. (Para 10)

The principle that once an election has been made and the lease determined the election is irrevocable, would apply even when the election is not followed by a suit in ejectment and if the lessor had merely given a notice in writing of his intention to determine the lease as provided in Sec. 111 (g). If rent is subsequently received by the lessor, the rights of the parties will have to

be determined in accordance with the provisions of Section 116 of the Transfer of Property Act. The determination of the lease referred to in Section 116 will certainly include determination of the lease as a result of the lessor electing to take advantage of the forfeiture and determining the lease by giving notice in writing under Section 111 (g). Once the lease is determined by the issue of the requisite notice, a contractual relationship thereafter can arise only with the consent of both the parties. The irrevocable character of the election must follow in either case. (Para 11)

The plain language of Section 113 indicates that a waiver does not ipso facto result from any act of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as subsisting. It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. Illustration (a) must, therefore, be understood and applied in consonance with the principle underlying the section with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances of the case, be regarded as amounting to a waiver. (Para 12)

Section 113 consists of two limbs: (a) the express or implied consent of the person to whom notice is given and (b) "the act of the person giving the notice showing the intention to treat the lease as subsisting". In order to constitute a waiver, both the limbs must concurrently operate, which means, that an act by itself and of its own force, without reference to the intention of the parties, cannot bring about a waiver. The principle underlying Section 116 of the Act will also apply in applying Section 113 as this is also a case of continuance of the lease restoring the old tenancy. (Para 13)

The preponderance of the weight of authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease as subsisting. According to the decisions, there should be either an express contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant. Whether the conduct of the party justified such an inference would undoubtedly turn upon the facts and circumstances of each case. AIR 1926 Cal 763, Dissent. from. (Para 17)

The circumstance that in the receipts issued by the owner, the word 'rent' is used is not decisive of the question. Case law referred. (Para 17)

(B) Civil P. C. (1908), Preamble — Interpretation of statutes — Illustrations — Use of.

Illustrations are useful as aids to construction and for securing the proper meaning of the section, but they cannot control the plain meaning of the section; Illustrations appended to sections of a statute are useful to show how sections may operate and are of relevance and value in construing the text. They should only be rejected as repugnant to the section as the last resort of construction. (Para 12)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 471 (V 55) =
(1968) 2 SCJ 291, Calcutta Credit Corporation Ltd. v. Happy Homes (Private) Ltd. 2, 19, 26
- (1968) AIR 1968 SC 919 (V 55) =
(1968) 2 SCJ 528, Ramamurti Subudhi v. Gopinath 18, 22, 26, 31
- (1967) 1967-1 Mad LJ 337 = ILR
(1967) 2 Mad 324, Abdul Jameel v. M/s. Simson and Machonochy Ltd. 31
- (1966) AIR 1966 All 623 (V 53), Ram Dayal v. Jawala Prasad 30
- (1963) AIR 1963 SC 1459 (V 50) =
(1964) 2 SCR 114, State of Punjab v. British India Corporation Ltd. 18
- (1962) AIR 1962 SC 847 (V 49) =
(1962) 2 SCJ 303, Jumma Masjid v. Kodimaniandra Deviah 12
- (1961) AIR 1961 SC 1067 (V 48) =
(1961) 3 SCR 813, Ganga Dutt v. Kartik Chandra Das 31
- (1959) AIR 1959 Andh Pra 346 (V 46) = (1959) 1 Andh WR 143, Kapur Chand v. Kanji 31
- (1959) AIR 1959 Pat 128 (V 46) =
1958 BLJR 766, Puran Mal v. Onkar Nath 29
- (1957) AIR 1957 Cal 627 (V 44) =
ILR (1958) 2 Cal 426, Pulin Behary v. Miss Lila Dey 26
- (1957) AIR 1957 Pat 206 (V 44) =
ILR 35 Pat 894, Zaffar Hussain v. Mahabir Prasad 29
- (1956) AIR 1956 All 175 (V 43), Moti Lal v. Basant Lal 27
- (1956) AIR 1956 Punj 246 (V 43) =
ILR (1957) Punj 86, Harbhajan Singh v. Munshi Ram 28
- (1954) AIR 1954 Cal 404 (V 41) =
ILR (1956) 1 Cal 461, Mahadeo Prasad v. Sulekha Sarkar 25, 26
- (1954) AIR 1954 Cal 460 (V 41) =
58 Cal WN 438, Panchanan v. Haridas 25
- (1953) AIR 1953 Nag 219 (V 40) =
ILR (1954) Nag 147, Iahibux v. Munir Khan 24
- (1951) AIR 1951 SC 285 (V 38) =
1951 SCR 560, Karnani Industrial Bank Ltd. v. Province of Bengal 12, 31
- (1949) AIR 1949 FC 124 (V 36) =
1949 FCR 262 = 1949 FLJ 168, Kai Khurshoo v. Bai Jebai 31
- (1949) 1949-1 All ER 768 = (1950) 1 KB 104, Clarke v. Grant 20

(1948) AIR 1948 Oudh 127 (V 35) =	
1947 OWN CC 523, Kamlapat Sahai v. Mt. Manho Bibi	23
(1945) AIR 1945 Bom 132 (V 32) =	
ILR (1945) Bom 68, Navnitlal v. Baburao	22, 25
(1942) 1942-2 All ER 674, Booker v. Palmer	15
(1926) AIR 1926 Cal 763 (V 13) =	
43 Cal LJ 272, Manicklal v. Kadambini	2, 22, 23, 25, 30
(1923) 1923-2 Ch 347 = 92 LJ Ch 616, Civil Service Co-operative Society Ltd. v. McGrigor's Trustee	8
(1921) 1921-1 AC 271 = 90 LJ PC 1, Rex v. Paulson	8
(1920) 1920-2 KB 315 = 89 LJ KB 845, Evans v. Enever	7, 8
(1917) AIR 1917 Pat 469 (V 4) =	
2 Pat LJ 595, Wali Ahmad v. Mt. Hussaini	29
(1916) AIR 1916 PC 242 (V 3) =	
(1916) 2 AC 575, Mohamed Syedol Ariffin v. Yeoh Ooi Gark	12
(1912) 24 Mad LJ 263 = 15 Ind Cas 445, Chengiah v. Rajah of Kalahasti	2, 9
(1881) ILR 7 Cal 132 = 8 Cal LR 281, Koylesh Chunder v. Sonatum Chung Barooie	12
(1872) 7 CP 360 = 41 LJ CP 239, Grimwood v. Moss	7, 8, 9
(1846) 15 M and W 718 = 71 RR 800, Jones v. Carter	7, 8, 9, 11
(1824) 1 Car and P 346 = 71 RR 806, Doe v. Meux	8
(1775) 1 Cowp 243 = 98 ER 1066, Doe d Cheny v. Batten	20
S. Kuppaswamy, for Appellant; A. Sundaram Ayyar and V. N. Srinivasa Rao, for Respondents.	

JUDGMENT: This Second Appeal arises out of a suit in ejectment and the tenant who failed in the Courts below is the appellant in the second appeal. The premises in question is situated in Sembudoss Street and the owner and landlord was one Kuppaswamy Naicker now represented by the plaintiffs in the action. By G. O. No. 2216 (Home), dated 5th August, 1958, the Government issued a notification exempting the premises from the provisions of the Rent Control Act. The tenant filed two writ petitions, W. P. Nos. 732 and 733 of 1958 to quash the order of the Government and the petitions were dismissed on 10th November, 1960. The tenant preferred Writ Appeals Nos. 156 and 157 of 1960, therefrom and they too were dismissed on 15th November, 1962. Meanwhile, on 6th October, 1958, within two months after the order of exemption by the Government, the plaintiffs instituted the suit O. S. No. 1822 of 1958 on the file of the City Civil Court, Madras, for recovery of possession of the property after giving notice, Exhibit A-1, dated 2nd September, 1958, terminating the tenancy. Pending disposal of the writ proceedings, there was an order of limited interim stay and after the final disposal of the writ proceedings the

suit was taken up and disposed of. Several objections were raised by the defendant, the tenant, and only two points were argued before me in the second appeal. One is that the suit is bad for want of proper notice to quit, the objection, being that the notice terminating the tenancy by the midnight of 30th September, 1958 is bad in law. A perusal of the judgment of the Courts below shows that this point was not seriously pressed before the Courts below and it was also not shown how this notice was defective. Before me too, the point was merely mentioned and when the attention of the learned Counsel for the appellant was drawn to the fact that in the grounds of appeal in this Court no objection has been taken touching this aspect, learned Counsel did not pursue the matter further. Indeed the only point that was pressed before me is the point of waiver. The tenant has filed a batch of receipts in respect of rents paid from August, 1958 to November, 1962. The third of the series of receipts is dated 31st October, 1958 being the receipt of a sum of Rs. 212-50 towards the rent for the premises for the month of October, 1958. The argument on behalf of the tenant is that after the tenancy came to an end by the midnight of 30th September, 1958, the landlord has received the rent from the tenant for the entire month of October, 1958 and for the subsequent months and he should therefore be held to have waived the prior notice to quit thereby treating the tenancy as still subsisting. Counsel on both sides cited some decisions touching this aspect as to whether or not this conduct of the landlord would amount to waiver.

2. Learned Counsel for the appellant placed considerable reliance upon illustration (a) to Section 113 of the Transfer of Property Act and the absence of a provision corresponding to the second proviso in Section 112 of the Transfer of Property Act. His contention is that the notice, Exhibit A-1, issued under S. 111 (h) of the Act determining the tenancy must be held to have been waived and stood cancelled by reason of the landlord accepting rent which had become due in respect of the property since the expiration of the notice. He urged that in the case of waiver of forfeiture by acceptance of rent which had become due since forfeiture the Legislature had made a special provision in the second proviso to Section 112 that when such rent is accepted after the institution of the suit to eject the lessee on the ground of forfeiture, such acceptance of rent is not a waiver and that the Legislature had made a deliberate departure and distinction between waiver of forfeiture and waiver of notice to quit. In support of his contention learned Counsel relied upon the following observations of Buckland J., in *Manicklal v. Kadambini*, AIR 1926 Cal 763:

"Now, under Section 112 which deals with a similar position in connection with forfeiture under Section 111 (g) it is expres-

sly provided that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture such acceptance is not a waiver."

"It is argued by analogy that in the circumstances there is no waiver. To that, I think, the answer is that where rent is accepted after the notice to quit, whether before or after a suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting. One cannot logically say that the fact of accepting rent by itself shows an intention if a suit has been filed. The intention shown by the act itself must be the same in either case. Therefore, by accepting the rent, the plaintiff in my opinion showed an intention to treat the lease as subsisting and acceptance of rent was waiver of the notice to quit notwithstanding the fact that a suit had already been filed for the purpose of ejecting the tenant. It has also to be observed that under S. 112 the acceptance of rent after suit has been exactly provided for, and it may well be argued that had it been intended that acceptance of rent after suit should not operate as a waiver in the case of a notice to quit one would have expected that a proviso similar to that in S. 112 would have been incorporated in Section 113."

With great respect, I am unable to agree with this view. Further, this view has not been followed in several decisions of the various Courts. Learned counsel on both sides invited my attention to some of the decisions both Indian and English; learned counsel for the appellant, relying upon some of the observations in the cases cited, attempted to make out that in the matter of waiver of forfeiture, and waiver of notice to quit, there is some material difference between the law in England and the law in India and that the decisions in England cannot afford much of a guidance in the solution of the problem. It is true that there are observations in some of the decisions suggesting some difference between the law in England and the law in India as enacted in Sections 111 to 113 and 116 of the Transfer of Property Act. In my view there is no difference in the matter of substance and such difference as is observed in the statutory enactment of the law in India is very superficial and a distinction without difference. On a careful consideration of all the aspects of the matter concerning the law relating to waiver of forfeiture and waiver of notice to quit, I am of the view that the law is the same in England and in India, vide *Chengiah v. Rajah of Kalahasti*, (1912) 24 Mad LJ 263 and *Calcutta Credit Corporation Ltd. v. Happy Homes (Private) Ltd.*, (1968) 2 Andh WR (SC) 42: (1968) 2 SCJ 291: (1968) 2 Mad LJ (SC) 42, 43 = (AIR 1968 SC 471).

3. Before I proceed further to examine the decisions, it is necessary to refer to the well-established principles, because, in my opinion, the principle underlying Section 112, that after the landlord had elected to avail himself of the forfeiture and had given notice in writing to the lessee of his intention

to determine the lease and followed it up by a suit in ejectment there is no waiver, would equally apply to Section 113 where the landlord has instituted a suit in ejectment, preceded by the issue of notice determining the lease. The absence of a corresponding proviso, in Section 113, is of no significance and does not manifest any intention on the part of the Legislature to make any difference. When forfeiture occurs as specified in Section 111 (g) on the happening of any one of the specified events, the lease does not ipso facto come to an end, but it only gives a right to the lessor, if he is so minded and so elects, to determine the lease, taking advantage of the forfeiture. It is not the mere happening of the specified events at the instance of the lessee that would bring about a termination of the lease putting an end to the relationship, but it is the determination of the lessor to elect to determine the lease that would bring about a dissolution of that relationship. The requirement of the landlord to so elect is based upon the well-recognised principle of law that no man can take advantage of his own wrong and that the lessee by his unilateral act and by committing a wrong cannot make the lease void; it is only voidable and has to be avoided by the lessor.

4. In striking contrast to this provision requiring a clear election on the part of the lessor to determine the lease, the provision in Section 111 (g) states that the lease of immovable property is determined "on the expiration of a notice to determine the lease or to quit or of intention to quit duly given by one party to the other". Under Section 111 (h) the lease is determined on the expiration of the notice which can be given by the unilateral choice of one of the parties, there being nothing further to be done by the other party. The issue of such a notice, of its own force and without anything more, after the expiry of the period, determines the lease.

5. Before the Amending Act of 1929, all that was necessary for the lessor was to manifest his election to avail himself of the forfeiture and determine the lease and it was enough if he did some act showing his intention to determine the lease following the forfeiture. There was a conflict of decisions as to whether a distinct, independent act showing the intention to determine the lease was a condition precedent to the suit in ejectment or whether a suit in ejectment itself could be regarded as showing the animus of the landlord. By the Amending Act of 1929 it is now provided that the lessor should give notice in writing to the lessee of his intention to determine the lease. The second proviso to Section 112, that acceptance of rent after the filing of the suit in ejectment will not amount to a waiver, merely illustrates the principle that once the lessor with knowledge of the forfeiture makes an election by express words or by an unequivocal act, the election is irrevocable, with the result that, if the lessor gives notice determining the

lease on the ground of forfeiture and files a suit, no subsequent act would amount to a waiver. In situations and circumstances, where the landlord has not filed a suit in ejectment, there may be some room or scope for argument that particular act done by the lessor in electing to determine the lease on the basis of forfeiture is either ineffective or equivocal and that the manifestation of the required intention is not clear, but, when the landlord manifests his intention by instituting a suit in ejectment, that conduct is a final, positive and decisive act, and leaves no room for doubt, with the result that the election becomes irrevocable; the lease is once for all determined, it cannot be retracted.

6. In this connection, reference may be made to the statement of the law by Woodfall on Landlord and Tenant (26th Edn., p. 946, Section 2057):

"If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accepts rent, or distrains, or sets up a cause of forfeiture a subsequent non-payment of rent, it is no waiver. A writ containing an unequivocal claim for possession, or an unequivocal claim for a declaration of title to possession, operates as a final election to determine the lease." Vide also 23 Halsbury, 672 (foot-notes (a) and (b)), where the distinction between demand for and receipt of rent after the cause of forfeiture prior to the suit and the receipt of rent after the suit in ejectment is referred to.

7. The leading decision in England is *Jones v. Carter*, (1846) 15 M & W 718, in which it was held that, if a lessor brought an action in ejectment that was an unequivocal act and that the receipt of rent after the action in ejectment could not operate to revive the lease; the statement of the law by Lord Wensleydale in that case has been uniformly followed in all the subsequent cases. In *Grimwood v. Moss*, (1872) 7 CP 360, the question arose whether after the commencement of the action in ejectment the lessors were entitled to distrain for rent which subsequently accrued due. It was held that the action in ejectment was irrevocable and could not be retracted. Willes, J., after referring to (1846) 15 M & W 718, put the matter thus at p. 364:

"It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter..... In my opinion, the subsequent distress can make no difference."

I may next refer to the decision in *Evans v. Enever*, (1920) 2 KB 315, in which the principle in (1872) 7 CP 360 was applied. In that case the lease contained a proviso for re-entry if the lessee became bankrupt. In July, 1918, the lessee was adjudged bankrupt and in January, 1919, the lessor took out a specially indorsed writ claiming possession of the premises for forfeiture for non-payment of rent. Taking advantage of Sec-

tion 212 of the Common Law Procedure Act of 1852, the defendant paid the rent and costs to the plaintiff and the proceedings came to an end. In the following May the plaintiff sued the defendant for possession claiming that the lease was forfeited by reason of the defendant's bankruptcy. It was held that, notwithstanding that the rent which was paid to the plaintiff in the first action, had accrued due subsequent to the date of the adjudication, its acceptance by the plaintiffs did not operate as a waiver of the forfeiture. Lord Coleridge, J., observes as follows (at p. 320):—

"That is well-recognized law which has never been disputed. But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

8. There is no need to refer to the other decisions and it is sufficient to refer to the decision in *Civil Service Co-operative Society v. McGrigor's Trustee*, (1923) 2 Ch 347. In that case, after the bankruptcy of the lessee, the lessors served on the debtors and the trustee in bankruptcy a notice of writ exercising the right of re-entry, and subsequently the lessors made a demand for and accepted the rent which had accrued due. It was held that the demand for and acceptance of rent accrued due after the issue of the writ did not operate as a waiver of the forfeiture. Russell, J. (at p. 357), referred to the case and pointed out the distinction between the demand for and acceptance of rent simpliciter and the issue of and the commencement of a writ or legal proceeding in ejectment, the latter case constituting the final election of the landlord to determine the tenancy. Reference may be made to the following observations (at p. 358):—

"Neither of those cases touches the real question, namely, whether the issue and service of writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture. In my opinion, the authorities establish that this is so. In (1846) 15 M & W 718, Parke, B., held that after ejectment brought, there being no evidence of actual re-entry by the landlord, the landlord could not sue for rent; and he cites with approval a decision of Lord Tenterden that the receipt of rent after ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe v. Meux*, (1824) 1 Car and P 346. To the same effect is the case of (1872) LR 7 CP 360, where it is definitely stated that the bringing of an ejectment action is an irrevocable election to determine the tenancy; see also *Rex v. Paulson*, (1921) 1 AC 271 and *Evans v. Enever*, (1920) 2 KB 315. I adopt the words of Lord Coleridge, J., in (1920) 2 KB 315, when he says: "There is a series of cases which establish that if an action is

brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

9. In (1912) 24 Mad LJ 263, this Court followed and applied the rule enunciated in (1846) 15 M & W 718 and (1872) 7 CP 360. It was held that where a right of forfeiture had accrued to the lessor and he had elected to determine the tenancy, the election was irrevocable and the parties could not by any subsequent agreement revive the old tenancy. Wallis, C. J., observed that the framers of the Transfer of Property Act did not intend to depart from the well-established rule of English Law that, where a right of forfeiture had accrued to the lessor and if he manifested his intention to enforce the forfeiture, that was an election to determine the tenancy and the election was irrevocable.

10. Acceptance of rent which has become due since the forfeiture is regarded as waiver of forfeiture under the main operative portion of Section 112, because the acceptance of rent is an affirmation that the lease was subsisting at the time when the rent became due after the forfeiture. But this acceptance of rent, after the suit in ejectment is filed, is not regarded as a waiver, because, once the matter has come to the Court, the election has become irrevocable. The only thing necessary under the second proviso is that there must be an unequivocal demand or possession in a proceeding instituted in the Court.

11. Though it is not strictly necessary in the instant case, I may, however, observe that the principle of (1846) 15 M & W 718 that once an election has been made and the lease determined the election is irrevocable, would apply even when the election is not followed by a suit in ejectment and if the lessor had merely given a notice in writing of his intention to determine the lease as provided in Section 111 (g). If rent is subsequently received by the lessor, the rights of the parties will have to be determined in accordance with the provisions of Section 116 of the Transfer of Property Act. The determination of the lease referred to in S. 116 will certainly include the determination of the lease as a result of the lessor electing to take advantage of the forfeiture and determining the lease by giving notice in writing under Section 111 (g). Once the lease is determined by the issue of the requisite notice, a contractual relationship thereafter can arise only with the consent of both the parties. The irrevocable character of the election must follow in either case. On juristic principles, I cannot see any difference between the determination of the lease under Section 111 (g) as a result of the issue of the requisite notice after forfeiture and the determination of the lease under Section 111 (g). Logically speaking, the acceptance of rent referred to in the opening

words of Section 112 must be acceptance of rent before the lessor issues the notice in writing, determining the lease, under Section 111 (g). As in the instant case, a suit in ejectment has been instituted, it is unnecessary to pursue that aspect further.

12. I shall next consider the scope of Section 113, i.e., the receipt of rent by the landlord accruing due subsequent to the notice determining the lease followed by a suit in ejectment. The plain language of Section 113 indicates that a waiver does not ipso facto result from any act of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as subsisting. It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. Illustration (a) must, therefore, be understood and applied in consonance with the principle underlying the section with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances of the case be regarded as amounting to a waiver. Illustrations are useful aids to construction and for securing the proper meaning of the section, but they cannot control the plain meaning of the section; see *Koylash Chunder Ghose v. Sonatun Chung Barooie*, (1881) ILR 7 Cal 132. Illustrations appended to sections of a statute are useful to show how sections may operate and are of relevance and value in construing the text. They should only be rejected as repugnant to the section as the last resort of construction: vide *Maxwell on Statutes*, p. 43: *Mohamed Syedol Ariffin v. Yeoh Ooi Gark*, LR (1916) 2 AC 575 at 581 and *Jumma Masjid v. Kodimaniandra Deviah*, (1962) 2 SCJ 303; (1962) 2 MLJ (SC) 90; (1962) 2 AnWR (SC) 90; AIR 1962 SC 847 at 851. I do not see any repugnancy between the operative portion of Section 113 and the Illustration (a) as there is no difficulty in understanding the Illustration in consonance with the section. The context in which a particular act is referred to in Section 113 shows that the rent should be received at such time and in such manner as to be equivalent to the landlord assenting to the lessee continuing in possession. The receipt of rent may only create a presumption and cannot by its own force amount to a waiver. Section 113 consists of two limbs: (a) the express or implied consent of the person to whom notice is given and (b) "the act of the person giving the notice showing the intention to treat the lease as subsisting". In order to constitute a waiver, both the limbs must concurrently operate, which means, that an act by itself and of its own force, without reference to the intention of the parties, cannot bring about a waiver. So much is quite clear from the plain language of the section, which en-

bodies the basic principles, and I find no justification for reading the Illustrations as being repugnant to the section. Every effort should be made to interpret the Illustration in conformity with the main section. The principle underlying Section 116 of the Act will also apply in applying Section 113 as this is also a case of continuance of the lease restoring the old tenancy. The English law regards the effect of waiver as creating a new tenancy, but the language of Section 113 points to a restoration of the old tenancy. As observed earlier, this is really a distinction without difference because, in either case the essential point to be considered is whether the other party is continuing in the relationship of a lessee, either under the old lease restored, or under a new tenancy, subject to the same terms and conditions of the prior lease, as specified in Section 116. It is in this connection that reference must be made to the following observations of the Supreme Court in *Karnani Industrial Bank Ltd. v. Province of Bengal*, (1951) SCJ 407: (1951) SCR 560: AIR 1951 SC 285:

"There can be no question of the lessee 'continuing in possession' until the lease has expired, and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made 'at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession'."

13. I may also add that the marginal note "waiver of notice to quit" and the language employed in Section 113 that "the notice is waived", are not happy and that what really happens is virtually the creation of a new tenancy on the old terms and not a revival or restoration of the old tenancy. Viewed in this light, there is no difference between the Indian and English law. The expression "waiver of notice to quit" has been used in the section rather loosely, taking the expression from some of the decisions in England. I may refer to the following statement in *Radman's Law of Landlord and Tenant* (13th Edn., p. 528, Section 390) to show that the use of the expression "waiver of notice to quit" after the determination of the lease by such notice is not technically correct:

"Effect of withdrawal.—A notice to quit may be withdrawn or abandoned during its currency; or the right to enforce it may be waived, either expressly or by implication, before it has expired, but no withdrawal, abandonment or waiver is effectual without the consent of the party to whom the notice is given."

"It has been held that a withdrawal of the notice by consent during its currency does not nullify the notice, but operates as evidence of an agreement for a new tenancy to take effect on the determination of the old. Where the notice has expired,

'it is technically wrong to speak of the waiver though this convenient expression is commonly used'. If the relationship of landlord and tenant continues thereafter 'it is by agreement between the parties' constituting a new tenancy, 'since the old tenancy is already at an end.'"

14. An examination of the cases, which have dealt with the scope of Section 113, read with Illustration (a) thereto, shows that the preponderance of the weight of authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease as subsisting. According to the decisions, there should be either an express contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant. Whether the conduct of the party justified such an inference would undoubtedly turn upon the facts and circumstances of each case.

15. In this connection I may refer to the following observations of Lord Greene, *M. R. in Booker v. Palmer*, (1942) 2 All ER 674:

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule."

16. In the instant case it is impossible to attribute to the owner the intention either to continue the relationship of landlord and tenant or to create a new tenancy. The writ proceedings initiated by the tenant questioning the legality of the order of the Government; the hot contest made by the landlord therein and the landlord filing a suit immediately after the order of exemption passed by the Government completely repeal any notion of the relationship of landlord and tenant.

17. The circumstance that in the receipts issued by the owner, the word 'rent' is used is not decisive of the question.

18. In this connection, reference may be made to the latest decision of the Supreme Court in *Ramamurthy Subudhi v. Gopinath*, (1968) 2 SCJ 528: AIR 1968 SC 919. That case dealt with the question whether the relationship between the parties was that of landlord and tenant or that of licensor or licensee. In that case, the suit in ejectment, after the termination of the tenancy, was compromised, under which it is specifically provided that the tenant should vacate the house in question after a period of five years and that he should pay all arrears of rent claimed in the suit and also pay future rent promptly with a condition that, if the tenant committed default to pay rent for three con-

secutive months, the landlord would be entitled to obtain possession of the house. The question arose whether this compromise created a relationship of landlord and tenant so as to attract the provisions of the Orissa House Rent Control Act. In determining the intention of the parties, the Supreme Court pointed out that the fact that the owner had brought the suit in ejectment was an important circumstance in the view that when the landlord had brought the suit his intention was manifest that he was keen about ejecting the lessee after having terminated the tenancy, and it was difficult to impute thereafter an intention to the lessor to create a fresh tenancy. Commenting upon the use of the word 'rent' in the memorandum of compromise, the Supreme Court observed:

"Coming to the terms of the compromise, it is true as stressed by the learned counsel for the respondent that the word 'rent' has been used, but the word 'rent' is not conclusive for, as observed by this Court in *State of Punjab v. British India Corporation Ltd.*, (1964) 1 SCJ 571: (1964) 2 SCR 114 at p. 123: AIR 1963 SC 1459 at p. 1463, in its wider sense rent means any payment made for the use of land or buildings and thus includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by tenant to landlord for property demised to him."

The principle of this decision completely governs the instant case, both on the question of the effect of the suit in ejectment and the effect of the receipts passed using the word 'rent'.

19. I shall next refer to another recent decision of the Supreme Court, in (1968) 2 Andh WR (SC) 42: (1968) 2 SCJ 291: (1968) 2 Mad LJ (SC) 42 = (AIR 1968 SC 471). In that decision, too, the Supreme Court pointed out that under Section 113 of the Transfer of Property Act the act which operates as a waiver must show an intention to treat the lease as subsisting and other party's consent, express or implied therefor. In that case the tenants, who were holding over, issued, on 12th August, 1953, a notice to the landlord of their intention to vacate the premises on 31st August, 1953. But by their letter, dated 26th August they withdrew that notice. The landlord did not agree to the withdrawal of the notice and insisted that the lease had been determined under Section 111(h) of the Transfer of Property Act. Dealing with the question of waiver, the Supreme Court observed as follows:—

"Clearly Section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent...express or implied therefor. The law under the Transfer of Property Act on the question in hand is not different from the law

in England. Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting."

20. Reference may also be made to the decision in *Clarke v. Grant*, (1949) 1 All ER 768, in which after valid notice to terminate the lease the agent of the landlord accepted the rent in the mistaken belief that it was for a period prior to the notice, determining the lease. It was held that it did not amount to waiver. It is true that the mistake on the part of the agent when he received the rent is an important distinguishing feature, of that case but what is relevant is the perspective of approach of Lord Goddard, C.J., as to the consequence of the receipt of rent. The distinction between the receipt of rent in the case of a forfeiture before determining the lease and the receipt of rent after the determination of the lease was pointed out in these terms:

"If one may say so with respect to the learned Deputy Judge, he fell into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that an act of forfeiture has been committed. If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognises that the lease is continuing. With regard to the payment of rent after a notice to quit, however that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy."

That has been the law ever since it was laid down by the Court of King's Bench in *Doe d. Cheny v. Batten*, (1775) 1 Cowp 243, where Lord Mansfield said:

"The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was?"

It is impossible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money

as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy."

21. In the instant case there can be no doubt, that *quo animo* when the rent was received during the pendency of the suit was not to have the relationship of landlord and tenant.

22. I may next refer to the Bench decision of the Bombay High Court in *Navnital v. Baburao*, AIR 1945 Bom 132. In that case, the Rent Court released the house for the personal use of the landlord and he filed a suit in ejectment after serving upon the tenant the requisite notice to quit. The tenant sent a cheque expressly stating as rent but the landlord in the receipt, noted that he received it as compensation for use and occupation. On behalf of the tenant emphasis was laid on the absence of a proviso in Section 113 of the Transfer of Property Act corresponding to the second proviso to Section 112. But this argument was not accepted and the Bench held that the test in all these cases is the intention at the time when the payment is received, i.e., was the act of the landlord one from which one can impute the intention of creating a renewal of tenancy. Stone, C.J., pointed out that in the case of acceptance of rent subsequent to the notice to quit by the landlord is inaccurately referred to as the waiver of a notice to quit but that the correct view is that it is the creation of a new agreement. The decision of *Buckland, J.*, in AIR 1926 Cal 763 was referred to but not followed. *Kania, J.* (as he then was), who delivered a concurring judgment and observed that in the matter of effect of acceptance of rent after notice to quit, there was no difference between the Indian Law, i.e., the provision in Section 113 of the Transfer of Property Act, and the English Law. The learned Judge also rejected the argument that by reason of the absence of a proviso in Section 113, the Legislature should be deemed to have made a departure from Section 112; it was also pointed out that the phraseology of Section 113 is not strictly accurate. That receipt of rent cannot be separated and divorced from the intention to treat the lease as subsisting was pointed out in these terms:—

"In my opinion, this line of argument is faulty, because it attempts to split the provision of Section 113 in two parts. It is an attempt to read in Section 113 the words 'by acceptance of rent' as an act resulting absolutely in the waiver of the notice to quit, irrespective of the question whether there was an intention to treat the lease as subsisting or not."

I may also add that the relevant discussion in this Bench decision of the Bombay High Court, attention is focussed mainly on the question of the effect of receipt and not on the note made by the landlord that the receipt of the money was as compensation. Even the recital, whether as rent or "as compensation" is not decisive in view of the

decision of the Supreme Court in (1968) 2 SCJ 528: AIR 1968 SC 919, referred to earlier.

23. Reference must next be made to the decision in *Kamlapat Sahai v. Mt. Manho Bibi*, AIR 1948 Oudh 127. In this case the landlord instituted a suit in ejectment and obtained a decree. The question arose whether payment of rent in pursuance of an arrangement in the appellate Court in the matter of stay of execution amounted to waiver when payments were received as rent. The decision in AIR 1926 Cal 763 was referred to and dissented. *Kidwai, J.*, delivering the judgment observed that once the suit has been instituted it cannot possibly be said that the lessor had manifested the intention that the lease was subsisting. It was observed that the word "rent" was misused in the receipt and would not indicate that notice to quit had been waived. The importance of this decision is that when a landlord and the tenant have been engaged in a serious fight in Court proceedings asserting rival contentions, it was impossible in that background to impute to the lessor an intention to treat the lease as subsisting. The principle of this decision directly applies to the instant case.

24. In *Ilahibux v. Munir Khan*, AIR 1953 Nag 219, in which the facts were similar, the same view was taken observing that the test was, if the tenant had insisted upon withdrawal of the suit in ejectment treating the relationship of landlord and tenant as subsisting, would the landlord have agreed. It was observed that the act of the landlord ought, in the light of the circumstances in the case, lead to the irresistible conclusion that he had given up the rights asserted by him in the proceedings and that when parties are litigating their rights in Court those rights could not be affected except by an express contract between them to the effect that the rights asserted in the suit by the plaintiff and denied by the defendant had been adjusted either out of Court or through the intervention of the Court.

25. I may now refer to the decision of the Calcutta High Court in *Mahadeo Prasad v. Sulekha Sarkar*, AIR 1954 Cal 404, in which the view of *Buckland J.*, was not followed. In that case the landlord after a valid notice to quit brought a suit and obtained a decree in ejectment, the tenant's claim for protection under the Rent Control Law having been negatived. During the pendency of the appeal by the tenant, the landlord accepted rent from the tenant who desired to be relieved from the bother of depositing the rent under the procedure provided in the Rent Control Act. It was held that under the circumstances, payment and acceptance of rent was not with the intention of renewing or reviving or continuing the old tenancy or creating a new one. It was also held that independently of the representation of the tenant that he made the payment to the landlord merely as a

matter of convenience the legal position was the same and there was no waiver as there was not the requisite consensus ad idem to treat the lease as subsisting. With regard to Illustration (a) to Sec. 113, it was pointed out that it is only in the absence of any indication pointing reasonably to a contrary intention that the acceptance of rent would amount to waiver. In this decision the decision of Buckland J., in AIR 1926 Cal 763 was not only referred to but the criticism of Stone, C.J., in AIR 1945 Bom 132 was also referred to with approval. This decision clearly emphasises that the fundamental principle in the doctrine of waiver is the intention of relinquishment of a known right, and that an act by itself would not amount to waiver. This decision was followed and approved in a Bench decision reported in the same volume in Panchanan v. Haridas, AIR 1954 Cal 460, in which also the decision of Buckland J., in AIR 1926 Cal 763 was referred to and dissented. In that case, after notice to quit, the payment of rent was made and received. The tenant made the payment in pursuance of the Rent Control Act and the landlord received it. The Bench pointed out that mere acceptance of rent was not decisive but the intention was the important factor and the circumstance that it was paid under the provisions of the Rent Control Act, leaving no option to the landlord repelled any intention on his part, to treat the lease as subsisting. The point to be noticed in this decision and other decisions where payments were made and received under the Rent Control Act is that those decisions emphasise that the governing factor is the intention and not mere receipt, divorced from the other circumstances of the case. The Bench pointed out that it is for the tenant to establish that there was an intention to treat the lease as subsisting and that the circumstance under which the rent was paid and received was the important consideration and not the mere payment.

26. In Pullin Behari v. Miss Lila Dey, AIR 1957 Cal 627, the same view was taken and the decision in AIR 1954 Cal 404 was approved and followed. While referring to this decision, I may add that there are observations in that judgment that there is some difference between the English Law and the Indian Law in view of the language employed in Section 113 of the Transfer of Property Act, which I have already indicated is not quite happy. That apart, the recent decisions of the Supreme Court in (1968) 2 SCJ 528: AIR 1968 SC 919 and (1968) 2 Mad LJ (SC) 42: (1968) 2 AndhWR (SC) 42: (1968) 2 SCJ 291 = (AIR 1968 SC 471) have made it clear that Section 113 of the Transfer of Property Act there is really no difference between Indian and English Law.

27. In Moti Lal v. Basant Lal, AIR 1956 All 175, it was held that no question of waiver arises after the landlord has brought a suit after issuing a valid notice

determining the lease. It was observed as follows:—

"As will appear from the language of Section 113, a waiver can be brought about by the action of the landlord if after determining the tenancy by notice the landlord chooses to accept the rent again from the tenant. In such an event under Section 113 of the Transfer of Property Act, a notice for determination of the lease already given by the landlord to the tenant will be deemed to have been waived. No question of waiver arises after the landlord has brought a suit on the basis of a valid notice given for determination of the lease. After such a suit has been brought, there can be no waiver, though it is always open to a landlord to renew the lease at any time he pleases. I do not, therefore, think that any question of waiver arises in this case."

28. In Harbhajan Singh v. Munshi Ram, AIR 1956 Punj 246, the same view was taken emphasising that the question of waiver is one of intention and that mere acceptance of rent after the expiration of the notice to quit is not in itself a waiver but that it is merely a circumstance which will have to be considered along with other facts of the case bearing upon the question of intention of the lessor. The circumstances relied upon in that case repelling any inference of waiver was, the Court proceedings instituted by the landlord to recover possession.

29. The Patna High Court also has taken the same view in Zaffar Hussain v. Mahabir Prasad, AIR 1957 Pat 206, that acceptance of rent by the landlord after the issue of notice to quit by itself would not constitute waiver and that there must be evidence of consensus ad idem between the parties to continue their relationship as creating a new tenancy. The view taken by the earlier Bench decision of the same High Court in Wali Ahmad v. Mt. Hussaini, AIR 1917 Pat 469 was followed. In AIR 1957 Pat 206, the notice to quit was given on 11th January, 1954, and application for eviction was filed in June, 1954, the complaint of the landlord being that the tenant defaulted to pay rent from November, 1953 to May, 1954, and the question was whether the claim for rent for the period subsequent to the termination of the lease by notice to quit amounted to waiver. The Bench held that it must be shown by independent evidence that the landlord has attempted to continue the relationship of landlord and tenant and that in the absence of such evidence, a mere claim for rent would not be sufficient. In the earlier case in AIR 1917 Pat 469, the Bench had held that the institution of a suit in ejectment is an unequivocal declaration of an intention to determine the tenancy and the inclusion of a claim for rent in such a suit should not be held to be a waiver, but the claim for rent must be understood as a claim for damages for wrongful occupation. In Puran

Mal v. Onkar Nath, AIR 1959 Pat 128, notice to quit was given by the landlord on 1st June, 1946, and a suit in ejectment was filed in November, 1946, in which there was also a claim for arrears of rent from February, 1946, up to the date of suit and future profits. A second suit for the same relief was filed in December, 1949, claiming arrears of rent from December, 1946 to November, 1949. Both the suits in which there was a denial of title were decreed. In the High Court, the plaintiff was permitted to amend the plaint deleting the claim for rent. On behalf of the tenant, an argument was advanced that, notwithstanding the deletion of the prayer for recovery of rent, the landlord must be deemed to have waived in view of his having previously claimed rent in both the suits for the period subsequent to the notice to quit. The Bench held that the question of waiver was essentially a question of intention and the action of the landlord should manifest an intention to keep the lease still subsisting. The matter was stated thus:

"Further, as will appear from the above, the question whether or not there was waiver of notice to quit is purely a question of intention of the parties. It is quite manifest from the provisions of Section 113 that in order to constitute waiver there must be an intention not only on the part of the lessor but also on the lessee to treat the lease as subsisting. In order, therefore, to determine whether or not in a particular case there was waiver of notice to quit one has to see whether from the contract of the landlord and tenant, by demand and acceptance of rent or by demand followed by express promise to pay, or otherwise an intention to treat the lease as subsisting can be inferred, and this would certainly depend upon the facts and circumstances of each case.

When it is question of intention it is plain that not even the payment and acceptance of rent by the landlord after the notice to quit, much less a mere demand of rent, necessarily waives the notice. The question under Section 113 is whether the act of landlord, manifested either by acceptance of rent or by demand of rent, is such as necessarily leads to the inference that there was an intention of creating a renewal of the tenancy or as treating the tenancy, as still subsisting. Therefore, neither the acceptance of rent nor the demand of rent is conclusive on the question of waiver. It is a question of fact to be determined in each case."

30. I may next refer to the decision of the Single Judge in Ram Dayal v. Jawala Prasad, AIR 1966 All 623, where during the pendency of the suit in ejectment, the landlord received rent from the tenant and the learned Judge referred to and followed the decision of Buckland, J., in AIR 1926 Cal 763, taking the view that the mere act of receiving the rent was sufficient to constitute waiver though such a receipt was made

during the pendency of the suit. There is no reference to any other decision and discussion. With respect, I am of the view that this decision is not of much assistance as a precedent.

31. Learned Counsel for the appellant relied upon the Bench decision in Kapur Chand v. Kanji, (1959) 1 Andh WR 143 = AIR 1959 Andh Pra 346, of the Andhra Pradesh High Court where the landlord has received rent from the tenant after notice to quit. There, before the matter came to the High Court, there was a remand earlier and on remand the lower appellate Court had found on the evidence that the landlord accepted the rent for several months after the notice to quit with the intention of treating the lease as subsisting. On this finding, if I may say so, it was rightly held that the landlord cannot eject the tenant. The decision in Kai Khurshroo v. Bai Jerbai, (1949) FCR 262 = (1949) FLJ 168 = AIR 1949 FC 124, turned upon the peculiar facts of that case and there was a difference of opinion, Patanjali Sastri, J., as he then was, taking a different view. There, after notice to quit, defendants 2 and 3 who claimed to be sub-tenants insisted upon continuing in possession and paid the rent month after month. The majority took the view that the landlord had obvious motive in receiving the payments of rent after a particular period i.e. the appointment of a receiver of the property of the mortgagor at the instance of his mortgagee. Having regard to the uniform view taken in all the decisions, both Indian and English, I am not inclined to interpret this decision of the Federal Court as an authority for the position that the payments and receipt of rent as such in every circumstance would amount to waiver, whatever may be the circumstances of the case and the intention of the lessor. It is significant to refer to the following observations to show the crucial distinguishing feature in that case:

"There was obviously a change when the second set of cheques were sent to the plaintiff in November, 1942. This time they were not returned to the defendants and the plaintiff kept them in his hands for some time and then sent them on to his bankers. Curiously enough this synchronizes with the appointment of a Receiver by the mortgagees who was to take possession of the house on 20th November, 1942. It may be that it was this circumstance which brought about a change in the mind of the plaintiff."

That the Supreme Court regarded the intention of the parties as important is clear from the decision in (1951) SCJ 407 = (1951) SCR 560 = AIR 1951 SC 285, already referred to, in which the Supreme Court has adverted to the significance of the context in which the payment was made and received. In the decision of the Federal Court emphasis was laid that when the tenant made the payment, he used the word 'rent' in the letter which accompanied the cheque. In the latest decision of the Supreme Court already

referred to in (1968) 2 SCJ 528 = AIR 1968 SC 919, the Supreme Court had observed that the use of the word 'rent' was not conclusive. For all these reasons I am of the view that the decision of the Federal Court in Kapadia's case, (1949) FLJ 168 = (1949) FCR 262 = AIR 1949 FC 124 must be restricted to the facts of that case and not laying down a general proposition contrary to the plain language in Section 113 of the Transfer of Property Act in which the intention to treat the lease as subsisting is clearly emphasised. I may also add that in Abdul Jameel v. M/s. Simson and Machonochy Ltd., (1967) 1 Mad LJ 837, I have held that if a contractual tenancy comes to an end by efflux of time and if the tenant continues in possession and the landlord accepts the rent after such expiration that will not afford ground for holding that the landlord has assented to a new contractual tenancy. The observations of the Supreme Court in Ganga Dutt v. Kartik Chandra Das, (1961) 3 SCR 813 = (1962) 2 Mad LJ (SC) 161 = (1962) 2 Andh WR (SC) 161 = (1962) 2 SCJ 584 = AIR 1961 SC 1067 at p. 1070, as extracted in the above decision would show that the Supreme Court was already of the view that after the determination of the tenancy, possession of the tenant must be in pursuance of any contract, express or implied, thereby emphasising that the paramount consideration is the intention of the parties concerned and not any physical act of omission or commission.

32. The result is the second appeal is dismissed with costs. No leave.

Appeal dismissed.

AIR 1970 MADRAS 176 (V 57 C 44)

KAILASAM, J.

Harcharan Singh Premi, Petitioner v. The Officer Commanding Army, Military Hospital, Madras-16 and another, Respondents.

Writ Petn. No. 440 of 1968, D/-29-11-1968.

Army Act (1950) Ss. 3 (xviii), 19, 2 (1) (a) — Temporary Commissioned Officer — He comes within definition of S. 3 (xviii) and is subject to provisions of Act — He can be removed only by following procedure under the Act, the Rules and the Regulations and not by following Army Instructions which are in the nature of administrative directions — Army Instructions cannot have effect of modifying rights given under the Act. AIR 1951 Mad 777, Rel. on—(Army Rules (1954) Rule 15) — (Army Instructions, D/- 20-10-1962, Para. 12). (Para 7)
Cases Referred: Chronological Paras
(1951) AIR 1951 Mad 777 (V 38) =
ILR (1952) Mad 153 = 52 Cri LJ
827, Chatterjee v. Sub Area Com-
mander Head Quarters, Madras

7

T. Govindarajulu, for Petitioner; V. Sure-
shan, for Respondents.

ORDER: This petition is filed by a temporary Commissioned Officer to quash the Order of the Officer Commanding, Military Hospital, Madras dated 20-3-1967 in consequence of an order of the Ministry of Defence issued by the Director General, Armed Forces, Military Service dated 27-2-1967 terminating the services of the petitioner as a Commissioned Officer.

2. The petitioner was enrolled in the Army Medical Corps on 8-12-1953 as a Sepoy Nursing Assistant. After about 10 years of service, he was promoted in 1963 as Lance Naik; and, in 1964, as Naik. The petitioner appeared before the Service Selection Board at Kolhapur and before the Medical Board at Delhi and was selected for grant of Permanent Regular Commission in the Army Medical Corps by the Director General, Armed Forces Medical Services by his order dated 22-4-1965. The petitioner reported himself for duty on 2-5-1965. The Petitioner's Commission was gazetted in the Gazette of India on 18-2-1967. Nine days after the Commission was granted, the President of India terminated the petitioner's Commission on 27-2-1967. The termination of the Commission is stated to be under Paragraph 12 of the Army Instructions 231. The petitioner filed a review petition to the Director General, Armed Forces Medical Service on 7-3-1967, under Section 27 of the Army Act, 1950, and as the petitioner did not receive any immediate redress on his application for review, he submitted a petition on 9-3-1967 to the President of India. The petition to the President of India was rejected on 21-9-1967 and hence this Writ Petition.

3. In this petition, it is unnecessary to go into the competency or otherwise, of the petitioner to continue as a Commissioned Officer, for, the petitioner challenged the order terminating his service as not in accordance with law. Shortly put, the contention of the learned counsel for the petitioner is that he being a Commissioned Officer, is governed by the Army Act and any dismissal and the termination of his service can only be under Section 19 of the Act, i.e. subject to the provisions of the Army Act and the Rules and Regulations made thereunder. On behalf of the Central Government, it is submitted that the petitioner was appointed as a Commissioned Officer under the Army Instructions and as he was only a temporary Commissioned Officer, he was governed by Army Instructions dated 20th October, 1962, paragraph 12, which provides that if an officer, during the probationary period, is reported as unsuitable to retain his Commission, it will be terminated at any time during or after the probationary period. In order to appreciate the contention of the learned counsel, it is necessary to refer to the relevant provisions of the Act, the Rules and the Army Instructions.

Therefore, I am unable to accept the contention of the respondent. If the tender or delivery to the party is shown as impracticable, it is open to the Landlord to adopt the procedure of affixture.

10. In this case, from the several notices that have come back to the petitioner for the reasons already mentioned and the previous conduct of the tenant in connection with the notice of attornment, it would not be unreasonable for the landlord to proceed on the basis that it is not practicable to tender or deliver notice personally to the tenant. This is enough to justify the conclusion that by affixing of the notice on a conspicuous part of the property, there has been due service of the notice.

11. Quite apart from what I have stated with regard to the service of registered notice or affixation of the notice on a conspicuous part of the premises, it is enough to hold that in this case, there has been due service of notice by virtue of the fact that the notice has been sent by post under "certificate of posting" and the presumption arises under S. 114 (f) of the Indian Evidence Act that the letter has been duly delivered to the addressee as the letter has been addressed to the residential address of the respondent tenant.

12. For these reasons, I find no substance in the contention of the respondent and allow this revision petition with costs.

13. The respondent-tenant is directed to vacate and deliver possession of the premises to the petitioner within three months from this date.

Petition allowed.

AIR 1970 MYSORE 81 (V 57 C 20)

M. SADASIVAYYA AND

D. M. CHANDRASHEKHAR, JJ.

Poovamma and others, Appellants v. Sumathi and others, Respondents.

Appeal No. 127 of 1960, D/- 28-3-1969 from decree of Sub. J., South Kanara, D/- 14-9-1956.

Civil P. C. (1908), S. 11 — Acquisition of land — Suit relating to title to acquired land — Petition disputing apportionment of compensation — Parties and issues common in both proceedings — Both proceedings disposed of by common judgment but decrees were two — No appeal against decree in suit — Held, decree in suit had become final and principles of res judicata barred appeal from decree in petition: AIR 1953 SC 33 & (1911) ILR 33 All 51 (FB), Foll.; AIR 1943 Mad 139 (FB) & AIR 1927 Lah 289 (FB), Dissented from; Case Law Ref.

(Paras 5, 7, 14, 20, 28 and 29)

Cases Referred:	Chronological	Paras
(1966) AIR 1966 SC 1332 (V 53) =		
(1966) 3 SCR 300, Sheodan Singh v. Daryao Kunwar		21, 22
(1962) AIR 1962 SC 338 (V 49) =		
(1962) 3 SCR 759, Badri Narayan v. Kamdeo Prasad		13, 17, 20
(1961) AIR 1961 SC 1457 (V 48) =		
(1962) 1 SCR 574, Daryao v. State of U. P.		15
(1953) AIR 1953 SC 33 (V 40) =		
1953 SCR 154, Raj Lakshmi Das v. Banamali Sen		7
(1953) AIR 1953 SC 419 (V 40) =		
1950 SCR 754, Narhari v. Shanker		9, 13, 14
(1943) AIR 1943 Mad 139 (V 30) =		
ILR (1943) Mad 235 (FB), Pappammal v. Meenammal		24
(1927) AIR 1927 Lah 289 (V 14) =		
ILR 8 Lah 384 (FB), Mt. Lachhmi v. Mt. Bhulli		11, 25
(1911) ILR 33 All 51 = 7 All LJ 861 (FB), Zaharia v. Debia		27, 28

Shivashankar, for Appellants; K. R. D. Karanth, for Respondents.

CHANDRASHEKHAR, J.:— This is an appeal from the judgment and decree in Original Petition (L. A. C.) No. 76 of 1951 on the file of the Subordinate Judge of South Kanara. That petition arose on a reference under Section 30 of the Land Acquisition Act, for apportionment among the claimants of the compensation awarded for acquiring 79 cents of land in T. S. No. 265 in Mangalore Town. The learned Subordinate Judge held that respondents-claimants 11 to 18 were solely entitled to the entire compensation. Feeling aggrieved by that decision, claimants 2, 4 to 7 and 19 have preferred this appeal impleading Claimants 11 to 18 as respondents.

2. At the hearing of the appeal Mr. K. R. D. Karanth, learned counsel for respondents, raised the following two preliminary objections to the appeal:

- (i) The appeal is barred by the principle of res judicata, as the appellants did not appeal from the decree in the suit which was decided along with the Original Petition by a common judgment; and
- (ii) The entire appeal abated on the death of appellant No. 5, Vedavathi, whose legal representatives have not been brought on record.

3. Before going into the merits of the appeal, it is necessary to consider these two preliminary objections because, if either of them is upheld, the appeal must fail and it would be unnecessary to go into the merits of the appeal.

4. Mr. K. Shivashankar Bhat, learned counsel for the appellants, and Mr. Karanth addressed elaborate arguments on these preliminary objections.

5. We shall now consider the first preliminary objection. It is common ground

that in the Original Petition and in the Original Suit the parties are common and the main issues are also common. Those issues relate to the title to the suit land which was acquired. The apportionment of the compensation for this land is the subject matter of the Original Petition. Though there was a common judgment in these two proceedings, there were two separate decrees, one in the Original Suit and the other in the Original Petition. The appellants have not preferred any appeal from the decree in the Original Suit, which is against them.

6. Mr. Karanth, argued that the decree in the Original Suit, against which no appeal has been filed, has become final and operates as *res judicata* in regard to the present appeal and hence the present appeal is barred and should be dismissed *in limine*.

7. As stated by the Supreme Court in *Raja Lakshmi Dasi v. Banamali Sen*, AIR 1953 SC 33 the principles underlying Section 11, Civil P. C., are applicable even when the case does not fall within the strict terms of that Section.

8. Where two proceedings involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not in the other, the question whether the matter decided in the latter proceedings, becomes *res judicata* so that it cannot be reopened in the appeal, is one on which there is no decision of this Court (the High Court of the New State of Mysore). On this question there is a conflict of decisions of different High Courts. Each learned counsel referred to certain observations of the Supreme Court as supporting his respective contention.

9. Mr. Shivashankar Bhat, strongly relied on the observations of the Supreme Court in *Narhari v. Shanker*, AIR 1953 SC 419. There, the plaintiffs claimed 1/3 of certain properties from one set of defendants, i.e., defendants 1 to 4 and another 1/3 from another set of defendants, i.e., defendants 5 to 8. The trial Court decreed the suit. Each set of defendants filed a separate appeal claiming 1/3 of the properties. The first Appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed in the file of the other connected appeal. The plaintiffs thereafter brought before the High Court two appeals one against the decree in the appeal filed by defendants 1 to 4 and the other, against the decree in the appeal filed by defendants 5 to 8. In the former appeal the plaintiffs had impleaded as respondents all the defendants and had paid the full court-fee necessary for an appeal against the dismissal of the entire suit. The plaintiff's prayer covered both the appeals. The

latter appeal was dismissed by the High Court as being filed beyond limitation.

10. At the hearing of the former appeal, it was contended by the respondents therein that it was barred by the principle of *res judicata* on account of the dismissal of the latter appeal. The High Court upheld that contention and dismissed the former appeal also on the ground that the judgment in the latter appeal operated as '*res judicata*.'

11. Against the decisions of the High Court the plaintiffs then filed two appeals which ultimately came up before the Supreme Court. Reversing the decrees of the High Court this is what the Supreme Court said at page 420:—

"It is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand, J. in his learned Judgment in AIR 1927 Lah 289, mentioned above, the determining factor is not the decree but the matter in controversy.

As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of *res judicata* arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of *res judicata* does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerned the entire suit. As such, there is no question of the application of the principle of *res judicata*. The same judgment cannot remain effective just because it was appealed against with a different number or copy of it was attached to a different appeal. The two decrees in substance are one"

12. Relying on the above observations Mr. Shivashankar Bhat urged that the bar of *res judicata* is not created by the decree, but by an earlier judgment, and that even where there are two suits, a decision simultaneously cannot be a decision in the former suit. Mr. Shivashankar Bhat also argued that though in the present case there were two decrees, one in the Original Suit, and another, in the Original Petition, the two decrees were in substance only one.

13. The aforesaid observations in *Narhari's* case, AIR 1953 SC 419 have been explained by the Supreme Court in a later decision, *Badri Narayan v. Kamdeo Prasad*, AIR 1962 SC 338 at pp. 340 and 341. The Supreme Court pointed out that in *Narhari's* case, AIR 1953 SC 419 the first appeal was really a consolidated appeal against the decrees in both the appeals and could have been split up for

the purposes of record into two separate appeals, and that it does not mean whenever there be more than one appeal arising out of one suit, only one appeal is competent against the order in any of those appeals irrespective of the fact whether the issues for decision in those appeals were all common or some were common and others raised different points for determination. The Supreme Court also pointed out that the decision in Narhari's case, AIR 1953 SC 419, does not apply to cases which are governed by the general principles of res judicata and not by Section 11 C. P. C.

14. We think Narhari's case, AIR 1953 SC 419 is distinguishable on facts from the present case, and the observations in Narhari's case, AIR 1953 SC 419 are applicable only when there is one suit which gives rise to two appeals. But in the present case there were two proceedings, one a suit, and another a reference under Section 30 of the Land Acquisition Act. Since both these proceedings are not suits, what applies is not Section 11, Civil P. C., but the general principles of res judicata.

15. Mr. Shivashankar Bhat next referred to certain observations in Daryao v. State of U. P., AIR 1961 SC 1457 at p. 1466. Gajendragadkar, J., (he then was) who spoke for the Court, said that if the petition filed in the High Court under Art. 226 of the Constitution is dismissed not on the merits, but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to him, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32.

16. The above observations were made while considering as to when a decision of the High Court in a petition under Article 226 of the Constitution, may operate as res judicata so as to bar a subsequent petition before the Supreme Court under Art. 32. The above observations have no application in regard to the question whether an unappealed decree pursuant to a single judgment in two suits between the same parties, will operate as res judicata in an appeal filed against the other decree (under the same judgment).

17. Mr. Karanth strongly relied on the decision of the Supreme Court in AIR 1962 SC 338.

18. There, against the decision of the Election Tribunal two appeals were presented before the High Court by the Election petitioner and the returned candidate respectively. The High Court allowed the appeal of the Election petitioner but dismissed that of the returned candidate. Thereafter the returned candidate appeal-

ed before the Supreme Court against the decision of the High Court in his Election Appeal only and not against the decision in the other Election Appeal (filed by the Election petitioner). A preliminary objection was taken before the Supreme Court that the appeal was barred by res judicata as it was not open to the appellant to question the correctness of the decision of the High Court in the other appeal which had become final.

19. Upholding the plea of res judicata, the Supreme Court said that the decision of the High Court though stated in one judgment, really amounted to two decisions and not one decision common to both the appeals, and so long as the decision of the High Court in one of the appeals stood, the appellant could not question before the Supreme Court the finding of the High Court in his appeal before the High Court as the finding in his appeal had to follow the finding in the other appeal.

20. We think, Badri Narayan's case, AIR 1962 SC 338 is distinguishable on facts from the present case. There, there were two decisions though stated in one judgment; but in the present case both in the Original Suit and the Original Petition, there was only one decision, namely, as to which of the parties had the title to the acquired land. We think the decision of the Supreme Court in Badri Narayan's case, AIR 1962 SC 338 has no application to the present case.

21. Mr. Karanth next relied on the decision of the Supreme Court in Sheodan Singh v. Daryao Kunvar, AIR 1966 SC 1332. There, the appellant had brought two suits against the respondent, while the respondent had brought two suits against the appellant. As there were common issues in these four suits, they were tried together by consent of parties and were disposed of by a common judgment. Separate decrees were prepared in each suit. The appellant filed four separate appeals against the decrees in these four suits. One of these appeals was dismissed by the High Court as being time barred, while another appeal was dismissed by the High Court on account of the appellant not applying for translation and printing of records. When the remaining two appeals came up for hearing before the High Court, the respondent pleaded that those appeals were barred by the principle of res judicata as her title to the suit property had become final on account of the dismissal of two other appeals. The Supreme Court upheld the view of the High Court which held that the decision of the trial Court which became final on account of the dismissal of two of the appeals, operated as res judicata even in respect of the remaining two appeals, and in that view those remaining two appeals also should be dismissed.

22. The above case is also distinguishable on facts from the present case inasmuch as an appeal has been filed only from the decree in the Original Petition and no appeal was filed from the decree in the Original Suit. As to whether the decree not appealed from operates as *res judicata* in the appeal preferred from the other decree, the Supreme Court did not express any opinion in Sheodan Singh's case, AIR 1966 SC 1332 but left it open after noticing the rival views expressed by different High Courts on this point.

23. We shall now briefly advert to the divergent views of High Courts on the question when two proceedings involving common issues are disposed of in one judgment, and an appeal is filed against the decree in one and not in the other, whether the matter decided in the latter becomes *res judicata* so that it cannot be reopened in appeal.

24. The Madras High Court has almost consistently taken the view that there is no bar of *res judicata* in such circumstances. According to the Madras High Court, where the object of the appeal is, in substance, if not in form, to get rid of the very adjudication which is put forward as constituting *res judicata*, that adjudication should not be held to bar the appeal: Pappammal v. Meenammal, AIR 1943 Mad 139.

25. According to Tek Chand, J., who spoke for the majority of the Full Bench of Lahore High Court in AIR 1927 Lah 289 (FB), the estoppel of *res judicata* is created by a verdict or a judgment and not by a decree and attention must be concentrated not upon the fact that there is a record of an outstanding decree in favour of a party, but upon the question whether there has been an independent decision upon which the record was based.

26. The most serious objection to the view that an unappealed decree does not bar the hearing of an appeal from the other decree, is that if the latter decree is reversed or modified in appeal, there would be two inconsistent decrees on the file of the Court and both those inconsistent decrees may be sought to be executed. Tek Chand, J., sought to solve this difficulty by stating that if two or more conflicting decrees happen to be passed regarding the same property, the later decision shall be taken to have superseded the earlier and thenceforward the only effective adjudication.

27. With all respect to his Lordship, it is difficult to see how a decree which is not appealed from, can be superseded by a decision in an appeal from another decree. We think the correct legal position is, if we may say so with respect, as stated by Stanley, C. J., who spoke for the Full Bench of Allahabad High Court in Zaharia v. Debia, (1911) ILR 33 All 51 at p. 60:

"A decree, unless it be a decree which is a nullity by reason of, for example, fraud, cannot be superseded except upon appeal in regular course. This being so if we accede to the argument addressed to us, we should have two inconsistent decrees on the file of the Court. This would be a most serious anomaly, and in execution proceedings would cause complete impasse."

28. In order to avoid such conflicting, confusing and anomalous results, we think the view taken by the Full Bench of the Allahabad High Court in (1911) ILR 33 All 51 and which has been followed by the High Courts of Calcutta, Patna and Orissa, should be preferred to the view taken by the Madras High Court and a few other High Courts.

29. We must hold that the decree in the Original Suit regarding the title to the acquired land, which has not been appealed from, became final and the principle of *res judicata* bars the appeal from the decree in the Original Petition. In that view, it becomes unnecessary to consider the other preliminary objection whether the present appeal has abated on account of the death of Vedavathi whose legal representatives have not been brought on record.

30. In the result, this appeal is dismissed. But in the circumstances, we direct the parties to bear their own costs in this appeal.

Appeal dismissed.

AIR 1970 MYSORE 84 (V 57 C 21)

A. R. SOMNATH IYER, J.

Mallanna and others, Appellants v. Eramma and others, Respondents.

Second Appeal No. 190 of 1968, D/- 23-7-1969, from decree of Civil J., Raichur, D/- 23-1-1968.

(A) Civil P. C. (1908), Ss. 100 and 101 — Second appeal — Concurrent finding of Courts below as to agreement of sale being not genuine — Finding is one of fact — No interference. (Para 4)

(B) Civil P. C. (1908), O. 22, R. 4 — Impleading of only some of legal representatives of defendant — Suit does not abate — It continues against those impleaded against whom an effectual decision binding them can be made. (Para 8)

(C) Transfer of Property Act (1882), S. 62 — Self redeeming mortgage — Suit for possession — Mortgage debt already discharged — No suit for redemption of mortgage is necessary. (Para 9)

B. V. Deshpande, for Appellants; K. Jagannath Shetty, for Respondents Nos. 1, 3 and 4.

JUDGMENT:— The appellants are the defendants who were sued by the plaintiffs for possession and mesne profits with respect to a land which had been mortgaged by a certain Hanumavva who was the mother-in-law of the first plaintiff and the grand-mother of others. The case of the plaintiffs was that the mortgage was a self redeeming mortgage, and that the liability under the mortgage deed had come to an end after the expiry of the stipulated period. The defendants resisted the suit on more than one ground, but the Court of first instance overruled their defence and made a decree in favour of the plaintiffs for possession and mesne profits at Rs. 200 a year.

2. From that decree there was an appeal by the defendants and a cross-objection by the plaintiffs with respect to mesne profits awarded which, according to the plaintiffs, were not sufficiently adequate. The lower appellate Court dismissed the appeal preferred by the defendants and allowed the cross-objection and enhanced the mesne profits to a sum calculated at Rs. 400 a year.

3. The defendants appeal.

4. Mr. Deshpande appearing for the defendants urged before me that the Courts below were in error in overruling the pleas raised by the defendants in their written statement. The first submission made by him was that notwithstanding the discharge of the mortgage debt after the expiry of the stipulated period, the plaintiffs were not entitled to recover possession since there was an agreement of sale executed in favour of the defendants under which possession of the suit land had to continue with the defendants. But the Courts below recorded a finding that the agreement of sale produced by the defendants was not a genuine document, and, that finding being a finding on a pure question of fact is not open to discussion in this Court.

5. There is no substance in the argument advanced by Sri Deshpande that the decrees of the Courts below are contrary to law by reason of the refusal by the Court of first instance to accord permission for the examination of another hand-writing expert to elicit opinion contrary to the hand-writing expert's opinion which had been made available by the plaintiffs.

6. The defendants were permitted by the Court of first instance to examine another expert on an application made at an inordinately late stage, and it is their own fault if the defendants failed to avail themselves of the opportunity so made available to them.

7. It was next contended that since the suit land was the stridhana property of the deceased Hanumavva, her daughters became entitled to it after her death, and that the suit brought by the daughter-in-

law and the son's sons of Hanumavva was not maintainable. But Mr. Deshpande had to abandon this argument since he had to admit that the suit land, although it was the stridhana property of Hanumavva, did not become her absolute property and on her death it reverted to the heirs of her father.

8. It was next urged that not all the legal representatives of defendant 2 were brought on the record after his death, but his brother and son were the only persons impleaded as legal representatives, although the wife and the daughter should have also been added as legal representatives. But this contention has to fail for the reason that, if, not all the representatives were brought on record the suit does not fail and it has to continue against those persons who have been impleaded as legal representatives against whom an effectual decision which binds them could be made.

9. It was again submitted that a suit for redemption should have been brought, but this contention can have no legs to stand upon since the finding of the Courts below is that the mortgage debt stood discharged in consequence of the self redeeming mortgage. It is pointless for any one to urge that in that situation the redemption of the mortgage which no longer existed, should have been sought.

10. So the decree for possession made by the Courts below, is, in my opinion, unexceptionable and must be confirmed.

11. The next branch of the argument concerned mesne profits which, as I have already observed, were awarded at Rs. 200 by the Munsiff and at Rs. 400 by the Civil Judge. Mr. Deshpande in making the criticism of the enhancement made by the Civil Judge, found himself in great difficulty at more than one stage. He first made the submission that the Civil Judge enhanced the mesne profits without there being any evidence to support the enhancement. But he had to withdraw from that submission when it was pointed out to him that the Civil Judge did allude to the evidence of the 4th plaintiff and that given by P. W. 2 both of whom gave evidence that the income from the suit land was 60 bags of jawar a year. Mr. Deshpande did not dispute that the price of each bag of jawar at the relevant point of time was Rs. 30 and so, the effect of the evidence given by both these witnesses was that the manual income was in the neighbourhood of Rs. 1,800 a year.

12. When confronted with this difficulty Mr. Deshpande modified his submission and argued that, although the Civil Judge had disbelieved the evidence of P. W. 2 and the 4th plaintiff, he nevertheless made a decree for enhancement. But here again it transpires that Mr. Deshpande was not right, since the Civil Judge said nowhere in his judgment that he did not believe

the evidence of these witnesses. On the contrary the relevant discussion makes it clear that he did place dependence upon the evidence of both these witnesses and that the basis for the enhancement which he made was the evidence given by them. Mr. Deshpande cannot draw any substance for his argument that the Civil Judge did not believe the evidence of these two witnesses, from the fact that the Civil Judge did not allow the whole of the mesne profits claimed by the plaintiffs, but gave them only half of what they had claimed.

13. The argument advanced by Mr. Deshpande that the Civil Judge acted arbitrarily without the support of any evidence, overlooks the fact that the Civil Judge gave a smaller sum of money towards mesne profits not because he did not believe the evidence of P. W. 2 and the 4th plaintiff, but because he thought that allowance should be made for factors such as failure of crops, scarcity of rainfall and so on and so forth. The criticism of the enhancement made by the Civil Judge is, in my opinion, unreasonable and so unacceptable.

14. The last argument that was placed before me was that even so the provisions of Section 18 (1) of the Mysore Agricultural Debtors Relief Act, 1966 which came into force on April 1, 1969 made it incumbent on this Court to transfer that part of the appeal which concerns the liability to mesne profits to the Agricultural Debtors Relief Act Court functioning under that Act. That section reads:—

"18. Transfer of pending suits, appeals, applications and proceedings to the Court.

(1) All suits, appeals, applications for execution and proceedings in respect of any debt pending in any Civil or Revenue Court shall, when they involve the questions whether the person from whom such debt is due is a debtor, and whether the total amount of debts due from him exceeds twenty thousand rupees, be transferred to the Court.

15. It was asserted by Mr. Deshpande that the question which the issue appertaining to mesne profits necessarily involved is whether the original defendants and the legal representatives of the second defendant are debtors, and so, the transfer of the issue concerning mesne profits which is presented by this appeal for decision must stand transferred to the Court functioning under the Act. In support of this submission reliance was placed on the definition of the words "debt" contained in Section 2 which reads:—

"2(4) 'debt' means any liability in cash or kind, whether secured or unsecured, due from a debtor, whether payable under a decree or order of any Civil Court or otherwise and includes mortgage money, the payment of which is secured by the

usufructuary mortgage of immovable property but does not include arrears of wages, payable in respect of agricultural or manual labour, or any liability for the recovery of which remedy is barred by limitation;

(5) "debtor" means—

(a) an individual—

(i) who is indebted;

(ii) who holds land used for agricultural purposes or has held such land at any time not more than thirty years before 30th January 1960, which land has been transferred, whether under any instrument or not, and which transfer is in the nature of a mortgage, although not purporting to be so;

(iii) who has been cultivating land personally for the cultivating seasons in the two years immediately preceding the date of the coming into operation of this Act; and

(iv) whose annual income from sources other than agriculture and manual labour does not exceed one-third of his total annual income or Rs. 1,000 whichever is greater, and whose aggregate annual income from all sources does not exceed Rs. 5,000.

The other parts of the definition of a "debtor" are not material since no dependence was placed on those parts of the definition.

16. It is seen from the definition of the word "debtor" that an individual is a debtor for the purposes of the Act only when all the four conditions enumerated in sub-clause (a) of Cl. (5) of Section 2 of the Act cumulatively exist. The definition in sub-clause (b) which relates to an undivided Hindu family has no relevance since the defendants on whose behalf Mr. Deshpande advanced the argument are individuals falling within sub-clause (a) of Cl. 5 of Section 2 of the Act. Those individuals could claim the status of a debtor under the Act only if, firstly they are indebted, secondly if they held lands during the periods specified in that clause, thirdly if they have been cultivating the land personally during the two years to which that clause refers, and lastly if their annual income does not exceed the specified amount. The existence of all these attributes is indispensable to impress upon an individual the character of a debtor under the Act within the meaning of the Act.

17. Section 18 which enjoins the transfer of certain pending proceedings whether in a suit, or in an appeal or in other proceeding, can have application only if the pending proceeding involves the question whether the person against whom that proceeding was instituted was a debtor within the meaning of the Act. The other part of that section which speaks of the total amount of the debt has no materiality to the present discussion.

18. It cannot be said that the second appeal before me involves any question as to whether the appellants in this appeal are debtors within the meaning of the Act. That question would have arisen if they had raised a plea that they conformed to the description of a debtor contained in sub-clause (a) of Cl. (5) of Section 2 of the Act. No such plea was raised in the pleadings for the obvious reason that the Act came into force only on April 1, 1969 and the suit had been instituted long before it commenced to operate. But whatever may be the reason for which the plea was not raised and no claim was made to the status of a debtor within the meaning of the Act, what cannot be overlooked is that there is no such claim involved in this second appeal, and so, it does not fall within Section 18 of the Act.

19. But Mr. Deshpande for the first time produced a memo before me to-day in which there is an assertion that the appellants are debtors within the meaning of the Act. The memo states particulars with respect to all the matters of which sub-clause (5) of S. 2 of the Act speaks, and, I cannot take cognizance of the facts mentioned for the first time during the arguments, unless the appellants are permitted to amend the written statement, and, no such application has been made before me, or could be granted at this belated stage. The production of a memo which is signed only by the advocate for the defendants who could have no personal knowledge of the truth of the statements contained therein, cannot transform an appeal which does not involve any question such as the one to which Section 18 refers, to one falling within it.

20. I dismiss this appeal with costs.
Appeal dismissed.

AIR 1970 MYSORE 87 (V 57 C 22)

A. NARAYANA PAI, J.

D. Padmaraja Setty and others, Petitioners v. Gyanachandrappa and others, Respondents.

Civil Revn. Petn. Nos. 380 and 707 of 1968, D/- 1-7-1969, from order of Civil J., Hassan, in O. S. No. 2 of 1965.

(A) Hindu Succession Act (1956), S. 21 — Murder of mother and daughter on the same night — Difficult to ascertain who died first — Presumption under the section is that younger (daughter) survived the elder. (Para 4)

(B) Civil P. C. (1908), O. 22, Rr. 4, 5 — Hindu Succession Act (1956), S. 21 — Suit for partition and possession of his half share of property by 'B' against his widow mother P—Will by P of her property in favour of 'J' — Murder of 'P' and 'J' on

same night during pendency of suit — Statutory presumption under S. 21 Hindu Succession Act that 'J' survived 'P' — Applications by other brothers of B and also by heirs of 'J' for being brought on record as legal representatives of P — Held J's heirs could be brought on record to continue the original suit and not the brothers of B.

A suit for partition and possession of his share in property was filed by B one of the sons of P against her who was a Hindu widow. During the pendency of the suit P and her foster daughter 'J' were murdered on the same night. 'J' was presumed to survive P under Section 21 Hindu Succession Act. P had bequeathed her property to 'J' under a valid will. On death of P other brothers of B (her other sons) applied for being brought on record to continue the original suit as intestate heirs of P. The heirs of J also applied for the same purpose as representing the estate of P on the strength of the will. It was held that heirs of J were entitled to be brought on record to represent the estate of P and not the brothers of B (her other sons). The heirs of 'J' wanted to come on record not as representatives of 'J' but as persons now representing the estate of deceased P having acquired that estate as heirs of 'J' who had acquired it under the will before her death. The fact that in normal circumstances 'J' should have been impleaded as a legal representative does not make it impossible for some other person to come on record should she die before being brought on record as legal representative of P in the original suit. AIR 1951 Cal 518, Ref.

(Para 8)

Cases Referred: Chronological Paras
(1951) AIR 1951 Cal 518 (V 38) =
55 Cal WN 306, Manindra Kumar
v. Santi Rani 9

M. R. Narasimha Murthy (in C. R. P. Nos. 380 and 707 of 1968) and H. S. Shankaranarayana (in C. R. P. No. 707 of 1968), for Petitioners. T. Rangaswamy Iyengar for R. J. Babu, for Nos. 2 and 3 (in both C. R. Ps. Nos.); H. S. Shankaranarayana and K. V. Anantharamaiah (for No. 1) In C. R. P. No. 380 of 1968, for Respondents.

ORDER:— The property in suit, out of which these Revision Petitions arise, belonged to two brothers Dasarath and Tukappa. The former died first. After the death of Tukappa also, leaving only his widow Padmavathamma, one of the sons of Padmavathamma filed a suit for partition and delivery to him of a half share in the property. Padmavathamma had brought up her brother's daughter Janavva as her foster daughter.

2. During the pendency of the suit, Padmavathamma died. Both Padmavathamma as well as her foster daughter

Janavva were murdered on the same night.

3. The plaintiff filed I. A. No. VI for bringing on record his brothers because himself and his said brothers were the nearest intestate heirs of Padmavathamma under Section 15 of the Hindu Succession Act. Janavva's parents filed I. A. No. VII to come on record as legal representatives of deceased Padmavathamma, on the ground that Padmavathamma had left a registered will bequeathing all her estate in favour of Janavva and that after the death of Janavva they were the persons entitled to the estate as the nearest heirs to Janavva.

4. The will was a registered one and the same was proved by the evidence of the scribe, an attester and another. The evidence was accepted by the trial Court as satisfactorily establishing the truth and validity of the will. In view of the circumstances attending the murder of the two ladies making it difficult to ascertain as a fact which of them died first, the Court has drawn the presumption under Section 21 of Hindu Succession Act to the effect that the younger survived the elder.

5. On these findings, I. A. No. VII was allowed and I. A. No. VI dismissed.

6. Hence these two Revision Petitions by the brothers of the plaintiffs were sought to be brought on record in I. A. No. VI.

7. So far as the genuineness of the will itself is concerned, the matter is concluded by a finding of fact recorded by the trial Court in favour of the view that the will was true and valid. The Trial Court after discussing the evidence adduced on behalf of the propounders, accepted the same and upheld the truth and validity of the will. The discussion of the evidence also leaves no room for doubt that the evidence was worthy of acceptance, especially in view of the weak cross-examination on behalf of the petitioner and total absence of evidence adduced by them.

8. It appears to me that the argument cannot be accepted. The correct position is not that the parents of Janavva wanted to come on record as legal representatives of Janavva but as persons now representing the estate of deceased Padmavathamma having acquired that estate as heirs of Janavva who, as legatee under the will of Padmavathamma, had already acquired it before her death. Their title to come on record is traceable directly to the death of Padmavathamma who was a party to the suit. The fact that in normal circumstances Janavva should have been impleaded as a legal representative does not make it impossible for some other persons to come on record should she die before being brought on record as legal repre-

sentative of Padmavathamma in the Original Suit.

9. Mr. Narasimha Murthy has placed strong reliance on a decision of the Calcutta High Court reported in Manindra Kumar v. Santi Rani, AIR 1951 Cal 518. Actually the decision does not support his contention. The facts of that case were that on the death of one Surdendra Nath, the defendant in that suit, his three sons Sudhansu, Himanshu and Biranshu, were sought to be brought on record as legal representatives. But before the application could be disposed of, Biranshu died whereupon another application was made to bring on record Santi Rani, the widow of deceased Biranshu. The trial Court rejected the second application and made the strange order of substituting in the place of Surendra Nath not only his living sons but also the deceased son Biranshu. The Calcutta High Court pointed out that the substance of the matter was that the second application should have been regarded, not as an independent application to bring on record the legal representative of Biranshu, but as one for amendment of the original application for substitution of the heirs of Surendra by putting in the name of Santi Rani instead of Biranshu. They rejected the contention that the death of Biranshu, before he was brought on record as a party, resulted in any abatement of the suit and also the contention that Art. 177 of the Limitation Act applied to such a case. The ultimate order of the Calcutta High Court was to set aside the refusal of the trial Judge to implead Shanti Rani, the widow of Biranshu, and to direct substitution in the place of the original defendant Nurendra Nath, of his two sons Sudhansu and Himansu and also Santi Rani, the widow of the third son Biranshu.

10. Actually, therefore, the decisions of the Calcutta High Court supports the view that in the circumstances of the case, where the immediate heirs or successors of a deceased party dies before being brought on record as a legal representative, the next set of persons on whom the estate devolves answers the description of legal representatives because they would, in then existing circumstances, represent in law the estate of the original deceased party.

11. I see therefore no illegality in the order made by the trial Court directing the impleading of the parents of Janavva as now representing the estate of the deceased Padmavathamma, the party defendant in the suit.

12. Both the Revision Petitions are therefore, dismissed.

Revision petitions
dismissed.

AIR 1970 MYSORE 89 (V 57 C 23)

T. K. TUKOL AND M. SANTHOSH, JJ.

N. Bommon Behram and another, Petitioners v. The Government of Mysore and others, Respondents.

Writ Petn. No. 3244 of 1968, D/- 6-6-1969.

(A) Land Acquisition Act (1894), S. 11 Proviso (As inserted by Mysore Act 17 of 1961) — Land Acquisition Officer and State Government — Relation between — Principal and Agent — Proviso to S. 11 is not ultra vires main section.

Proviso to Section 11 of the Land Acquisition Act as amended by the Mysore State Legislature is not inconsistent with the main section and therefore, is not ultra vires the provisions contained in the Central Act. The proviso does not take away the real power of the Land Acquisition Officer as envisaged in the Central Act.

(Para 14)

The acquisition proceedings are initiated and held by the Deputy Commissioner as an agent of the State Government and the compensation that he fixes in his award is an offer made on behalf of the Government. The judicial determination of compensation is required to be made by the District Court in case the owner of the property to be acquired declines to accept the offer and applies for a reference under Section 18 of the Act. In law an offer made by an agent is binding on his principal. Consequently the State Legislature can direct the Deputy Commissioner to seek the previous approval of the State Government, his principal, before finally making the award and filing it under Section 12 of the Act. In law an agent has to act with the consent of his master or within the scope of the authority and in enacting the Proviso to S. 11, the State Legislature has given effect to this legal concept by clarifying the scope of powers of the Deputy Commissioner in the matter of fixing the compensation in his award. The action of the Collector in holding the enquiry relating to acquisition under the Act is an administrative proceeding in order to enable him to form his own opinion regarding the various matters to be embodied in the award. The Proviso is intended as an equitable measure to safeguard the rights of the State and also to safeguard against the proposals for payment of inflated amounts of compensation which might have been determined under influence of extraneous considerations.

(Paras 11, 12, 13)

The section and the Proviso have to be read together and have to be construed harmoniously. If the proviso is intended to act as a restraint on the power conferred by the main section, that power

shall be construed as one which emerges after conformation with the requirements of the proviso. The opinion which the Land Acquisition Officer has to embody in the award for the purpose of Section 11 is the opinion as modified by the order or direction, if any, given by the Government while approving the proposed amount of compensation. Consequently, there is no repugnancy between the proviso and the main section. (Case law discussed).

(Para 14)

(B) Land Acquisition Act (1894), S. 11 Proviso (As inserted by Mysore Act 17 of 1961) — Determination of compensation by Land Acquisition Officer — Government's approval — Nature — Confidential communication to Land Acquisition Officer asking to fix certain compensation amount — Effect.

Where the Government does not give approval to the amount of compensation arrived at by the Land Acquisition Officer but calls upon him to draft the award on the basis given in its communication and send it to the Government for approval, the communication does not become one without jurisdiction merely because the communication is secretive or asks the Land Acquisition Officer to adopt the reasoning of the Government. It is well within competence of the State Government to indicate in unequivocal terms as to the amount of compensation acceptable to it.

(Para 16)

(C) Constitution of India, Art. 226 — Certiorari — Against whom certiorari lies — Departmental Communication cannot be quashed.

A departmental communication is not liable to be quashed by writ of certiorari. Where the communication by Government to its subordinate officer is one which is firstly, confidential, secondly, within competence of the Government, thirdly, not embodying any official decision affecting right of the private citizen and fourthly, an administrative communication and not one made by judicial or quasi-judicial body, the communication is not liable to be quashed by issue of writ of certiorari. AIR 1954 Mad. 348. Rel. on; AIR 1964 Punj. 533 & AIR 1963 All 408 & AIR 1965 Mys. 255, Disting.

(Para 17)

(D) Constitution of India, Art. 226 — Suppression of material facts by applicant.

It is an elementary principle that persons seeking the assistance of the court in exercise of its extraordinary jurisdiction must come with clean hands. They should not suppress facts or state false facts or withhold material facts from the court.

(Para 19)

Cases Referred: Chronological Paras (1969) 1959-1 Mys. L. J. 301=17 Law Rep. 236, Vadivelu Gounder v. Spl. Land Acquisition Officer

- (1965) AIR 1965 Mys. 255 (V 52)=
 (1964) 1 Mys. L. J. 503, C. N.
 Nataraj v. Income Tax Officer,
 Bangalore 18
- (1964) AIR 1964 S.C. 1573 (V 51)=
 (1964) 7 SCR 1, Rajagopala v.
 State Transport Appellate Tribunal,
 Madras 15
- (1964) AIR 1964 Punj. 533 (V 51)=
 ILR (1964) 2 Punj. 150, Daya Swa-
 rup v. State of Punjab 18
- (1963) AIR 1963 All. 408 (V 50)=
 1963 (2) Cri. L. J. 241, Rameshwar
 Prasad v. Supdt. of Police,
 Moradabad 18
- (1961) AIR 1961 S.C. 1500 (V 48)=
 (1962) 1 SCR 676, Harish Chandra
 v. Deputy Land Acquisition
 Officer 11
- (1954) AIR 1954 Mad. 348 (V 41)=
 (1953) 2 Mad. L. J. 584, Kanda-
 swamy v. Dy. Registrar of Co-
 operative Societies, Coimbatore 17
- (1905) ILR 32 Cal. 605=2 All. L. J.
 771 (P.C.), Ezra v. Secy. of State 11
- (1903) ILR 30 Cal. 36=7 Cal. W. N.
 249, Ezra v. Secy. of State 11

R. M. Patil and V. H. Ron, for Petitioners; V. S. Malimath, Advocate General, for Respondents.

TUKOL, J.— The petitioners have filed this writ petition under Articles 226 and 227 of the Constitution praying that this court should be pleased to strike down the proviso to Section 11 and Section 15-A of the Mysore Land Acquisition Act 17 of 1961 (hereinafter referred to as the Act). They have also prayed for a writ of prohibition against respondents 2 and 3 directing them not to follow the instructions given in letter No. RD 220 AQB '68 dated 29/30th August 1968 and to issue a mandamus directing them to maintain their own valuation expressed in the draft award dated 24th July 1968.

2. In order to appreciate the points urged on behalf of the petitioners, it is necessary to refer briefly to the relevant facts that have given rise to the writ petition. Certain lands which are owned by the petitioners were notified for acquisition under Section 4(1) of the Act. The lands were required for the use of the Border Security Force under the control of the Central Government. Prior to the issue of this Notification on 1-5-1967, there were certain negotiations between the petitioners, the Chief Secretary to Government of Mysore and other officers at a meeting held on March 31, 1967. The petitioners handed over possession of the property on April 6, 1967. The preliminary notification was followed by the requisite declaration under the Section 6 of the Act by a Notification dated 1-7-1967. It appears that the petitioners claimed Rs. 18,83,650/- as compensation for their property. The Land Acquisition officer (respondent No. 3) prepared a draft award

and made a reference to the State Government for approval, purporting to act under the proviso to Section 11 of the Act. Pending the award, the petitioners were paid a sum of Rs. 6,50,000/- on September 21, 1967.

It appears that in the draft award submitted for the approval of the State Government, respondent No. 3 assessed the amount of compensation at about Rupees 13,00,000/- or so. The Government did not approve the compensation assessed by Respondent No. 3. Accordingly the Secretary to the Government of Mysore in the Revenue Department addressed a communication dated 29/30th August, 1968 marked "Strictly Confidential" conveying the approval of the Government to the award for a total sum of Rs. 6,57,870.15 Ps. and called upon the Land Acquisition Officer to prepare a fresh draft of the award in accordance with the details given in their communication.

The petitioners filed this writ petition on September 19, 1968 contending that the proviso to Section 11 of the Act was inconsistent with the main Section and that the State Government had no power to amend Section 11 of the Central Land Acquisition Act, so as to take away the real power of the Land Acquisition Officer as envisaged in the Central Act. It is also contended that the amendment is inconsistent with the main section and therefore ultra vires the provisions contained in the Central Act. The petitioners also contended that the communication dated 29/30th August, 1968 issued by the first respondent amounted to interference with the course of statutory duty and the statutory proceedings contemplated by Section 11 of the Act. They prayed that besides striking down the said communication, the court should direct the Land Acquisition Officer to ignore the instructions contained in the communication and to maintain the valuation made by her in the draft award dated 24th July, 1968. According to the petitioners, the impugned communication, if allowed to be acted upon by respondents 2 and 3, would work irreparable loss to them and that it was not within the competence of the State Government to issue instructions of the type contained in the said communication.

3. In the counter-affidavit filed by the respondents it is admitted that the properties had been taken possession of by the concerned officers on April 6, 1967 and that the petitioners had been paid Rs. 6,50,000/- on September 21, 1967. It is also admitted that the impugned communication was issued by the State Government indicating that they approved the award only for the sum expressly stated therein and that the aforesaid communication was within the competence of the Government. They have further stated, while declining to sanction the draft

as sent by the Land Acquisition Officer, that they had also indicated their reasons for proposing a modified estimate of compensation. They have denied the petitioners' allegation that there was a conspiracy between the State Government and the Officer of the Security Forces in order to bring down the valuation of the property. They maintain that the proviso to Section 11 is legal and that the action taken by the State Government is well within the ambit of its power conferred by that proviso.

They complain that the petitioners have not come with clean hands, suppressing the material facts in regard to the manner in which they had come in possession of the documents produced with the writ petition and that on that ground alone the writ petition was liable to be dismissed in limine. According to the respondents, the writ petition is premature and not maintainable. They have denied the other allegations of undue interference etc.

4. Respondent No. 3 who is the Land Acquisition Officer, has filed a separate counter referring to the relevant facts of the present acquisition proceedings, the payment of advance amount to the petitioners, the submission of the draft award and the receipt of the confidential communication from the Government. She has asserted that the Land Acquisition proceedings had been conducted in accordance with the statutory provisions and that as the award drafted was subject to the previous approval of the State Government under the proviso to Section 11 of the Act, the same had been submitted to the State Government for prior approval. It is maintained that the respondent is not entitled to make an award without the previous approval of the State Government in view of the impugned proviso.

As regards the communication, this respondent has stated that the said communication contained the reasons of the State Government for not according previous approval to the draft award and that it was within her competence to adopt reasons which she might think proper in support of the modified award which she may prepare and forward the same to the State Government for prior approval.

5. The communication (Exhibit D), which has occasioned the present writ petition was, as already stated, issued by the Secretary to the State Government in the Revenue Department to the Divisional Commissioner, Bangalore Division, Bangalore. The portions of the communications which were commented upon by the learned Advocate for the petitioners and have a bearing on the points at issue may be usefully extracted at this stage:

"I am directed to convey approval of Government to the award of a total sum of Rs. 6,57,870-15 P. (Rupees Six Lakhs Fifty Seven Thousand Eight Hundred and Seventy and Paise Fifteen only) in respect of lands measuring 86 acres, 22 guntas in S. Nos. 5, 9, 11, 12 and 13 belonging to Shri Bomman Behram and Smt. Mehra Mehta of Vaderapura village acquired for locating the VIII Battalion of the Border Security Force. The break-up of the total award with reasons indicated against each of the items is as under."

Then the communication indicates what in the opinion of the Government was the proper compensation for the different items including the statutory allowance at 15 per cent on the permissible items so as to make up the total amount as approved by the Government. The concluding paragraphs of this communication read as follows:—

"Out of the total award of Rs. 6,57,870-15 P. a sum of Rs. 6,50,000/- already paid may be deducted and the balance only is payable to the party concerned together with interest due according to rules.

The draft award on the above basis may be drawn and sent up to Government for approval within a week.

It should be ensured that no reference is made to this letter in the award by the Land Acquisition Officer. Though the Land Acquisition Officer may adopt the reasoning in the letter in the modified award, it should appear as if it is his own reasoning."

It is contended on behalf of the petitioners that this communication is without jurisdiction and that the proviso to Section 11 under which the State Government was taking shelter was ultra vires.

6. In order to pronounce on the competence of the State Government to issue a communication approving the draft award for a specific sum or declining to approve the draft submitted by the third respondent, it is necessary to decide the legality of the proviso that is challenged by the petitioners. We might mention at this stage that the petitioners have also attacked Section 15-A of the Act and have prayed for striking down the provision. Since none of the reliefs sought for by the petitioners in this petition turns upon the validity or otherwise of Section 15-A, we refrain from dealing with the nature and scope of the power dealt with therein or with the legality thereof. No arguments were also addressed to us on that point.

7. Section 11, with the proviso reads as follows:—

"Enquiry and award by Deputy Commissioner:—

On the day so fixed, or on any other day to which the enquiry has been adjourned the Deputy Commissioner shall

proceed to enquire into the objections (if any) which any person interested has stated pursuant to a notice given under Section 9 to the measurements made under Section 8, and into the value of the land at the date of the publication of the notification under Section 4, sub-section (1), and into the respective interests, of the persons claiming the compensation, and shall make an award under his hand of —

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him:

Provided that no such award shall be made by the Deputy Commissioner, without the previous approval of the State Government or such officer as the State Government may appoint in this behalf who in the case of an award made by an officer below the rank of the Deputy Commissioner of a District, may be the Deputy Commissioner of the District."

It is obvious from the main section that the competent authority to make the award therein is the Deputy Commissioner; it is he who has to determine the value of the land, give his opinion as regards the compensation to be allowed for the land and where there are more claimants, indicate the apportionment of such compensation amongst such persons. As regards the proviso, it unequivocally lays down that no award shall be made by the Deputy Commissioner without the previous approval of the State Government.

8. What is contended in this context by Mr. R. M. Patil, learned Advocate for the petitioners, is that when the main section constituted the Deputy Commissioner the exclusive authority to form his opinion as regards the amount of compensation and make an award the proviso which has been engrafted by State Legislature empowers the State Government to interfere with the formation of such opinion by the Deputy Commissioner according to his own judgment and appreciation of the facts on the material before him. Even though it was contended in the main affidavit that the State Legislature could not have amended the Central Land Acquisition Act, no arguments have been advanced before us as to the competency of the State Legislature to amend the said Act. We may incidentally point out that the subject of acquisition and requisition of property is item No. 42 in list 3 of 7th schedule. It is undisputed that the amendments made by the State

Legislature have been assented to by the President.

9. So, the sole ground of attack that requires consideration is, whether the proviso can be struck down as ultra vires on the ground that it materially interferes with the duties of the Land Acquisition Officer in forming his own opinion about the compensation that has to be allowed on the land. It is unnecessary to refer to the different sections which provide for or deal with the powers of the Deputy Commissioner in making the award and for that purpose forming his own opinion as to the various matters that are required to be included in the award.

There cannot be any doubt that the proviso, as it is worded, unambiguously requires the Deputy Commissioner to obtain the previous approval of the State Government before making an award; in other words, the compensation to be opposed (proposed?) by him in the award should have the approval of the State Government. Such amount, in some cases, may be fixed by the Government and communicated to the Land Acquisition Officer as proper compensation in their opinion. If the Land Acquisition Officer accepts the proposal made by the Government, then, there may not be further correspondence and he might prepare a modified draft of the award, obtaining the consent of the Government and then file the award under Section 12 of the Act. If he disagrees with the proposal made by the Government, there may be further correspondence or discussion between the Government and the Land Acquisition Officer, and in any case, the award as is required to be filed must be an award which has the previous approval of the Government.

10. In view of this position, it is not contended, and cannot be contended, by the State Government that fixation of the proposal as regards the amount of compensation made by the Government would interfere with the opinion which the Deputy Commissioner or the Land Acquisition Officer may form under Section 11 of the Act. The legality of such interference would necessarily depend upon the nature of the function or act which the Land Acquisition Officer is required to perform in drafting and submitting his award. If his function in that respect is quasi-judicial, interference by extraneous authority including the State Government would be repugnant to law. If on the other hand, the act of the Land Acquisition Officer is merely an administrative act and that act is sought by the Legislature to be controlled by the opinion of the Government, we do not think that the proviso would be repugnant to law.

11. It is unnecessary for us to go into the various sections of the Act in order to determine the precise nature of the act, which the Land Acquisition Officer performs in preparing his award, since there is the pronouncement of the Supreme Court in that subject. In *Harish Chandra v. Deputy Land Acquisition Officer*, AIR 1961 S.C. 1500, their Lordships had to deal with the question of limitation for making an application moving for a reference under Section 18 of the Act. In dealing with the question as to the nature of the award and when it should be said that the award has been made, their Lordships pronounced as follows on the legal character of the award and the nature of the act which the Land Acquisition Officer has to perform in preparing it :—

"In dealing with this question it is relevant to bear in mind the legal character of the award made by the Collector under Section 12. In a sense it is a decision of the Collector reached by him after holding an enquiry as prescribed by the Act. It is a decision, *inter alia*, in respect of the amount of compensation which should be paid to the person interested in the property acquired; but legally the award cannot be treated as a decision; it is in law an offer or tender of compensation determined by the Collector to the owner of the property under acquisition. If the owner accepts the offer no further proceeding is required to be taken; the amount is paid and compensation proceedings are concluded. If, however, the owner does not accept the offer Section 18 gives him the statutory right of having the question determined by Court, and it is the amount of compensation which the court may determine that would bind both the owner and the Collector. In that case it is on the amount thus determined judicially that the acquisition proceedings would be concluded. It is because of this nature of the award that the 'award can be appropriately described as a tender or offer made by the Collector on behalf of the Government to the owner of the property for his acceptance'. In *Ezra v. Secy. of State*, (1903) ILR 30 Cal. 36 at P. 86, it has been held that—

"the meaning to be attached to the word 'award' under S. 11 and its nature and effect must be arrived at not from the mere use of the same expression in both instances but from the examination of the provisions of the Law relating to the Collector's proceedings culminating in the award. The consideration to which we have referred satisfy us that 'the Collector acts in the matter of the enquiry and the valuation of the land only as an agent of the Government and not as a judicial officer;' and that "consequently, although the Government is bound by his proceedings the persons interested are not con-

cluded by his finding regarding the value of the land or the compensation to be awarded."

Then the High Court has added that such tender once made is binding on the Government and the Government cannot require that the value fixed by its own officer acting on its behalf should be open to question at its own instance before the Civil Court. The said case was taken before the Privy Council in *Ezra v. Secy. of State*, (1905) ILR 32 Cal. 605 (PC), and their Lordships have expressly approved of the observations made by the High Court to which we have just referred. Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement of the contract law as its applicability to cases of award, made under the Act cannot be reasonably excluded.....

.....
(the underlining (here in ' ') is ours). It would be manifest from these propositions laid down by the Supreme Court that the acquisition proceedings are initiated and held by the Deputy Commissioner as an agent of the State Government and that the compensation that he fixes in his award is an offer made on behalf of the Government. The judicial determination of compensation is required to be made by the District Court in case the owner of the property to be acquired declines to accept the offer and applies for a reference under Section 18 of the Act. In law an offer made by an agent is binding on his principal. In this view of the legal position, it would be difficult to contend that the State Legislature could not have required the Deputy Commissioner to seek the previous approval of the State Government, his principal, before finally making the award and filing it under Section 12 of the Act. In law an agent (has?) to act with the consent of his master or within the scope of the authority and in enacting the proviso, the State Legislature has given effect to this legal concept, by clarifying the scope of powers of the Deputy Commissioner in the matter of fixing the compensation in his award.

12. There appears to be another reason why the State Legislature seems to have amended Section 11 of the Act by incorporating this proviso. It is not unlikely, though the cases may be very rare, that in fixing up the compensation the Land Acquisition Officers may be influenced by extraneous considerations in determining the amount of compensation and may fix compensation far in excess of the real market value of such property

at the relevant date. The proviso is intended to safeguard against such vagaries and proposals for payment of inflated amounts of compensation which might subject Government to heavy losses.

13. We have no doubt in our mind, from the propositions of law laid down by their Lordships and extracted above, that the action of the Collector in holding the enquiry relating to acquisition under the Act is an administrative proceeding in order to enable him to form his own opinion regarding the various matters to be embodied in the award. A party who is aggrieved by the award made by the Land Acquisition Officer, has got his remedy under Section 18 of the Act by praying for a reference so that the amount of compensation should be judicially fixed by a competent court. In this context, we should also note that when the Land Acquisition Officer makes the award, the law does not provide any remedy to the State Government to challenge the compensation awarded under the award for the simple reason that the award is an offer of compensation on behalf of the State Government. The Proviso is intended as an equitable measure to safeguard the rights of the State.

14. As regards the contention raised by the learned Advocate for the petitioners that the proviso is inconsistent with the main section and that on that account it is repugnant to law, it has to be noted that the subject of a proviso is to qualify or modify the scope and the ambit of the matter dealt with in the main section; the proviso may impose certain restrictions on the power to be exercised as conferred by the main section or it may in certain cases incorporate circumstances under which extended power may be exercised by the authority concerned. But, under any circumstances, it is well established that the section and the proviso have to be read together and have to be construed harmoniously. Mr. V. S. Malimath, learned Advocate General appearing for the State, has drawn our attention to the following paragraph at page 219 of "Craies on Statute law" (Sixth Edition by S. G. G. Edgar) on the construction of repugnant provisos and saving clauses.

"It sometimes happens that there is repugnancy between the enacting clauses and the provisos and saving clauses. The question then arises, how is the Act, taken as a whole, to be construed? The generally accepted rule with regard to the construction of a proviso in an Act which is repugnant to the purview of the Act is that laid down in *Att. Gen. v. Chelsea Water-works*, namely 'that where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the pur-

view, as it speaks the last intention of the makers."

If the proviso is intended to act as a restraint on the power conferred by the main section, that power shall be construed as one which emerges after conformation with the requirements of the proviso. As already indicated, the Land Acquisition Officer acts on behalf of the Government and hence there cannot be any repugnancy between the main section and the proviso, if the Officer is required to obtain the prior approval of the Government. If the section and the proviso are read together, it would mean that before the Land Acquisition Officer makes the award as regards the compensation to be paid for the property to be acquired, he shall secure the prior approval of the State Government. In other words, for the purpose of the section the opinion which the Land Acquisition Officer has to embody in the award is the opinion as modified by the order or direction, if any, given by the Government while approving the proposed amount of compensation. From this point of view, we are unable to see any repugnancy between the proviso and the main section.

15. Our view that the proviso is not illegal even if it is held to override the opinion of the Land Acquisition Officer or the Deputy Commissioner, is supported from the proposition laid down by the Supreme Court in *B. Rajagopala v. S. T. A. Tribunal, Madras*, AIR 1964 S.C. 1573. In that case, their Lordships had to decide upon the powers under Section 43-A that had been incorporated by the Madras Legislature by Madras Act No. 20 of 1948, amending the Motor Vehicles Act, 1939. What was contended before their Lordships was that that section interfered both with the administrative and quasi-judicial functions to be performed by the authorities under the Act and that it was therefore ultra vires. Section 43-A reads thus:

"The State Government may issue such orders and directions of a general character as it may consider necessary, in respect of any matter relating to road transport to the State Transport Authority or Regional Transport Authority and such Transport Authority shall give effect to all such orders and directions."

When dealing with this question, their Lordships made a distinction between the orders and directions which are of administrative nature, and orders and directions which affect the quasi-judicial power exercisable by the authorities specified therein. In dealing with this section, their Lordships stated:

"In interpreting S. 43-A, we think, it would be legitimate to assume that the Legislature intended to respect the basic

After scrutinising the provisions of law,
their Lordships held that—

"On a fair and reasonable construction of S. 43-A it ought to be held that the said section authorises the State Government to issue orders and directions of a general character only in respect of administrative matters which fall to be dealt with by the State Transport Authority or Regional Transport Authority under the relevant provisions of the Act in their administrative capacity."

Applying the ratio of this decision, it should follow that the proviso which imposes certain restrictions on the opinion of the Land Acquisition Officer in proposing the compensation, the Legislature has done nothing more than laying down the policy which should guide the fixation of compensation to be embodied in an award to be made by the Land Acquisition Officer. The learned Advocate General drew our attention to a decision of this court in Vadivelu Gounder v. Spl. Land Acquisition Officer, 1969 (1) Mys. L. J. 301. In that case, there was no contest as to the vires of the proviso. All that was contended on behalf of the petitioners was that in exercising its power under the proviso, the State Government should

16. This brings us to the question of the legality or illegality of the communication impugned by the petitioners. We have already quoted the relevant portions of that communication and indicated that the communication was primarily intended to convey the approval of the Government to the award for a total sum of Rs. 6,57,870-15 P. In effect, the Government have declined to give their approval to the draft award submitted by the Land Acquisition Officer in July 1968. What is, however, objected to by the learned Advocate for the petitioners is what is contained in the last three paragraphs of this communication. It is stated that the petitioners had already been paid Rs. 6,50,000/- and taking into consideration the amount of compensation proposed by the Government, only the balance after deducting the amount paid, should be made payable to the party together with interest according to the rules. It also calls upon the Land Acquisition Officer to draft the award on the basis given in the communication and send it to the Government for approval, Mr. Patil, learned Advocate for the petitioners, submitted that this direction from the State Government completely smashes the voice of the Land Acquisition Officer and requires him to be only the mouth-piece of the State Government.

We have already indicated what the power of the State Government is. We have stated that if the main section and the proviso are read together, there shall not be an award without the previous approval of the State Government. Therefore, if the State Government indicated that in their opinion the total amount of compensation should not exceed Rs. 6,57,870-15 P. we are unable to see how this part of the communication can be said to be either without jurisdiction or in excess of jurisdiction. The learned Advocate for the petitioners, however, emphasised that the concluding paragraph which required the Land Acquisition Officer to adopt the reasoning given in the letter without making it appear that he adopted the reasoning of the State Government is what is objectionable. We agree that the concluding portion of this letter is out of tune and to a certain extent not called for. We are unable to understand why such secretive direction was sought to be given, when it was an indication in unequivocal terms of their opinion about proper compensation and well within the competence of the State Government.

Some comment was made on the sentence opens with the words "I am directed to convey". The word "direct" is normally employed in official communications issued on behalf of a

Government to convey any decision or direction and has no other connotation. It is common experience that communications like these drafted by executive officers do not conform to set patterns or to the legal requirements of any particular occasion or performance of duty. It has been often indicated that the Court should not scrutinise such documents as meticulously as they would scrutinise a document which is drawn to a form and set pattern.

17. Even assuming, as has been contended by the learned Advocate for the petitioners, that the concluding paragraph of this communication is in excess of jurisdiction, the question that we have to consider is whether a writ or certiorari can issue quashing this portion. The hurdles in granting this prayer are many. Firstly, it is a confidential communication issued by the State Government to one of its subordinate officers giving certain directions which they are competent to give under the law. Secondly, it does not embody any official decision in the matter, so as to affect adversely the rights of the petitioners, and thirdly, it is an administrative communication made in the course of the official duties and is not one which is made by either judicial or quasi-judicial body, calling for our interference under Article 226 of the Constitution. As laid down by the Madras High Court in *Kandaswamy v. Dy. Registrar of Co-operative Societies, Coimbatore*, AIR 1954 Mad. 348, a departmental communication is not liable to be quashed by a writ of certiorari.

18. The learned Advocate for the petitioners has drawn our attention to a number of decisions in support of the proposition that even administrative orders are liable to be quashed in exercise of the power vested in the High Court under Article 226 of the Constitution. We simply note those decisions as, in our opinion, they do not need elaborate discussion. They are: (1) AIR 1964 Punj. 533; (2) AIR 1957 Trav. Co. 203 (sic); (3) AIR 1963 All. 408 and (4) AIR 1965 Mys. 255.

In all these decisions, the orders or notices had been issued in exercise of some administrative power or in the discharge of some function under some Act or the other and those notices or orders affected either the fundamental or statutory rights of persons to whom they had been issued. It was in the context of the rights of the aggrieved party and their infringement by the executive action complained of that their Lordships in the various decisions came to the conclusion that executive actions which directly affect or threaten to affect the fundamental or statutory rights of persons can be struck down by High Courts, when approached by such persons, in exercise

of their powers under Art. 226 of the Constitution.

19. In the present case, the impugned communication was not issued to the petitioners. The petitioners have been meticulously silent in their affidavit as to how they came in possession of these documents. The learned Advocate for the petitioners when questioned, submitted that it was unnecessary for him to explain the possession of the documents. In our opinion, when an official communication addressed either by Government or by some superior authority to their or his subordinate and marked 'Confidential' is secured dubiously by persons who are interested in securing a decision in their favour on its basis, it would not be correct to treat the matter very lightly. It is the duty of the petitioners to explain in what legal manner they came in possession of these documents. It is an elementary principle that persons seeking the assistance of the court in exercise of its extraordinary jurisdiction must come with clean hands. They should not suppress facts or state false facts or withhold material facts from the court.

An attempt was made by referring to Sections 123 and 124 of the Evidence Act to contend that since the State Government had not claimed any privilege as regards these documents, the question of their admissibility would not be a matter of agitation before the court. We may state that the question of admissibility has not been raised and could not have been raised. The petitioners have sought for relief on documents which are genuine but which were not expected to be in their possession. The Government have conceded the genuineness of the documents and the instructions contained therein. The petitioners have made very strong allegations of conspiracy etc. against the respondents and the officers of the Security Force. We are unable to spell out or infer any such conspiracy because no such conspiracy is called for in the matter of compensation as the State Government has got wide powers and the rights of the owner of the property are amply safeguarded by conferring upon him the right to agitate before a competent judicial tribunal and have the matter judicially decided. Some of the lengthy arguments on the contents of this letter could have been avoided had the draughtsman of this letter confined himself only to relevant without being unnecessarily secretive about what he was doing in exercise of what the law authorises him to do.

20. The only other point that needs reference before we conclude is as regards two other letters which the petitioners have produced with their affidavits. What we have already stated as regards the possession of the confidential communica-

tion applies to these two letters also. They are produced at Exhibit C. The first is a copy of the letter D. O. No. H. D. 323 SST 67, dated 10-7-1968 from the Secretary to Government, Home Department, addressed to the Deputy Commissioner, Bangalore District. Reference is made in this letter to the Secretary having forwarded a demi-official letter from Sri P. R. Rajagopal, Deputy Director (Admn.) Directorate General of Border Security Force, New Delhi. It has been stated by the Secretary to the Deputy Commissioner that in view of what Rajagopal has stated in his communication, the Deputy Commissioner should not make further payment to the petitioner in addition to Rs. 6,50,000/- already paid. The second communication is a D.O. from P. R. Rajagopal to the Home Secretary. In this letter, Mr. Rajagopal has requested the Home Secretary not to make further payment to Shri Behram and has further stated—

"The Home Ministry of the Government of India is anxiously awaiting your communication on the final award of the Mysore Government. Should this award be in excess over what was originally proposed, the chances are that the Ministry may decide to call off the entire deal."

The argument of the learned Advocate for the petitioners is that it is on account of this threat held by Rajagopal that the State Government had been persuaded to limit the compensation to Rs. 6,57,870-15 P. We are unable to see the connection between this communication and the assessment of the compensation by the State Government. The reason is that possession of the property has already been taken and if the compensation proceedings are either dropped or closed at this stage, the State Government or the Central Government, as the case may be, would expose themselves for payment of damages. It is unnecessary to dilate on the implications of these letters which are not relevant to the points in issue.

21. In the result, we are of the opinion that the petitioners are not entitled to any relief. We have held that the proviso to Section 11 of the Act is valid and that the impugned notification which is only an official communication issued during the usual course of official business cannot be quashed. There cannot be a mandamus to respondents 2 and 3 to maintain their estimate of compensation as their opinion is subject to the approval of the Government.

22. The petition therefore fails and is accordingly dismissed with costs. Advocate's fee Rs. 150/-.

Petition dismissed.

AIR 1970 MYSORE 97 (V 57 C 24)

D. M. CHANDRASHEKHAR, J.

Shambhu Mada Hegde, Petitioner v. Rama Ishwar Hegde, Respondent.

Civil Revn. Petn. No. 417 of 1967, D/- 9-6-1969.

(A) Civil P. C. (1908), O. 20, R. 18 — Suit for partition of properties including land assessed to revenue — Preliminary decree — Compromise between parties subsequent to decree — Competency and duty of Court passing preliminary decree, to pass fresh decree in accordance with compromise.

The Court which passed a preliminary decree in a suit for partition of properties has competence and duty to take into account any compromise between the parties subsequent to such preliminary decree, and to pass a fresh decree in accordance with such compromise even if the properties include land assessed to revenue. The mere circumstance that the decree relates to lands assessed to revenue should not take away the competence of the Court to consider the plea of compromise or agreement subsequent to the preliminary decree and to make a fresh decree in accordance with such compromise or agreement if the same is proved. The Collector to whom a decree is sent under Order 20, Rule 18 C.P.C. has no jurisdiction to enquire whether the parties have entered into a compromise subsequent to the decree and to make a fresh decree in accordance with such compromise, if he is satisfied as to the existence of such compromise. AIR 1965 Mad. 305, Rel. on; AIR 1959 Mys. 233, Expl.

(Paras 11 and 12)

(B) Civil P. C. (1908), O. 23, R. 3 — Jurisdiction under — Formal application by a party to pass decree in accordance with compromise, not necessary.

Rule 3 of Order 23 does not provide that the Court should exercise jurisdiction under that rule only when there is formal application by one of the parties to pass a decree in accordance with a compromise or agreement. When such compromise or agreement is pleaded by a party even by way of defence in a suit, it is the duty of the court to proceed to enquire into the existence of such compromise or agreement and to pass a decree in accordance with it, if it is proved.

(Para 14)

(C) Civil P. C. (1908), O. 21, R. 2(3) — Applicability — Sub-rule applies only to execution.

The prohibition contained in sub-rule (3) of Rule 2 of Order 21 C.P.C., applies only in execution and the execution does not begin until after a final decree is made. Where in a suit for partition of properties including land assessed

to revenue, a preliminary decree is passed and the Court passing the decree directs that the decree should be sent to the Collector for effecting the partition of lands assessed to revenue, the Court cannot be said to have been executing the decree. There can be no bar under O. 21, R. 2(3) for a party pleading a compromise, entered into between the parties after the passing of a preliminary decree. AIR 1945 P.C. 152, Rel. on. (Para 16)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1470 (V 54)=
(1967) 3 SCR 153, Phoolchand v. Gopal Lal 7

(1965) AIR 1965 Mad. 305 (V 52)=
ILR (1965) 1 Mad. 111, Subramania v. Thangammal 10

(1959) AIR 1959 Mys. 233 (V 46)=
37 Mys. L. J. 103, Narasu v. Narayan 6, 8, 9

(1945) AIR 1945 P.C. 152 (V 32)=
72 Ind. App. 277, Madan Theatres Ltd. v. Dinshaw & Co. 16

T. S. Ramachandra, for Petitioners; K. R. Bhatta, for Respondent.

ORDER:— The principal question that arises for decision in this revision petition is whether the court which passed a preliminary decree in a suit for partition of properties including lands assessed to revenue, has competence and duty to take into account any compromise between the parties subsequent to such preliminary decree, and to pass a fresh decree in accordance with such compromise.

2. The respondent herein was the original defendant in O. S. No. 186 of 1925, a suit for partition, on the file of the Civil Judge, Junior Division, Honnavar. A preliminary decree was passed in that suit. He made an application which was styled as a Darkhast application, praying that he might be given possession of a half share in the suit lands assessed to revenue and of 3/8th share in the timber and other materials out of the demolished suit house. The petitioner herein filed objections to that application, pleading, inter alia, that subsequent to the preliminary decree, a compromise was entered into between the parties, under which each was given certain lands and gave up his rights in other lands, and that in view of the compromise, the application was not maintainable.

3. The Civil Judge, (Junior Division) overruled the petitioner's objections, appointed a Commissioner for apportioning the respondent's 3/8th share in the building materials, and directed that the decree should be sent to the Collector for effecting the partition of lands assessed to revenue.

4. Against that order, the petitioner preferred an appeal to the Civil Judge, Karwar, who dismissed the appeal. Feel-

ing aggrieved, the petitioner has come up in revision.

5. Mr. T. S. Ramachandra, learned counsel for the petitioner, urged that when the petitioner pleaded that a compromise was entered into between the parties subsequent to the preliminary decree, the learned Civil Judge, (Junior Division) should have enquired whether there was such a compromise and if he was satisfied that there was a lawful compromise, he should have made a decree or order in accordance with it. Mr. Ramachandra contended that without deciding first whether there was a compromise, it was not open to the learned Civil Judge, (Junior Division), to send the decree to the Collector under Order 20, Rule 18 C.P.C. and to appoint a Commissioner for apportioning the building materials.

6. The rival contention of Mr. K. L. Bhatta, learned counsel for the respondent, was that after the preliminary decree was made in respect of lands assessed to revenue, the learned Civil Judge, (Junior Division), became functus officio and could not go into the question whether the parties had subsequently entered into a compromise. In support of his contention Mr. Bhatta referred to the following observations of this Court in *Narasu v. Narayan*, AIR 1959 Mys. 233 at p. 234:

"A decree passed under Rule 18(1) of Order 20 directing partition by the Collector cannot be said to be a preliminary decree. So far as Civil Courts are concerned it is final for all purposes, though the partition of property may remain to be effected by the Collector....."

The Court which passed a decree must be deemed to have become a functus officio after passing the decree."

7. On the other hand, Mr. Ramachandra argued that even when the preliminary decree is in respect of partition of lands assessed to revenue, the court which passed that decree is competent to take into account subsequent developments like a compromise between the parties and to pass a fresh preliminary decree to accord with the altered situation. Mr. Ramachandra relied on the following observations of the Supreme Court in *Phoolchand v. Gopal Lal*, AIR 1967 S.C. 1470 at p. 1473:

"We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented It would in our opinion, be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and

specification of shares in the preliminary decree varied before a final decree is prepared. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so, and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal.

8. However, Mr. Bhatta argued that decrees for partition of lands assessed to revenue, form an exceptional category to which the general proposition laid down by the Supreme Court in the above decision will not apply, and that in regard to that category of decree, the true legal position is as stated by this court in AIR 1959 Mys. 233, i.e., the court which passed such a decree was *functus officio*. It was also argued by Mr. Bhatta that any plea that parties have entered into a compromise subsequent to such decree, should be put forth before the Collector to whom the decree is sent for effecting the partition and not before the Civil Court that had passed such decree.

9. In AIR 1959 Mys. 233, the question that arose for determination was whether there is any period of limitation for making an application to the Civil Court praying that a decree should be sent to the Collector under Order 20, Rule 18 C.P.C. The question whether the Civil Court which made a preliminary decree is competent to pass another preliminary decree taking into account events that have happened subsequent to the passing of the earlier preliminary decree, did not arise up for consideration in that case. The observations of their Lordships to the effect that the Civil Court becomes *functus officio* after passing the preliminary decree, must be understood in the context of that case. In my opinion, these observations cannot be understood as laying down a proposition that a Civil Court which makes a decree for partition of lands assessed to revenue, has no competence to pass another decree, where subsequent developments call for a fresh decree.

10. Then it is pleaded that subsequent to the passing of a preliminary decree the suit has been adjusted wholly or in part by an agreement or compromise, under Order 23, Rule 3 C.P.C., it is the duty of the court to inquire whether there has been such a compromise or agreement and if it is proved, to pass a decree in accordance therewith. The view I have taken receives support from the following observations of a Bench of Madras High Court in *Subramania v. Thangammal*, AIR 1965 Mad. 305 at p. 307.

"We are therefore of the opinion that the court is competent to take into account the matters set out in the compromise, if the compromise is found to be genuine and binding on the parties and the court is entitled to embody it in a set of fresh directions for the purpose of passing a final decree, and the directions so issued should be construed as not an amendment to the preliminary decree already passed, but rather as a fresh preliminary decree, which it is open to the court dealing with a partition suit to pass at any time till the stage of passing the final decree is over."

11. I do not see any reason why the mere circumstance that the decree relates to lands assessed to revenue, should make any difference and take away the competence of the court to consider the plea of compromise or agreement subsequent to the preliminary decree and to make a fresh decree in accordance with such compromise or agreement if the same is proved.

12. Mr. Bhatta has not shown any provision of law which confers on the Collector to whom a decree is sent under Order 20, Rule 18 C.P.C. jurisdiction to enquire whether the parties have entered into a compromise subsequent to the decree and to make a fresh decree in accordance with such compromise, if he is satisfied as to the existence of such compromise.

13. It was next contended by Mr. Bhatta that the petitioner has not made any application under Order 23, Rule 3 C.P.C., praying that a fresh decree should be made in terms of the alleged compromise, and that in the absence of such application the learned Civil Judge (Jr. Dn.) was not called upon to enquire into the alleged compromise and to pass a fresh decree, if the alleged compromise was proved.

14. Rule 3 of Order 23 does not provide that the court should exercise jurisdiction under that rule only when there is formal application by one of the parties to pass a decree in accordance with a compromise or agreement. When such compromise or agreement is pleaded by a party even by way of defence in a suit, I think, it is the duty of the court to proceed to enquire into the existence of such compromise or agreement and to pass a decree in accordance with it, if it is proved.

15. Lastly, it was contended by Mr. Bhatta that the compromise pleaded by the petitioner, even if established, would amount to an adjustment which had not been certified or recorded under Order 21 Rule 2 C.P.C., and that the same would not be recognised by the learned Civil Judge (Junior Division).

16. As pointed out by the Judicial Committee of the Privy Council in *Madan*

Theatres v. Dinshaw & Co., AIR 1945 P.C. 152 at p. 154, the prohibition contained in sub-rule (3) of Rule 2 of Order 21 C.P.C., applies only in execution and the execution does not begin until after a final decree is made. In the present case no final decree had been passed. In directing that the decree should be sent to the Collector (for effecting the partition of lands assessed to revenue) the Civil Judge (Junior Division) cannot be said to have been executing the decree. Hence there was no bar under sub-rule (3) of Rule 2 of Order 21, C.P.C., for the petitioner pleading the compromise.

17. The order of the learned Civil Judge, (Jr. Dn.) is unsustainable as he failed to consider the compromise pleaded by the petitioner, and the judgment of the learned Civil Judge, Karwar, affirming that order is also unsustainable. In the result, this revision petition is allowed and the order and the judgment of the courts below are set aside and the respondent's application is remanded to the Munsiff (the corresponding authority to the Civil Judge, Jr. Dn.) at Honnavar to dispose of it afresh according to law.

18. In this petition parties will bear their own costs.

Order accordingly.

Mysore Co-operative Societies Rules, 1960 is reasonable and has a rational connection with the object sought to be achieved viz. to maintain discipline, efficiency and integrity of the employees and keep them away from the affairs of the Committee of Management which is concerned with matters of policy like deciding upon the activities of the Society, the methods of carrying them out, the strength of staff required and their emoluments etc. If an employee is permitted to busy himself with affairs of this character, there is no doubt that he would have no time for his normal duties of office. The disability, if removed, will lead to neglect of duty and diversion of intelligence and time to matters falling outside the scope of legitimate work. The disability imposed on paid employee members serves a public purpose in requiring such members to devote all their time and intelligence towards efficient discharge of their duties for which they are being paid from the funds of the society. Case law discussed.

(Para 17)

The right to be elected to a Body of Management of a Co-operative society is a statutory right and the statute which has created it has imposed restrictions which are quite reasonable and have a legitimate and public object to serve.

(Para 19)

Rule 16 which enumerates the disqualifications for membership on the committee of Management of a society has in the relative clauses conceived of a well defined classification between the members of the society and the members who are employees of a society. It is only a paid-employee member of a society that is disqualified from being a member on the committee of management of any society or of its financing Banks. The classification cannot be said to be either arbitrary or vague. Members of a society who are free citizens and are not employed by any society on payment are quite different from members who are paid servants of a society. Clause (c) does not prohibit an employee of a co-operative society from seeking election as member on the Committee of Management of a society consisting exclusively of paid-employees. Members of a society who are not paid employees of a society form a distinct class from members who are paid employees of the society. The burden or the disqualification imposed on paid employee-members of a Co-operative Society is not imposed on other members who are simply members of a Co-operative Society. The constitutional validity of the disqualification would necessarily depend upon the object which such disability is intended to serve.

(Paras 11, 16, 17)

(B) Constitution of India, Arts. 14, 226 — Challenge to constitutionality of a provision of law — Absence of counter af-

AIR 1970 MYSORE 100 (V 57 C 25)

T. K. TUKOL AND C. HONNIAH, JJ.

M. Krishnamurthy, Petitioner v. State of Mysore and others, Respondents.

Writ Petn. No. 2574 of 1966, D/- 30-6-1969.

(A) Constitution of India, Art. 14 — Mysore Co-operative Societies Rules (1960), R. 16(1) (c) — Validity of — Not violative of Art. 14 — Disqualification imposed on paid employee members is reasonable and has a rational connection with the object sought to be achieved.

It is necessary in order to satisfy the requirements of Art. 14 of the Constitution that the basis of the classification must have some rational relationship with the object to be achieved. The test which should be applied in determining the validity of the burden imposed upon a class of people as distinct from another class, is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances. No burden can be imposed on one class of persons, natural or artificial, and arbitrarily selected which is not in like conditions imposed on all other classes. Case law discussed.

(Paras 12, 16)

The disqualification imposed on paid employee members under R. 16 (1) (c) of

fidavit does not establish the contention of petitioner.

Where the constitutionality of a provision of law is assailed, absence of counter affidavit does not establish the contention of the petitioner. It is open to the Court in such cases to consider facts and circumstances of common knowledge, human experience, conduct of public affairs and legal functions of institutions in testing the reasonableness of the restriction.

(Para 19)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Mad 301 (V 52) =
ILR (1964) 2 Mad 33, State of
Madras v. Murray and Co. 18
- (1958) AIR 1958 SC 538 (V 45) =
1959 SCR 279, Ramakrishna
Dalmia v. S. R. Tendolkar 12
- (1957) AIR 1957 SC 620 (V 44) =
1957 Cri LJ 1006, Ramji Lal v.
State of U. P. 18
- (1955) AIR 1955 SC 166 (V 42) =
1955 SCR 1004, Sakhawant Ali v.
State of Orissa 13
- (1953) AIR 1953 SC 91 (V 40) =
1953 SCR 404, Ameerunnisa
Begum v. Mahboob Begum 7
- (1953) AIR 1953 SC 215 (V 40) =
1953 SCR 1129, Ram Prasad v.
State of Bihar 7, 9

U. Subramaniam, for Petitioner; K. S. Puttaswamy, High Court Govt. Pleader (for Nos. 1 and 2) for Respondents.

TUKOL, J.— This Writ Petition raises a question of some significance to employees working in Co-operative Societies governed by the Mysore Co-operative Societies Act, 1959 and the Mysore Co-operative Societies Rules, 1960.

2. The petitioner has been a member of the Gandhi Bazar Consumers' Co-operative Society, Shimoga, since 1963; and was one of the nominated members on the Committee of Management which elected him as Secretary at its meeting held on 14-8-1963. He was one of the nominated members under Order No. 1912/66-67 issued by the Assistant Registrar on 3-10-1966. This order was followed by a communication dated 27-10-1966; from that very Officer intimating the petitioner that his nomination had been withdrawn as he was not eligible to serve as Director on the Committee of Management of the Society under the provisions of R. 16 (1) (c) of the Mysore Co-operative Societies Rules, 1960 (hereinafter called the Rules). The petitioner then filed the present writ petition on December 2, 1966 challenging the validity of the communication (document No. 3) and the provisions contained in Rule 16 (1) (c) of the Rules.

3. No counter has been filed on behalf of any of the respondents. Since the petitioner's nomination under Document No. 2 dated 3-10-1966 on the Committee of Management of the Gandhi Bazar

Consumers' Co-operative Society Limited (Respondent No. 3) was for the year 1966-67, the period stipulated therein has since expired and the question of striking down Document No. 3 withdrawing the nomination of the petitioner on the Committee of Management does not survive.

4. So the sole question that arises for consideration in this writ petition is whether the provisions contained in Rule 16 (1) (c) of the Rules are valid. It is undisputed that the petitioner has been a paid employee of the Shimoga Co-operative Bank Limited. Shimoga and also of the Kalika Parameshwari Co-operative Society Limited. The contention of the petitioner is that while other members of a Co-operative Society are eligible to be elected to a Committee of Management the Rule disqualifying a paid-employee of a Society from becoming a member of the Committee of Management of another Society is ultra vires being violative of Art. 14 of the Constitution. According to him, the relevant provision makes an unwarranted discrimination against a paid-employee of a particular Society by denying him the right conferred on all the members.

5. Since the other clauses of Rule 16 (1) were relied upon for founding the plea of discrimination, we reproduce the provision of sub-rule (1) of R. 16:

"16. Disqualification for Membership of Committee.

(1) No member of a Co-operative Society shall be eligible for appointment as a member of the Committee of management of such Society, if—

(a) he is in default to the society in respect of any loan taken by him, for such period as is specified in the bye-laws of the society, or in any case for a period exceeding three months; or

(b) he has directly or indirectly, any interest in any subsisting contract made with the society or in any property sold or purchased by the Society or in any other transaction of the society, except in any investment made in, or any loan taken from the society;

(c) he is a paid employee of any society or of its financing bank, provided that this shall not apply to a paid employee of a co-operative society consisting exclusively of paid employees of co-operative societies;

(d) he is a near relation of a paid employee of the Society.

Explanation— 'Near Relation' here means father, mother, husband, wife, son, daughter, undivided brother or unmarried sister, or such other relation as may be declared by the Government to be near relation for purposes of this clause.

(e) if he is employed as paid legal practitioner on behalf of the society or accepts employment as legal practitioner against the society;

(f) if he has been removed from office under Cls. (b) and (c) of sub-rule (2);

Provided that this disqualification shall cease to operate after the period, if any, fixed in the order or after the expiry of 3 years from the date of the removal or earlier by an order of Government."

6. Mr. U. Subramaniam appearing for the petitioner submitted that even though the other clauses of sub-rule (1) imposed a disability only with reference to the Society in which the member had committed a default, had acquired interest in any subsisting contract or transaction, or had been employed as paid legal practitioner on behalf of the Society, or had accepted employment as legal practitioner against the society, Cl. (c) was so general that an employee of any Society or of its financing Bank was disqualified from being appointed as a member of the Committee of Management of each and every Society even though he might be a paid employee of only one Society. It is manifest from Cls. (a), (b), (d) and (e) that each of them has reference to a well-defined class of members. While Cl. (a) imposes a disqualification on a member who has been a defaulter of the society in respect of loan taken by him, Cl. (b) disqualifies a member from being a member on the Committee of Management if he has directly or indirectly any interest in any subsisting contract made with the Society; Clause (d) disqualifies a person from being such member if he has any relation of his as a paid employee of that Society. Cl. (e) disqualifies a legal practitioner who is employed on behalf of the Society or who accepts employment against the society from being on the Committee of Management. It was contended on behalf of the petitioner that it would have been defensible to some extent if the disqualification to be a member of the committee of Management of a Society had been restricted only to that Society in which the member was a paid employee; the ban placed by Cl. (c) on an employee is not only with reference to the Society of which he is a paid employee but also with reference to other Societies of which he is not an employee at all.

7. Mr. Subramaniam submitted that the rule was violative of Art. 14 of the Constitution as the disqualification imposed on employees is not based on a valid classification and the restriction imposed on the rights of an employee member was wholly unreasonable. In support of his contention, he placed reliance on two decisions of the Supreme Court in *Ameerunnissa Begum v. Mahboob Begum*, AIR 1953 SC 91 and *Ram Prasad v. State of Bihar*, AIR 1953 SC 215. He has also placed reliance on some passage from *American Jurisprudence*.

8. The decision in *Ameerunnissa's case*, AIR 1953 SC 91 discusses the validity of

Waliuddowala Succession Act 1950. The Act was challenged by *Mahboob Begum and Kadiran Begum* and her children on the ground that it violated Art. 14 of the Constitution in depriving them of the benefit of the ordinary law viz., their claim to succession to the estate of deceased *Nawab Waliuddowala*. The Act had been promulgated with the avowed object to terminating disputes relating to succession to the estate of late *Nawab Waliuddowala*. The High Court and the Supreme Court held that the claim of the two widows and their children under the general law of the land to succeed to the property of *Waliuddowala* was itself a valuable right and the deprivation of that right by a piece of discriminative legislation was sufficient to bring the case within the purview of Art. 14 of the Constitution. The learned Advocate for the petitioner has relied upon paragraph 11 of the Judgment which reads as follows:—

".....It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not 'Per se' amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view." On the strength of these propositions of law, it was contended that there was no classification as such deducible in the rule and even if there was any, it was so unreasonable or arbitrary as to be struck down by this Court.

9. In *Rama Prasad's case*, AIR 1953 SC 215 the Supreme Court had to consider the validity of the *Bihar Sethi Lands (Restoration) Act (34 of 1950)* which singled out two individuals and one solitary transaction entered into between them and another party and declared the transaction to be a nullity on the ground that it was contrary to the provisions of law although there had been no judicial pronouncement by any Court or Tribunal on that point; the legislation was struck down on the ground that the legislature had singled out two individuals out of many lessees and denied them the right which every Indian Citizen possessed to have that right adjudicated upon by a judicial tribunal in accordance with law which applied to his case. It was held that the Act came directly within the mischief of Article 14 of the Constitution and was struck

down on that ground. In so doing, their Lordships referred to the nature and the scope of the guarantee implied in the equal protection clauses of the Constitution and stated that the presumption of constitutionality was of no avail to the State as there was no classification at all on the face of the statute.

10. It was contended by the learned Advocate for the petitioner that there was no reasonable classification implied in R. 16 and that the preamble to the Act did not indicate that the provisions had any object to achieve. Our attention was drawn to the preamble which states that in enacting the Mysore Co-operative Societies Act, 1959, the Legislature had thought it "expedient to consolidate and amend the laws relating to the Co-operative Societies in the State of Mysore." Since at the time of the enactment, there were different Acts relating to the Co-operative Societies functioning in the different areas comprising the new State of Mysore, the legislature merely stated in its preamble that its object was to consolidate and amend the laws relating to the Co-operative Societies. The object of the legislation can be easily gathered from the other provisions of the Act. The primary object is to facilitate and regulate the formation of Co-operative Societies which have as their objects "the promotion of economic interests or general welfare of its members or of the public in accordance with the co-operative principles." The various provisions of the Act are based on these solid principles of co-operation to serve the economic interests and the general welfare of the community. We have, therefore, to see whether the impugned clause of R. 16 is intended to serve this or any other rational object.

11. Rule 16 which enumerates the disqualifications for membership on the Committee of Management of a Society has in the relative clauses conceived of a well defined classification between the members of the Society and the members who are employees of a Society. It is only a paid-employee-member of a Society that is disqualified from being a member on the Committee of Management of any Society or of its financing Banks. The classification cannot be said to be either arbitrary or vague. Members of a Society who are free citizens and are not employed by any Society on payment are quite different from members who are paid servants of a Society. It should be noted at this stage that CL (c) does not prohibit an employee of a Co-operative Society from seeking election as member on the Committee of Management of a Society consisting exclusively of paid employees. In other words, where a Co-operative Society is formed exclusively by paid-employees of such Societies, it is open to each and every member of such Society, though some of

them may happen to be paid employees, to seek election to membership on the Committee of Management. The disqualification operates only in respect of Societies which are formed by other members not employed on payment under any of the Societies.

12. While we have no doubt that this classification is well defined, it is necessary in order to satisfy the requirements of Art. 14 of the Constitution that the basis of the classification must have some rational relationship with the object to be achieved. In *Ramakrishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 the Supreme Court has summarised on a close perusal of its earlier decisions the principles enunciated while considering the question of validity or constitutionality of any particular law attacked as discriminatory and indicated five classes in one of which the impugned statute is likely to fall. For the purpose of this case, we consider the following passage in class 1 relevant and accordingly quote it below—

"A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law....."

13. What then is the object sought to be achieved by the Rule by denying the paid employee-members of a Co-operative Society the right to seek election as members on the Committee of Management of any Co-operative Society? The contention of the petitioner that he has got a fundamental right like other members, to stand for election has no force. The right to stand for election is a statutory right and the exercise of it will depend upon the provisions of law conferring the said right. In this connection we may refer to the decision of the Supreme Court in *Sakhawant Ali v. State of Orissa*, AIR 1955 SC 166. In that case, their Lordships had to consider the validity of Section 16 (1) (ix) of the Orissa Municipal Act, 1950 which laid down that no person shall be qualified for election to a seat in the Municipality if such person is employed as paid legal practitioner on behalf of the

Municipality or as Legal Practitioner against the Municipality. This provision was attacked on the ground that it was violative of the fundamental rights guaranteed under Art. 14 and Art. 19 (1) (g) of the Constitution. In considering the attack under Art. 14, their Lordships observed—

".....Article 14 forbids class legislation but does not forbid reasonable classification for the purposes of legislation. That classification however, cannot be arbitrary but must rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification is made. In other words the classification must have a reasonable relation to the object or the purpose sought to be achieved by the impugned legislation.

The classification here is of the legal practitioners who are employed on payment on behalf of the Municipality or act against the Municipality and those legal practitioners are disqualified from standing as candidates for election. The object or purpose to be achieved is the purity of public life; which object would certainly be thwarted if there arose a situation where there was a conflict between interest and duty. The possibility of such a conflict can be easily visualised, because if a municipal councillor is employed as a paid legal practitioner on behalf of the municipality there is likelihood of his misusing his position for the purposes of obtaining municipal briefs for himself and persuading the municipality to sanction unreasonable fees."

14. Dealing with the objection under Art. 19 (1) (g) of the Constitution, their Lordships stated—

"The right of the appellant to practice the profession of law guaranteed by Article 19 (1) (g) cannot be said to have been violated, because in laying down the disqualification in Section 16 (1) (ix) of the Act the Legislature does not prevent him from practising his profession of law but it only lays down that if he wants to stand as a candidate for election he shall not either be employed as a paid legal practitioner on behalf of the municipality or act as a legal practitioner against the municipality. There is no fundamental right in any person to stand as a candidate for election to the Municipality. The only fundamental right which is guaranteed is that of practising any profession or carrying on any occupation, trade or business....."

15. From the principles laid down by the Supreme Court in this decision, it would be clear that the right to stand for election to any statutory body is not a fundamental right but is only a statutory right. The restriction imposed on a legal practitioner engaged on behalf of the municipality or against the municipality

disqualifying him from being a candidate at the election was held to be legal as the object sought to be achieved by it was purity of municipal administration and the possibility of such legal practitioner misusing his position as councillor. Logically it can be deduced from this decision that legal practitioners employed for or against a municipality are a class as distinguished from legal practitioners who are not so employed.

16. We have already pointed out that members of a Society who are not paid-employees of a Society form a distinct class from members who are paid-employees of the society. The tests which should be applied in determining the validity of the burden imposed upon a class of people as distinct from another class have been explained in the following passage in paragraph 528 of "American Jurisprudence 2nd Edition, Vol. 16, at page 918".

"In the exercise of the undoubted right of classification, it may often happen that some classes are subject to regulations and some individuals are burdened with obligations which do not rest on other classes or other individuals not similarly situated, but this fact does not necessarily vitiate a statute, because it would practically defeat legislation if it were laid down as an invariable rule that a statute is void if it does not bring all within its scope or subject all to the same burdens. Thus, it has been said that it is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public and that the very idea of classification is that of a inequality, so that the mere fact of inequality in no manner determines the matter of constitutionality. The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances. No burden can be imposed on one class or persons, natural or artificial, and arbitrarily selected, which is not in like conditions imposed on all other classes."

17. In the present case, the burden or the disqualification imposed on paid employee-members of a Co-operative Society is not imposed on other members who are simply members of a co-operative Society. The constitutional validity of the disqualification would necessarily depend upon the object which such disability is intended to serve. The main reason which seems to have weighed with the rule making authority is to keep the paid-employees of a Society free from parties and groups which involve themselves in election affairs. The primary duty of an employee is to concern himself wholly with the administrative aspects and with the

duties which are inherent in the nature of his employment. The employee of an institution has to devote his full time during the working hours to the performance of duties entrusted to him. Devotion to duty and dedicated industry ought to guide him; in that sense discipline in office is of great importance. He has no concern with the policy-making or exercise of functions solely entrusted to a Committee of Management. The interest of the institution and public policy require that the employees are kept out from the Committee of Management. An employee getting elected to a Committee of Management may often be required to keep himself away from his legitimate work as a paid servant. He may prove a disturbing element amongst his co-employees and might use his position for his personal gain and advantage. These and other conditions might have weighed with the Government in disqualifying paid-employees from seeking election to the Committee of Management.

We have therefore, no hesitation in holding that the disqualification imposed on employee-members is reasonable and has a rational connection with the object sought to be achieved viz., to maintain discipline, efficiency and integrity of the employees and keep them away from the affairs of the Committee of Management which is concerned with matters of policy like deciding upon the activities of the Society, the methods of carrying them out, the strength of staff required and their emoluments etc. If an employee is permitted to busy himself with affairs of this character, there is no doubt that he would have no time for his normal duties of office. The disability, if removed, will lead to neglect of duty and diversion of intelligence and time to matters falling outside the scope of legitimate work. We are therefore, convinced that the disability imposed on paid-employee members serves a public purpose in requiring such members to devote all their time and intelligence towards efficient discharge of their duties for which they are being paid from the funds of the Society.

18. The learned Advocate for the petitioner drew our attention to the decision of the Madras High Court in *State of Madras v. Murray and Co.*, AIR 1965 Mad 301, in which their Lordships had to consider the reasonableness of the restriction imposed on the fundamental right guaranteed by Article 19 (1) (g) of the Constitution. The appeals before their Lordships were against the decisions of a single Judge who dealt with the applications of the respondent under Art. 226 of the Constitution challenging the validity of a notification issued by the Commissioner of Police prohibiting the plying of hand-carts in day-time on Mount Road from Round Tana to Gemini Round about between 7-30

hours to 20 hours a Main Road in a business area. Their Lordships held that the impugned notification which totally prohibited the passage of hand-carts during daytime was invalid. In coming to this conclusion their Lordships relied upon the decision of the Supreme Court in *Ramjilal v. State of U. P.*, AIR 1957 SC-620 in which the scope of Cl. (6) of Art. 19 has been dealt with. We do not see any analogy between the restriction held invalid in that case and the restriction under consideration.

19. The learned Advocate for the Petitioner further contended that as the respondent had not filed any counter affidavit, the impugned legislation should be held to be invalid as the restriction imposed on the right of a paid-employee member was prima facie unreasonable and sufficient to rebut the presumption of constitutionality of the rule. He quoted paragraphs 139 and 140 from Vol. 16 of American Jurisprudence which deal with the presumption of constitutionality and the limitations of that presumption. The relevant portion reads:

"The presumption of constitutionality of legislation is a strong one. But it is not conclusive; it is a rebuttable presumption of fact.

It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, this presumption in favour of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute

... .. the presumption of constitutionality has been held inapplicable to a state statute abridging the freedom of press assured by state and federal constitutions.

These principles do not come into play in this case as there is neither a denial nor a diminishment of any fundamental right. Where the constitutionality of a provision of law is assailed, absence of counter affidavit does not establish the contention of the petitioner. It is open to the Court in such cases to consider facts and circumstances of common knowledge, human experience, conduct of public affairs and legal functions of institutions in testing the reasonableness of the restriction. We have discussed the impugned restriction with reference to relevant factors relating to Co-operative Societies and their normal activities. The right to be elected to a Body of Management of a Co-operative Society is a statutory right and the statute which has created it has imposed restrictions which, in our opinion, are quite reasonable and have a legitimate and public object to serve.

20. In the result, we hold that the order (document No. 3) issued by the As-

sistant Registrar of Co-operative Societies on 27-10-1966 is legal and the provisions under which the same was issued are constitutionally valid. The petitioner is not entitled to any relief. The petition is dismissed. In the circumstances of the case, we make no order as to costs.

Petition dismissed.

AIR 1970 MYSORE 106 (V 57 C 26)

A. R. SOMNATH IYER, J.

M/s. Multanmal Chempalal, Bellary, Appellant v. M/s. C. P. Shah & Co., Bombay, Respondent.

Second Appeal No. 312 of 1965, D/- 31-7-1969, from decree of Civil J., Bellary, D/- 22-9-1964.

Sale of Goods Act (1930), S. 26 — Sale of goods — Buyer may agree to take risk even before property in goods, passes to him — Clause 7 in contract providing that risk passed to buyer on despatch of goods and buyer not entitled to make claim in respect of loss or damage — Clause 8 providing for passing of title only on payment of full price — Condition in Cl. 7 held absolute and not controlled by Cl. 8 — Delay in payment of price due to default of buyer and consequent loss of goods — Case falls under first proviso to S. 26 and buyer not entitled to claim damages for loss.

Under Section 26, Sale of Goods Act prima facie the risk passes only with property, but the section authorises a contract to the contrary under which the risk passes even before the title to the property passes. So it is permissible for the contracting parties to enter into an agreement that although property does not pass, the risk passes and they may fix the point of time when it so passes. (Para 7)

The plaintiff agreed to purchase cloth pieces from defendant. Clause 7 of the contract provided "if the goods are to be booked to upcountry the same will be done at the buyer's risk and no claim shall be entertained for the loss or damage." Clause 8 of the contract provided "until the full payment of this bill is received the goods covered by this bill shall be the seller's property." The defendant despatched the goods through a public carrier from Bombay to Bellary on 7-3-1957 but the payment of the price was made only in May owing to a dispute about Bank charges. The defendant thereafter forwarded the necessary receipt for taking delivery but the plaintiff could not take delivery as the goods were found missing or lost. The plaintiff sued to recover the amount paid by him.

Held (i) that the protection which the seller gave to himself under Cl. 7 was

not in any way controlled by Cl. 8. The condition in Cl. 7 that the risk passed to the buyer at the point of time when they were despatched by the seller to the buyer was absolute and that being so, the provision contained in Cl. 8 that property shall not pass until the full price is paid did not arrest the passing of that risk. Clause 7 was in truth an agreement to the contrary which controlled the operation of the general rule which Section 26 of the Sale of Goods Act incorporates.

(Para 8)

(ii) that in the circumstances it was clear that the loss would not have occurred if plaintiff had not unreasonably delayed the payment due to dispute about Bank charges. Hence, the first proviso to Section 26 was attracted and the loss must be borne by the plaintiff, quite apart from the provisions of Cl. 7 of the contract.

(Para 11)

V. Tarakaram, for Appellant; S. G. Sundaraswamy, for Respondent.

JUDGMENT:— The appellant is the plaintiff and his suit was for the recovery of a sum of Rs. 2,100 from the defendant from whom he agreed to purchase some quantity of cloth pieces for a sum of Rs. 1,449-12-3 towards which the plaintiff paid an advance of Rs. 50. The goods were despatched from Bombay to Bellary in a truck belonging to a public carrier on March 7, 1957, but the balance of the price payable by the plaintiff was paid only in May through a bank draft. Until then, there was a controversy with respect to a small sum of money which represented bank charges, the payment of which was insisted upon by the defendant but was refused by the plaintiff. Eventually the plaintiff paid that amount only in May nearly two months after the goods had been despatched through the public carrier. The defendant then on May 20, 1957 forwarded the necessary receipt on the presentation of which the plaintiff could collect the goods from the carrier, but the plaintiff could not obtain delivery of those goods, which by then, were missing. This suit was instituted in that situation for the recovery of the price paid by the plaintiff to the defendant.

2. The defendant resisted the suit on the ground that under the terms of the contract between the parties, the goods were at the plaintiff's risk after their despatch by the seller and that clause reads:

"If the goods are to be booked to upcountry, the same will be done at the buyer's risk and no claim shall be entertained for any loss or damage." It is not disputed that the despatch of the goods from Bombay to Bellary fell within this clause, and that if nothing else could be said about it, once those goods are despatched by the defendant from Bombay to the plaintiff, the defendant would be

under no liability to pay any compensation for their loss or destruction. That, was, the view taken by the two Courts below which dismissed the plaintiff's suit.

3. But in this appeal preferred by the plaintiff, Mr. Tarakaram advanced the contention that the courts below depended upon clause 7 in isolation, without considering the effect of Clause 8, under which, according to Mr. Tarakaram, the goods continued to be at the seller's risk until the full price payable by the plaintiff was paid. That clause reads:

"Until the full payment of this bill is received the goods covered by this bill shall be the seller's property".

4. It was contended by Mr. Tarakaram that under Clause 8 the goods continued to be the goods of the seller even after the goods had been despatched from Bombay since the price was paid by the plaintiff only in May 1957. Mr. Tarakaram also contended that the evidence discloses that the goods never reached Bellary and that they must have been lost in transit at a point of time when the seller was still the owner of the goods and the property in those goods had not yet passed to the buyer.

5. This was not the ground on which the plaintiff maintained his claim before the courts below and no issue was raised with respect to that matter. Even on the assumption that Clause 8 controlled the operation of Clause 7, what was necessary for the plaintiff to establish in order to sustain his dependence on Cl. 8 was that the goods were lost before the plaintiff paid the price, and, with respect to that matter Mr. Tarakaram was unable to point out any evidence. It is obvious that the plaintiff did not at any stage attempt to support his claim in the way in which Mr. Tarakaram attempted to maintain it in this Court. So the question whether the goods continued to be the goods of the defendant when they were lost was one into which no investigation was made by the two courts below.

6. Moreover, it does not appear to me that the protection which the seller gave to himself under Clause 7 was to any extent controlled by Clause 8. All that Clause 8 states is the point of time when the property in the goods passes from the seller to the buyer. It speaks nothing about the responsibility for loss or destruction of the goods even before the property in the goods passes to the buyer. On that question Clause 7 is complete and exhaustive. It says that once the goods are despatched by the seller, they shall be at the risk of the buyer who will not have any right to make any claim against the seller in respect of loss or damage. This condition in the contract is absolute and is to no extent subject to the provi-

sions of clause 8, and, clause 7 is a contract to the contrary within the meaning of Section 26 of the Sale of Goods Act which reads:

"Risk prima facie with property. — Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not:

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault;

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party."

7. The clear meaning of this section is that prima facie the risk passes only with property, but the section authorises a contract to the contrary under which the risk passes even before the title to the property passes. So it is permissible for the contracting parties to enter into an agreement that although property does not pass, the risk passes and they may fix the point of time when it so passes.

8. In this case, the contract entered into between the parties with respect to that matter was that the risk passes to the buyer at the point of time when they are despatched by the seller to the buyer and that being so, the provision contained in clause 8 that property shall not pass until the full price paid does not arrest the passing of that risk. Clause 7 is in truth an agreement to the contrary which controls the operation of the general rule which Section 26 of the Sale of Goods Act incorporates.

9. That being so, the contention that the goods were lost when they had not become the property of the plaintiff but continued to be the property of the defendant, cannot assist the plaintiff's claim if it otherwise has to fail under clause 7. And in my opinion, it has to, in that way.

10. There is also another reason why the plaintiff's claim must be negatived. The first proviso to Section 26 says that where delivery has been delayed either because of the fault of the buyer or the seller, the goods are at the risk of the party in fault with respect to any loss which might not have otherwise occurred. In the case before me, it is obvious from the correspondence between the parties that the goods were despatched by the defendant as early as on March 7, 1957 as can be seen from Exhibit P-3, the carrier addressed a communication to the plaintiff on June 13, 1957 which stated that the goods so despatched reached Bellary within a few days, and that for about

three months they were lying in the octroi office obviously for the reason that during all the period the plaintiff was carrying on a vexatious correspondence with the defendant with respect to a small sum of money representing bank charges, although eventually it was only in May, that he agreed to pay those charges.

11. So it was, that delivery could not be made to the plaintiff until May 20, 1957 on which date the necessary document of title was handed over to the plaintiff's representative in Bombay as can be seen from Exhibit P-2. It is quite reasonable to infer that the goods were lost some time between the middle of March 1957 when the goods must have reached Bellary and May 20, 1957 when payment in full was made by the plaintiff, and that during that period when the plaintiff was in default in resisting the demand for the payment of bank charges the goods must have been lost, is, I think, a fair and proper inference. That loss, it is obvious, would not have occurred if the plaintiff had not unreasonably delayed the payment of the bank charges during a long period of two months. So, on the admitted facts, it is obvious that the first proviso to Section 26 is attracted and the loss must be borne by the plaintiff, quite apart from the provisions of clause 7 of the contract.

12. So I dismiss this appeal. No costs.
Appeal dismissed.

AIR 1970 MYSORE 108 (V 57 C 27)

K. R. GOPIVALLABHA IYENGAR, J.

Raghavendra Kalmeshwar Kulkarni and another, Appellants v. Siwaya Basya Hiremath and others, Respondents.

Misc. Second Appeal No. 36 of 1969, D/-8-7-1969, from order of Civil J., Hubli, D/- 22-12-1966.

Civil P. C. (1908), O. 21, R. 35, S. 47 — Acknowledgment of delivery of possession by decree-holder — Judgment-debtor is entitled to raise objection as to validity of delivery of possession. 1968 (1) Mys. L. J. 311, held, not correct in view of AIR 1961 S.C. 272.

Where the decree-holder filed a memo acknowledging delivery of possession and seeking suitable orders and the judgment-debtor sought by application to raise objections in regard to the validity of the order passed for delivery of possession and the consequent order disposing of the execution petition, the rejection of that application is illegal. The Court should dispose of the same on merits after giving the decree-holders an opportunity to file their objections. The pendency of certain proceedings relating to the property in dispute does not disentitle the judgment

debtors from raising the objections in respect of which they have sought permission. (1968) 1 Mys. L. J. 311, held, is not correct in view of AIR 1961 SC 272.

(Paras 6, 8, 9)

Cases Referred: Chronological Paras

(1968) 1968-1 Mys. L. J. 311, Tavanappa Hambanna v. Veerabhadra Tippanna

(1961) AIR 1961 S.C. 272 (V 48)=

(1961) 1 SCR 591, B. V. Patankar v. C. S. Sastry

B. V. Deshpande and K. R. D. Karanth, for Petitioners; V. S. Malimath (for Nos. 1 and 2) and M. Rama Bhat (for No. 3 (i) to 3 (iii)), for Respondents.

JUDGMENT:— The appellants who are the decree-holders sued out execution of the decree ultimately confirmed in S. A. No. 275/1965 on 24-2-1966. For delivery of possession of the property they made an application in L. C. D. No. 140/1966 on the file of the First Additional Munsiff, Hubli and obtained possession of the property on 17-4-1966. On 1-6-1966, the decree-holders filed a memo marked Ex. 14 acknowledging delivery of possession of the properties and seeking suitable orders. On the same day, the judgment-debtors made an application marked Ex. 15 opposing the memo filed by the decree-holders, stating that the possession of the property was handed over to them. The judgment-debtors further submitted that the purported delivery of possession on 17-4-1966 was not legal and that the same is not binding on the judgment-debtors and that they may be given an opportunity to file objections in this regard. The learned Munsiff passed an order on Exhibit 14 in the following terms:

"possession delivered. E. P. disposed off".

2. This order is dated 3-6-1966. On the same day, the learned Munsiff rejected the application of the judgment-debtors seeking an opportunity to file objections in regard to delivery of possession. Against this order dated 3-6-1966, the judgment-debtors filed Civil Appeal No. 119 of 1966 before the Civil Judge, Hubli. The appellate court allowed the appeal and set aside the order passed by the learned Munsiff and remanded the matter to the trial Court for fresh trial and disposal according to law. It is against this order the decree-holders have preferred this Second Appeal.

3. This appeal appears to have been registered earlier as Civil Revision Petition No. 658 of 1967 but later, it came to be registered as Miscellaneous Second Appeal No. 36 of 1969. The order passed by the learned Civil Judge is not to set aside the order passed on Ex. 14 but merely deals with the order rejecting Ex. 15.

4. Sri. B. V. Deshpande, learned counsel for the appellants contends that an application like Ex. 15 is not maintainable

as the same was filed at a stage when possession of the property has already been delivered. He placed strong reliance on a decision of this court reported in 1968 (1) Mys. L. J. 311. Though it appears that the said decision supports the contention of Sri Deshpande, it cannot be of much use to him in view of the decision of the Supreme Court reported in AIR 1961 S.C. 272. It was pointed out by the respondent's counsel that when the decision reported in 1968 (1) Mys. L. J. 311 was tendered, the Supreme Court's decision has not been brought to its notice. With reference to the contention that the objection could not be raised by the judgment-debtor after the decree-holder acknowledges delivery of possession, it is observed in the above cited High Court decision that:

"the learned counsel for the respondent has not drawn my attention to any provision in the Code which entitles a judgment-debtor to raise objections before the executing Court that the delivery of possession accepted by the decree-holders as complete and effectual is a paper delivery."

It is further observed that:

"At the stage of delivery, the Code does not contemplate any objection being raised by the judgment-debtor to the delivery of possession made under R. 35 or 36 of Order XXI.....".

"In my judgment, at the stage of delivery the judgment-debtor has no interest in the property to protect and he is not entitled to raise any objection to the delivery effected through the process of the Court which is accepted by the decree-holder, except where objection is raised that there is excess delivery or that property not covered by the decree is delivered."

5. The learned counsel Sri V. S. Math appearing for the judgment-debtor, who places reliance on AIR 1961 S.C. 272, submits that it takes a different view. This submission is not without force. The appellants therein took out execution on 9th July 1951 and got possession of the property on 22nd July 1951. On 13th August 1951, the respondent-judgment-debtor made an application to the executing Court under Sections 47, 144 and 151 of the Code of Civil Procedure for setting aside the ex parte order of delivery of possession and for re-delivery of possession of the house to him. The District Judge rejected the said application. But on appeal, this order was reversed and the High Court directed the decree-holders to return possession of the house in dispute to the judgment-debtor. The High Court held that the executing Court has no jurisdiction to order the eviction of the respondent because of the provisions of Mysore House Rent and Accommodation Control Order 1948,

which was in operation on the date of eviction. Regarding the applicability and the maintainability of the application, the Supreme Court observed:

"The inapplicability of Section 47 to the proceedings out of which the appeal has arisen was also raised before us, but that contention is equally unsubstantial because the question whether the decree was completely satisfied and therefore, the court became functus officio is a matter relating to execution, satisfaction and discharge of the decree". Further it is observed:

"When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application under Section 47, and not in a separate suit."

It may further be stated that the objection raised by the judgment-debtor in the case reported in 1968 (1) Mys. L. J. 311, was that the delivery effected to the decree-holder by the bailiff was, only a paper delivery and actual delivery had not been effected and therefore record of delivery could not be made but the Court overruling the objection recorded delivery of possession; the decree-holder had accepted delivery of possession effected through the bailiff of the court without any objection and it is in these circumstances that the High Court held that the judgment-debtor was precluded from raising any objection relating to the delivery of possession. Though the observations appear to lend support to the appellant's contention they should be taken with reference to the facts of the case. For this reason also the observations relied upon by the appellant's counsel cannot assist his contention.

6. The application for re-delivery of possession was made in the case decided by the Supreme Court after the delivery of possession was made. What is now sought by the judgment-debtors in this case under Ex. 15 is to raise objections in regard to the validity of the order passed for delivery of possession and the consequent order disposing of the execution petition.

7. The learned Judge does not advert to the merits of the objections sought to be raised by the judgment-debtors. It may be mentioned here that the judgment-debtors filed their objection statement before the appellate Court but the appellate Court has not gone into the merits of the objections which he could not properly go into.

8. Sri Deshpande submitted that the judgment-debtors have made an application under Section 41 of the Mysore Land Reforms Act and the same is pending. Further, it is submitted that the respon-

dents have filed a petition for review of the judgment of this court in S. A. No. 275 of 1965. The judgment-debtors have further filed a Long Cause Suit for a declaration that the proceedings before the learned Munsiff are null and void and that their possession was protested. It appears to me that the pendency of these proceedings do not disentitle the judgment-debtors from raising the objections in respect of which they have sought permission under Ex. 15. In my opinion, the trial Court erred in shutting out the judgment-debtors from raising the objections. It was not proper that the judgment-debtors should have been permitted to make an application incorporating their objections and seeking such reliefs as they thought proper and the trial Court ought to have disposed of the same on merits after giving the decree-holder an opportunity to file their objections. In this view of the matter, it appears to me that the order of the learned Civil Judge allowing Ex. 15 and setting aside the order of the Munsiff dated 3-3-1966 rejecting Ex. 15 is correct.

9-10. The learned Munsiff will now receive the application filed by the judgment-debtors in the appellate Court and proceed to dispose of the same on merits, after giving the decree-holders an opportunity to file their objections.

11. The order passed at present in the Execution Petition will be subject to the final orders on the objection petition filed by the judgment-debtors as permitted by the lower-appellate Court.

12. With these observations, the Second Appeal is dismissed.

13. There will be no order as to costs. Order accordingly.

AIR 1970 MYSORE 110 (V 57 C 28)

G. K. GOVINDA BHAT AND
M. SADANANDASWAMY, JJ.

K. Y. Pilliah and Sons, Applicant v.
Commissioner of Income-tax, Mysore,
Bangalore, Respondent.

I.T.R.C. No. 17 of 1967, D/- 18-6-1969.

Finance Act (1950), S. 2 (11) (a) proviso — Assessee submitting return for assessment year 1950-51 — Income from 1-7-1949 to 31-3-1950 shown — Permission under S. 2 (11) (a) proviso of the Act to change the period of 'previous year' to nine months granted — Income cannot be assessed at the rate applicable for twelve months' income.

The discretion vested in the Income Tax Officer under S. 2 (11) (a) proviso of the Act is limited to the period of the previous year only. Once the period of 'previous year' is fixed and the income

of the 'previous year' is determined that income can be charged at the rates specified in the Finance Act and at no other rate. Where the Income Tax Officer accorded consent for change of the 'previous year' to cover the period of nine months from 1-7-1949 to 31-3-1950 it was held that the assessee's income for the nine months ending on 31-3-1950 can be taxed only at the rate applicable for the income of the said period of nine months and not at the rates applicable for twelve months income. AIR 1966 SC 1285, Foll.

(Paras 12, 13 & 14)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1285 (V 53) =

(1966) 60 ITR 411, Esthuri Aswathaiah v. Commr. of Income Tax,
Mysore

3, 10

K. Srinivasan, for Applicant. S. R. Rajashekhar Moorthy, for Respondent.

ORDER:— The questions referred for our decision under Section 66 (2) of the Indian Income Tax Act, 1922, hereinafter referred to as the Act are:—

1. Whether the Income Tax Tribunal was justified in law in refusing to entertain the additional ground of appeal urged by the Assessee regarding the correct rate of tax applicable or to be applied for the nine months' income considered in the assessment?

2. Whether the Assessee's income for nine months ended on 31-3-1950 could have been rightly assessed at the rate applicable for twelve months' income?

3. Whether there was any material available on record to support the Tribunal's conclusion that the Assessee's turnover for the year ended 31-3-1950 was Rs. 15,00,000/-.

2. The learned counsel on both sides were agreed that question No. 1 need not be answered as the said question is involved in Question No. 2 which was directed by this Court to be referred as it arises out of the order of the Tribunal. The learned counsel for the Assessee, Sri K. Srinivasan, did not press question No. 3 and he submitted that the same may be answered in favour of the Revenue.

3. The only question that requires to be answered is Question No. 2. In our opinion, the Judgment of the Supreme Court in Esthuri Aswathaiah v. Commr. of Income Tax, Mysore, (1966) 60 ITR 411 = (AIR 1966 S.C. 1285), furnishes a complete answer and the question has to be answered in favour of the assessee.

4. The relevant facts so far as they are material for the purpose of answering question No. 2 as found in the statement of the case submitted by the Tribunal are as follows:—

5. The Mysore Income Tax Act, 1923 was repealed and the Act was extended to the erstwhile Mysore State by Section 13 of the Indian Finance Act, 1950 with effect from the first of April 1950.

Under the Act, the 'financial year' commences on the first of April, and the expression 'previous year' is defined in Sec. 2 (11). In 1950 it read thus:—

"2(11). 'Previous year' means in respect of any separate source of income, profits and gains—"

"(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made upto a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up;

Provided that where an assessee has once been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income Tax Officer and upon such conditions as the Income-tax Officer may think fit.

(b)(omitted as unnecessary)

(c)(omitted as unnecessary).

6. Under the Act, the tax is levied for each financial year commencing on the first April at the rate or rates prescribed in the Finance Act in force for the time being and is actually charged on the total income of the 'previous year'. The year for which the tax is paid is called the 'assessment year' or 'income-tax year'. 'Previous year' on the income of which the tax is levied is called the 'accounting year'.

7. For the assessment year 1949-50, the Assessee was assessed under the Mysore Income Tax Act on his income earned during the accounting year ended on 30th June 1949. By reason of the repeal of the Mysore Income Tax Act and the extension of the Indian Income Tax Act, the first assessment year under the Act commencing on the first of April, so far as the erstwhile Mysore State was concerned, was the assessment year commencing on the first of April 1950. The Assessee submitted his Return for the assessment year 1950-51 commencing on the first of April 1950 in respect of the income earned during the period of nine months from 1-7-1949 to 31-3-1950. He sought the consent of the Income-tax Officer for allowing him to change the financial year ending on 31st March. That request of the Assessee was granted by the Income-tax Officer, but with a condition that the income of the period from 1-7-1949 to 31-3-1950 would be assessed at the rates applicable to the income of twelve months.

8. The Income Tax Officer assessed the income that had accrued during the period

of nine months at the rates applicable to the income of twelve months. That order was affirmed on appeal by the Appellate Authorities. Hence the matter has come up on a reference sought at the instance of the Assessee.

9. It was argued by Sri. K. Srinivasan, the learned counsel for the Assessee, that the proviso to clause (a) of sub-sec. (11) of Section 2 of the Act does not empower the Income-tax Officer to impose a condition that the Assessee shall be assessed at the rates applicable to the income of twelve months where consent is granted for change of the 'previous year' even where as a result of the change the period of the 'previous year' becomes less than twelve months.

10. In (1966) 60 ITR 411=(AIR 1966 S.C. 1285), the facts were as follows:— The appellant, who had adopted the year ending on June 30th as the 'previous year' was assessed to tax for the year ending June 30, 1950, for the assessment year 1951-52. For the assessment year 1952-53, he filed a return for 21 months commencing on July 1, 1950, and ending on March 31, 1952, and to this change the Income-tax Officer accorded his sanction and he assessed the total income for the period of 21 months at the rate applicable to that total income.

11. One of the main contentions urged by the Assessee which was rejected by the Supreme Court was that the income for 21 months should be assessed at the rate applicable to the income of the last period of twelve months. In the said case, the Supreme Court laid down the following three propositions:

(1) That the length of a 'previous year' need not necessarily be twelve calendar months.

(2) Where the Income-tax Officer accords his consent to a change of the 'previous year', he has ample power to impose the condition that the full period from the end of the 'previous year' for the preceding year's assessment to the end of the new accounting year should be taken as the 'previous year' for the current assessment year. In a case where the 'previous year' at any given time applicable to the Assessee ends on June 30th and he wants to vary it so as to make it end on March 31st next, the Income-tax Officer has power to accord sanction to the change on the condition that the 'previous year' would consist of the entire period of 21 months commencing on June 30th of the year upto which his accounts were last made upto March 31st of the year upto which his accounts are newly made up.

(3) Where the Income-tax Officer accords consent for change of the 'previous year' he has no power to vary the rate at which the income of the 'previous year' is to be assessed.

12. The law as laid down by the Supreme Court is that once the length of the 'previous year' is fixed and the income of the 'previous year' is determined that income must be charged at the rates specified in the Finance Act and at no other rate.

13. It was argued by the learned counsel for the Revenue that under the proviso to clause (a) of sub-section (11) of Section 2, the Income-tax Officer has the power to accord consent for the change upon such conditions as he may think fit and that power comprehends within its ambit the power to impose a condition that where the 'previous year', as a result of the change allowed, falls below twelve months, the Assessee shall be liable to pay tax at the rates applicable to the income of twelve months. It is clear from the judgment of the Supreme Court that the discretion vested in the Income-tax Officer under the proviso is limited to the period of the 'previous year' only. It was open to the Income-tax Officer in the instant case to impose a condition that the Assessee's 'previous year' for the Assessment year 1951-52 shall be a period of 21 months commencing from 1-7-1949 to 31-3-1951. That, the Income-tax Officer has not done. He has accorded consent for change of the 'previous year' to cover that period of nine months from 1-7-1949 to 31-3-1950. Having accorded consent, he had no power under the Act to impose a condition to charge tax at a rate higher than the rate charged under the Finance Act. That power is a legislative power and cannot be exercised by any authority exercising power under the Act.

14. We therefore answer question No. 2 in favour of the Assessee that the Assessee's Income for the nine months ended on 31-3-1950 can be taxed only at the rates applicable for the income of the said period of nine months and not at the rates applicable for twelve months' income. Question No. 3 is answered in the affirmative in favour of the Revenue in view of the concession made by the learned counsel for the Assessee. The respondent will pay the costs of the Assessee. Advocate's fee Rs. 250/-

Reference answered.

AIR 1970 MYSORE 112 (V 57 C 29)

A. NARAYANA PAI AND
M. SANTHOSH, JJ.

Quazi Mir Shariyat Ali, Petitioner v.
State of Mysore, Respondent.

Writ Petn. No. 1755 of 1966, D/- 12-9-1969.

States Reorganisation Act (1956),
Ss. 116, 117 — First stage promotion of
allottee after reorganisation — Protection

LM/AN/G54/69/NNH/M

of service conditions in respect of pay scales — Benefit when available — Government of India Memorandum dated 12-5-1957 para 5 — Interpretation.

Where a Government servant is allotted to a new State on reorganisation, on the first promotion, he is entitled, in view of the directive contained in para 5 of the Government of India Memorandum dated 12-5-1957, to the protection of service conditions in respect of pay scales that would have been admissible to him on such promotion in his parent State before reorganization if such scale is more favourable than the scale attached to the post in the new or reorganized State to which he is allotted. The essence of para 5 is that the benefit of higher pay scale which a Government Servant would have got in his parent State, had he continued there, is not to be taken away from him for reason only of the fact that he has got allotted to another State under the States Reorganization Act. The said protection is also limited to the first promotion in the new State. (Para 5)

Before one could say that a pay scale is higher than another pay scale with reference to posts, there must first be an equivalence in the matter of functions and responsibilities of the posts. The allottee can complain of prejudice only if the pay scale of a post to which he is promoted in the new State is lower than the pay scale of a similar or equivalent post in his parent State, to which he would have been promoted. If the post in the parent State which carries higher salary is a superior post whose functions and responsibilities are more important and heavier than those of the post to which he is promoted in the new State, he cannot complain of any prejudice at all. What para 5 proposes to do is to meet a grievance or to avoid a prejudice. As prejudice or grievance can arise only if the two posts are of equal importance and the salary of the post in the parent State is higher than the salary of the post in the new State, that is the only situation sought to be met by the said paragraph. [The State Government was directed in the instant case to examine the question from this point of view.] (1965) 1 Law Rep. 93, Ref.

(Para 5)

Cases Referred: Chronological Paras
(1965) 1965-1 Law Rep. 93, N. A.

Kulkarni v. State of Mysore 3

S. Rangaraj, for Petitioner; N. S. Chandrashekhar, High Court Govt. Pleader, for Respondent.

NARAYANA PAI, J.:— This is a writ petition for a direction in the nature of mandamus to be issued to the State Government for fixing the pay of the petitioner on promotion as Inspecting Officer in the Department of Indian Medicine with effect from 23-9-1958 in the pay

that the requisite intention to justify a conviction u/s. 447 I. P. C. has not been proved and the mere fact that the action of petitioners resulted in annoyance to the complainant, even if true, cannot amount to criminal trespass. On the other hand, for the opposite party, it is contended that when the land in question was in possession of the complainant, the action of petitioners cannot but be construed as one done with intent to annoy him.

5. The principle of law has been clearly explained by the Supreme Court in the decision reported in AIR 1964 SC 986, Smt. Mathri v. State of Punjab as follows:

"In order to establish that entry on the property was with intent to annoy, intimidate or insult, it is necessary for the court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering; that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the court has to consider all the relevant circumstances, including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance, being the dominant intention which prompted the entry." All that the learned Magistrate has found was that the action of petitioners caused annoyance to the complainant who was in possession of the disputed land. He has failed to determine taking all circumstances into consideration including the natural consequence of the act and the plea of the petitioners whether the dominant intention of the entry was to cause annoyance.

In the present case, admittedly, petitioner no. 1 was serving as gomasta-jhan-
kar under the complainant for 7 or 8 years and claims to have been given the piece of land in question towards his remuneration. While the complainant says that he was giving five pudugs of paddy every year as remuneration, there is no clear finding whether the remuneration consisted of paddy, as alleged by the complainant, or the land had been given as asserted by petitioner no. 1. In the circumstances, when all that the petitioners did was to plough the land and spread manure asserting that petitioner no. 1 has been in possession of that land in lieu of his wages, it will not be reasonable to conclude that the dominant inten-

tion of making the entry was to annoy the complainant. On the other hand, the dominant intention in all probability was to assert possession over the land. Merely because by such assertion annoyance resulted to the complainant, it cannot be said that the trespass amounted to criminal trespass punishable u/s. 447 I. P. C.

6. In the result, the revision is allowed, the conviction and sentence are set aside and the petitioners are acquitted.

Revision allowed.

AIR 1970 ORISSA 49 (V 57 C 22)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Ramakanta Mohanty; Petitioner v. Divisional Forest Officer, Athgarh; Division and another, Opposite Parties.

Original Jurisdiction Case No. 137 of 1969, D/- 28-7-1969.

Constitution of India, Art. 311 — Order of dismissal of forest guard passed by D. F. O. on 30-12-1967 with effect from 23-5-1966 — Order is valid and effective only from 30-12-1967 — Retrospective part can be separated from the order — AIR 1966 SC 951, Rel. on. (Paras 1, 2)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 951 (V 53) = (1966) 2 SCR 404, Jeeva Ratnam v. State of Madras I

R. N. Das, P. K. Das and J. Swain, for Petitioner; Advocate General, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner was dismissed from service on 30-12-67. The Divisional Forest Officer, however, gave retrospective operation to the order of dismissal by saying that the services of Sri Ramakanta Mohanty Forest Guard are dispensed with, with effect from the date of his absconding from head quarters, i.e. from 23-5-66. The only contention urged by Mr. R. N. Das is that the order of dismissal cannot be given retrospective operation. This is concluded by the decision in AIR 1966 SC 951, Jeeva Ratnam v. State of Madras. It was stated therein that the order of dismissal would be valid from the date when it was passed and the retrospective part can be separated from the order of dismissal. Following the aforesaid decision, we hold that the dismissal order would take effect from 30-12-67.

2. The writ application is accordingly allowed. A writ of mandamus would issue to the opposite parties, directing them to treat the petitioner as continuing in service till 30-12-67 on which date his services were terminated by the order of dismissal.

IM/IM/E378/69/SSG/B

3. The application is allowed with costs. Hearing fee Rs. 50/- (Rupees fifty only).

4. R. N. MISRA, J.: I agree.
Petition allowed.

AIR 1970 ORISSA 50 (V 57 C 23)

B. K. PATRA, J.

Gopinath Das, Petitioner v. Alekh Sahu and others, Opposite Parties.

Criminal Revn. No. 171 of 1967, D/- 5-9-1969, against order of Judicial Magistrate, Daspalla, Campnayagarh, D/- 12-12-1966.

(A) Criminal P. C. (1898), S. 439—Revision against acquittal at instance of private party — Interference with finding of acquittal by Court when justifiable — Mere possibility of arriving at contrary conclusion on basis of evidence on record does not justify interference.

It is true that it is open to the High Court in revision to set aside an order of acquittal even at the instance of private parties although the State might not have thought fit to appeal, this jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. No criteria has been laid down for determining such exceptional cases which would cover all contingencies. But some cases of this kind which would justify the High Court in interfering with the finding of acquittal in revision are (1) where the trial court has no jurisdiction to try the cases but has still acquitted the accused, (2) where the trial court has wrongly shut out evidence which the prosecution wished to produce, (3) where the court of appeal has wrongly held evidence which was admitted by the trial Court to be inadmissible, (4) where material evidence has been overlooked either by the trial Court or by the appeal court and (5) where the acquittal is based on a compounding of the offence which is invalid under the law. AIR 1962 SC 1788, Foll.

(Para 5)

A mere possibility for another court to arrive at a contrary conclusion on the basis of evidence on record cannot by itself be a reason to set aside the order of acquittal.

(Para 5)

(B) Penal Code (1860). S. 102 — Right of private defence — How long continues — Attempt to assault accused with weapon by the injured—Weapon snatched away by accused—No evidence to show any attempt by injured to snatch back the weapon or to secure any other weapon

— Inflicting of injuries by accused on the injured by the weapon held could not be in private defence.

The right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence might not have been committed, and it continues as long as such apprehension of danger to the body continues. Whether a person claiming to exercise right of private defence had any reasonable apprehension of danger or not depends on the state of his mind at that time and it is for him to say what danger he apprehended. Outsiders cannot divine what was passing in his mind.

(Para 6)

Where the accused alleged that since the injured person wanted to assault him with a tangia which he (injured) was holding at the time of occurrence, the accused snatched away the weapon and assaulted him with it till the injured fell down on the ground and there was no evidence or allegation by the accused himself that there was any attempt on the part of the injured person either to snatch back the weapon or to secure any weapon from elsewhere:

Held, that the accused had failed to establish that the right of private defence was available to him. So long as Tangia was in the hands of the injured and the latter attempted to kill him, accused had every justification to apprehend danger to his body and consequently he would have been justified to inflict such injury as he would have considered necessary to save himself. But once the Tangia was snatched away by accused from the injured, there could not have been any further apprehension in the mind of accused. If there was evidence to show that after the Tangia was seized from injured the latter was attempting to catch hold of some other weapon, that could have been a sufficient justification for accused to exercise his right of private defence.

(Para 6)

Cases Referred: Chronological Paras-
(1962) AIR 1962 SC 1788 (V 49)=

1963 (1) Cri LJ 8, K. Chinna-swamy Reddy v. State of A. P.

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Kanungo and R. N. Mohanty, for Petitioner; R. K. Kar and R. Mohanty, for Opposite Parties.

ORDER:— This application in revision is directed against an order of the Magistrate, First Class, Daspalla acquitting the opposite parties, thirteen in number, who were prosecuted on charges under Section 148/426 I. P. C. and five of whom, namely, Denei Sahu, Mahajan Naik, Kirantan Padhan, Mohan Naik and Udaya Sahu also under Sections 326/324/323, I. P. C. The case against them is that at

about 6 A. M. on 28-3-1965 they formed themselves into an unlawful assembly and being armed with Katis, Tangias, Farsa and Lathis restrained Lingaraj Das while he was proceeding on a cycle and dealt blows on him thereby causing simple and grievous hurt on his person. The opposite parties pleaded not guilty. Their case is that there are two factions in the village for the last about 12 years, Lingaraj Das (injured) and Arakhit Barik are leaders of one faction while petitioners Alekh Sahu and Danei Sahu are leaders of the other faction, and there was a number of cases between them. Some-time previous to the occurrence, Lingaraj Das was convicted under Section 307 I. P. C. for attempting to commit the murder of one Lokanath Misra and in that case some of the members of the opposite party were witnesses for the prosecution. Since then, Lingaraj Das used to move on cycle with a Farea for his personal safety. In mouza Kurum Bankatara where the occurrence took place and to which place all the parties belong, Dutikeshwar Mahadeb of which one Lokanath Misra was the Managing trustee owns some lands and opposite party no. 2 Mahajan Naik was cultivating some of the lands of the deity as a bhag tenant. After Lokanath Misra, Durga Madhab Deo became the trustee of the temple and Lingaraj Das as an agent of Durga Madhab Deo was looking after the affairs of the deity. On the date preceding the occurrence, Lingaraj Das wanted to dislodge Mahajan Naik from the land which he was cultivating. On the date of occurrence when Lingaraj Das was passing by the side of Mahajan's house on a cycle, the latter questioned him as to why he was attempting to dispossess him from the land. Lingaraj got down from his cycle and taking up the Tangia which he was holding wanted to assault Mahajan with it. Mahajan thereupon snatched away the Tangia from Lingaraj and assaulted him with it till Lingaraj fell down on the ground. None of the other members of the opposite party was present by the time of the said occurrence. The essence of the defence therefore, is that while Mahajan admitted having caused some injuries on Lingaraj but pleaded that he did so in exercise of his right of private defence, the other members of the opposite party denied having taken part in the occurrence.

2. Lingaraj Das examined as P. W. 1 stated that on the date of occurrence when he was coming down from Kabelpur bridge on a cycle, opposite party Alekh Sahu suddenly came from the house of Mahajan and stood in front of his cycle and catching hold of the handle of his cycle asked him as to why he

was creating trouble in the village. He therefore got down from the cycle. Immediately thereafter the other members of the opposite party who were variously armed with Katis and lathis gathered at the spot. Danei Sahu attempted to give a blow on his neck with a Kati. He tried to ward off the blow by his left hand and the Kati blow fell on his wrist. He then fell down. Then Mahajan Naik attempted to give a blow with his Kati on his neck and he again warded it off with his left hand and received an injury on the left upper arm. He then became unconscious and did not know who caused the several injuries on his person. The doctor examined as P. W. 2 who had examined Lingaraj Das found as many as eleven injuries on the person of Lingaraj. These consisted of bleeding incised injuries on the left wrist, left humerus and the left rib; lacerated injuries on the left elbow, left humerus, left tibia; and compound fractures of the left ulna, left tibia; and abrasions on the fore-head and right arm. Some of the injuries were grievous in nature while the rest were simple. Five other witnesses were examined on the prosecution side to prove the occurrence besides the investigating officer. The defence examined one witness to support the stand taken by Mahajan Naik and he stated inter alia that excepting Mahajan Naik, the other members of the opposite party were not present at the occurrence.

3. The learned Magistrate considered the evidence on record, disbelieved the prosecution case regarding participation of the members of the opposite party excepting Mahajan Naik in the occurrence and acquitted them. He accepted the plea of Mahajan that he caused injuries on Lingaraj Das in exercise of his right of private defence and also ordered his acquittal.

4. Two contentions were advanced by Mr. Kanungo appearing for the petitioner the first being that the prosecution case disclosed the commission of an offence under Section 307, I. P. C. and that as such the Magistrate had no jurisdiction to decide the case finally but that he should have committed the opposite parties to the Court of Session and secondly that on the evidence placed before the Court, the acquittal of the opposite parties and at any rate that of Mahajan is unjustified and perverse. In the charge sheet that was laid by the Police before the Magistrate no mention was made that an offence under section 307 I. P. C. had been committed. No exception was taken from any quarter when after perusing the papers placed before the Court under section 173 Cr. P. C., the learned Magistrate framed the charges which did not include one under section 307, I. P. C.,

In order no. 23 dated 17-8-1966, the Magistrate recorded that he had been approached by the prosecution side. He therefore submitted the records before the S. D. M., Nayagarh stating that in the circumstances he did not like to try the case. The S. D. M. sent back the records to him stating that he did not see any reason why the learned Magistrate should not proceed with the trial of the case and that if he felt that his judicial functions were in any way interfered with he could draw up appropriate proceedings against the persons concerned. It is thereafter that the Court Sub Inspector filed an application before the Magistrate for framing an additional charge under section 307 I. P. C. which after due consideration was rejected by the learned Magistrate on the ground that the case diary did not disclose any materials to warrant framing of such a charge. The contention of Mr. Kanungo is that two blows with the Kati were aimed at the neck of Lingaraj Das which fortunately he warded off and that this shows that the intention of opposite parties was to kill him. But the further case of the prosecution is that after these two blows were given to Lingaraj he became unconscious and that thereafter the opposite party members dealt several other blows on the person of Lingaraj. If the intention of opposite parties was to kill him they could have easily done so after Lingaraj fell down unconscious. The fact that they did not do so shows that the intention of the assailant or assailants was not to cause his death. In the circumstances, the charges framed by the learned Magistrate were correct and he had jurisdiction to proceed with the case.

5. So far as his second contention is concerned, it is true that it is open to the High Court in revision to set aside an order of acquittal even at the instance of private parties although the State might not have thought fit to appeal, but it is now well settled that this jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. No criteria has been laid down for determining such exceptional cases which would cover all contingencies. But some cases of this kind which would justify the High Court in interfering with the finding of acquittal in revision have been indicated by their Lordships of the Supreme Court in *K. Chinnaaswamy Reddy v. State of Andhra Pradesh*, AIR 1962 SC 1788. The cases enumerated are (1) where the trial Court has no jurisdiction to try the cases but has still acquitted the accused, (2) where the trial court has wrongly shut

out evidence which the prosecution wished to produce, (3) where the court of appeal has wrongly held evidence which was admitted by the trial court to be inadmissible, (4) where material evidence has been overlooked either by the trial Court or by the appeal court and (5) where the acquittal is based on a compounding of the offence which is invalid under the law. Here, the learned Magistrate has duly considered the evidence let in on the prosecution side regarding the participation of the opposite parties in the occurrence and has given certain reasons in support of his finding that excepting opposite party Mahajan Naik, the others did not take any part in the occurrence. It may be possible for another Court to arrive at a contrary conclusion on the basis of evidence on record but this by itself cannot be a reason to set aside the order of acquittal. Every aspect of the prosecution case has been considered by the learned Magistrate and he has given reasons in support of his finding. The order of acquittal of the opposite parties except Mahajan cannot be interfered with.

6. The case of Mahajan Naik however stands on a different footing. Mahajan has admitted having caused certain injuries with his Kati on Lingaraj Das. But he pleaded that he did so in exercise of his right of private defence. If the establishment of this plea involves the appreciation of evidence and circumstances and the learned Magistrate has appreciated them in a particular manner, the High Court in revision would not substitute its own appraisal of the situation and set aside the order of acquittal. But in this case I find that even if all that Mahajan has said in support of his defence is accepted in toto, his plea is not established. He stated that Lingaraj Das attempted to kill him with his Tangia and therefore he (Mahajan) snatched the Tangia from Lingaraj and then inflicted the injuries on the latter with the sharp edge of the Tangia and also with its handle. The right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence might not have been committed, and it continues as long as such apprehension of danger to the body continues. So long as the Tangia was in the hands of Lingaraj and the latter attempted to kill him, Mahajan had every justification to apprehend danger to his body and consequently he would have been justified to inflict such injury on Lingaraj as he would have considered necessary to save himself. But once the Tangia was snatched away by Mahajan from Lingaraj, there could not have been any further apprehension in the mind of

Mahajan. In fact, Mahajan had not stated what further injury he apprehended from Lingaraj. If there was evidence to show that after the Tangia was seized from Lingaraj the latter was attempting to catch hold of some other weapon, that could have been a sufficient justification for Mahajan to exercise his right of private defence. But that is not the case here. Whether a person claiming to exercise right of private defence had any reasonable apprehension of danger or not depends on the state of his mind at that time and it is for him to say what danger he apprehended. Outsiders cannot divine what was passing in his mind. When Mahajan himself had not chosen to speak out what danger he had at that moment expected from Lingaraj who was completely disarmed by him, and when he did not say that at that moment there was any attempt on the part of Lingaraj either to snatch back the Tangia from him or to secure any weapon from elsewhere, it is manifest that Mahajan has failed to establish that the right of private defence was available to him. The learned Magistrate has taken a wrong view of law while considering this aspect of the defence case.

7. In the result, I would allow this application so far as it relates to opposite party No. 2 Mahajan Naik, set aside the order of acquittal passed against him and direct that the case be sent back to the learned Magistrate for disposal according to law. The order of acquittal in respect of the other opposite parties is maintained.

Order accordingly.

AIR 1970 ORISSA 53 (V 57 C 24)

S. K. RAY, J.

Banwarilal Boid, Appellant v. P. Neelakantham and others, Respondents.

Second Appeal No. 36 of 1965, D/- 27-8-1969, against decision of Dist. J; Koraput, D/- 19-10-1962.

Limitation Act (1963). S. 5 — Sufficient cause — Appellant businessman returning from another place on last day of limitation — Lawyer out of town — Copies already given to the lawyer — Copies found out 5 days after search — Delay of 5 days for filing appeal — Held there was sufficient cause and delay could be condoned. AIR 1962 SC 361, Foll.; AIR 1919 Pat 503, Diss. (Para 6)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 361 (V 49)=
1962-2 SCR 762, Ram Lal v.
Rewa Coalfields

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KM/KM/F239/69/MNT/D

(1919) AIR 1919 Pat 503 (V 6)=

4 Pat LJ 381, Jahar Mal v.
Pritchard

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Y. S. N. Murty, for Appellant; P. V. V. Rao, N. V. Ramdas and Mrs. A. K. Padhi, for Respondents.

JUDGMENT: This is a second appeal preferred by the plaintiff from an order dated 19-10-62 of Sri C. Mohapatra, District Judge, Koraput-Jeypore, passed in Title Appeal No. 6 of 1962, rejecting a petition under section 5 of the Limitation Act filed by the plaintiff-appellant before him and thereby ultimately dismissing the appeal as time-barred.

2. The only question therefore that arises in this appeal is whether the District Judge was justified in rejecting the appeal filed before him on ground of limitation by dismissing this application for condonation of delay.

3. It is not in dispute that the appeal filed before the District Judge was beyond time by five days. The appellant filed an application under Section 5 of the Limitation Act for condoning the delay. This application was supported by an affidavit. The circumstances detailed therein as the cause for delay are that the appellant was a cloth merchant and had to go to Bombay in connection with his business. He returned to Jeypore on 30th of January 1962, but found that his lawyer had left the town and gone to Cuttack in connection with some sales-tax matters. He also found that the clerk who was attached to the lawyer had left his service. He had already made arrangements for getting certified copies of the judgment and decree of the trial court in order to file the appeal and the copy had been obtained and was with the lawyer. But he could not get hold of the same as his lawyer and his clerk were both absent. He tried unsuccessfully to trace them with the help of another lawyer, Sri Sahu, from the office of his lawyer who was at Cuttack. The copies were ultimately found out on the 5th and the appeal was filed on the 6th. These averments stand unchallenged as no counter has been filed by the other side.

4. The appellant in support of his allegations in the petition examined himself and his lawyer Sri V. Ramarao, P. W. 2. There is no counter-evidence in the case.

5. The learned District Judge relying on a decision of the Patna High Court reported in AIR 1919 Pat. 503, Jahar Mal v. Pritchard, which seems to lay down that the parties should not be encouraged to defer till the very last moment the taking of steps in course of an action for which a limit of time is prescribed by

rules, and that no indulgence ought to be shown to a party who so puts off taking action till the last day, if by happening of some unexpected accident he exceeds the time-limit.

The Supreme Court has ruled to the contrary in a decision reported in AIR 1962 SC 361, Ramlal v. Rewa Coalfields. They have said as follows.

"The failure of appellant to account for his non-diligence during the whole of the period of limitation prescribed for the appeal does not disqualify him from praying for the condonation of delay under Section 5. Where the appellant did not file the appeal till the last day of limitation and as he fell ill on the last day of limitation, he filed the appeal thereafter asking for the delay to be excused and it was held that his want of diligence till the last day of limitation would not disqualify him from applying for the excusing of delay."

6. In view of this decision of the Supreme Court the rejection of the petition for condonation of delay under section 5 of the Limitation Act filed by the appellant was erroneous. The appellant has shown sufficient cause in his petition which has been proved through him and his lawyer. In the circumstances this appeal is allowed and the case is remanded back to the District Judge to be disposed of on merits.

The appellant, however, shall pay Rs. 150/- as costs to the respondents' counsel Sri N. V. Ramdas within four weeks.

Appeal allowed.

AIR 1970 ORISSA 54 (V 57 C 25)

G. K. MISRA AND S. ACHARYA, JJ.

Darbari Kamar, Appellant v. State, Respondent.

Criminal Appeal No. 227 of 1966, D/- 28-11-1968, from order of S. J. Koraput, D/- 2-12-1966.

(A) Evidence Act (1872), S. 8 III. (i) — Accused absconding from village after commission of offence—Fact of absconding is an incriminating circumstance and is relevant. (Para 5)

(B) Criminal P. C. (1898), Ss. 164 and 367 — Retracted confession of accused — Extent of corroboration required — Case of an accomplice is different — Variation between confessional statement and evidence in case — Variation held not material — (Evidence Act (1872) Ss. 24, 133, 114, illus. (b)).

Law is well settled that if the confession is retracted, a conviction cannot be based thereon unless it is corroborated.

There is a distinction between the nature of corroboration required in the case of an accused and that of an accomplice. In the case of an accomplice the corroboration must be in material particulars. In the case of corroboration of a retracted confession of an accused if the general trend of the prosecution evidence corroborates the essential part of the confessional statement, the confession can be accepted as true. It is not essential that each and every fact and circumstance in the confessional statement must be proved by independent evidence. In such a case the confession has no value, and in every case the court has to insist upon independent evidence on each and every point. (Para 6)

In a case, the accused confessed before a Magistrate that the deceased and he were drunk; that they quarrelled on account of drinking; that the accused shot an arrow which struck the deceased on his chest as a result of which he died. The accused also stated where the incident took place and how he absconded for fear. The confession was however later on retracted. Evidence of one eye-witness to the incident was corroborated by another witness whose deposition was accepted as being true. Their evidence and that of the Doctor who examined the body of the deceased corroborated almost every part of the confessional statement, except that the quarrel spoken of by the accused in his confessional statement was not mentioned by the witnesses. But one of the witnesses merely stated that the accused challenged the deceased by saying that he would kill one of the four brothers including the deceased and the deceased replied that he was alone there and whom the accused would shoot.

Held, (1) that the confessional statement of the accused having been corroborated by the evidence in the case, it must be held to be true and a conviction could be based thereon. However, the conviction was based on the evidence in the case.

(Para 6)

and (2) that much importance should not be attached to the minor discrepancy, viz., the variance between the prosecution evidence and the confessional statement regarding the quarrel between the deceased and the accused and that the confessional statement could not be held untrue on that account. AIR 1965 Orissa 175, Foll. (Para 6)

Cases Referred: Chronological Paras (1965) AIR 1965 Orissa 175 (V 52)=

1965 (2) Cri LJ 520, State v. Ramchandra

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S. C. Adhikari, for Appellant; Standing Counsel, for Respondent.

G. K. MISRA, J.: The appellant has been convicted under Section 302 I. P. C. and sentenced to imprisonment for life.

2. There was some ill-feeling between the accused and the members of the family of the deceased. In the afternoon of 1-12-63 the deceased was going to bring fuel from the forest. All of a sudden the accused came out of his house armed with a bow and arrows and told the deceased that he would kill him. He shot an arrow which pierced the left side of the chest of the deceased who died instantaneously. The accused absconded from the village and was arrested only on 26-9-65. The evidence of the prosecution witnesses was recorded under Section 512 Cr. P. C. in the absence of the accused. The defence is one of complete denial. The learned Sessions Judge held that the death was homicidal and that the accused killed the deceased.

3. The finding that the death was homicidal is fully supported by the evidence of the Doctor (P. W. 8). There was a punctured wound. The lower portion of the two ventricles of the heart were completely punctured. The injury was ante mortem. The Doctor opined that the deceased must have died within half an hour from the time of the infliction of the injury. There can hardly be any dispute that the deceased died as a result of the arrow shot.

4. The conviction is based on the evidence of the eye-witness P. W. 14 corroborated by that of P. W. 4, who appeared on the scene immediately after the occurrence. P. W. 14 is a sister-in-law of the deceased. She narrated as to how the accused came out of his house and suddenly gave an arrow shot as a result of which the deceased fell down. Thereafter the accused went away with his bow and arrow inside the jungle.

P. W. 4 has not seen the actual arrow shot, but hearing the shout of P. W. 3 she came out, found the deceased lying dead with the arrow sticking to his chest, and the accused going away to the jungle. These two witnesses are two rustic village folks and though there was some quarrel between the accused and the family members of the deceased, we find no sufficient justification as to why these two ladies would falsely implicate the accused in such a ghastly crime.

5. Soon after the occurrence the accused was untraced. He did not remain in the village. He was arrested about 2 years after on 26-9-65. P. Ws. 2, 4 and 6 testify to the fact of his absence from the village. P. Ws. 12, 13 and 15 are the Investigating Officers. They depose that they could not trace out the accused during the period of these two years. This conduct on the part of the accused in ab-

sconding from the village is admissible under Section 8 of the Evidence Act. Illustration (i) appended to the section runs thus:

"A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant." The fact of absconding therefore is an incriminating circumstance. In his statement under Section 342 Cr. P. C. the accused was put this question. He did not furnish any reasonable explanation, but merely denied the factum of his absence from the village.

6. The accused also made a confession before the Magistrate, First Class (P. W. 7). The learned Sessions Judge held that the confession is voluntary and true. That the confession is voluntary is not disputed before us. It is however contended that the confession is not true. To appreciate this contention the confessional statement, which is a very short one, may be quoted:

"Myself and Budu were both drunk. We started quarrelling on account of drinking. I shot an arrow. That struck on the chest of Budu. He fell down there and died. This incident happened near the outer courtyard of the house of the deceased. After this incident I left the village out of fear. I concealed myself in village Nuagad. When I appeared before the Thana, the Police arrested me."

This confession has been retracted. Law is well settled that if the confession is retracted, a conviction cannot be based thereon unless it is corroborated. There is a distinction between the nature of corroboration required in the case of an accused and that of an accomplice. In the case of an accomplice the corroboration must be in material particulars. In the case of corroboration of a retracted confession of an accused if the general trend of the prosecution evidence corroborates the essential part of the confessional statement, the confession can be accepted as true.

The aforesaid distinction however is academic in the peculiar facts and circumstances of this case where almost every part of the confessional statement is corroborated in material particulars by the prosecution evidence.

It has been established from the evidence of the Doctor and the eye-witness that the deceased died as a result of an arrow shot on his chest. This is exactly the confessional statement. The evidence of the eye-witness establishes that the

deceased had an instantaneous death on the very spot near the house of the deceased. That is also the confessional statement. There is evidence that after the incident the accused left the village and absconded. That is proved by the evidence of P. Ws. 2, 4, 6, 12, 13 and 15. He was arrested two years after.

The confessional statement begins by saying that both the accused and the deceased were drunk and they started quarrelling between them. There is no prosecution evidence that both of them were not drunk. On this point therefore there is no contradiction. There need not be any positive evidence on the point also to accept the confessional statement as it is not essential that each and every fact and circumstance in the confessional statement must be proved by independent evidence. In such a case the confession has no value, and in every case the court has to insist upon independent evidence on each and every point.

With regard to the fact that there was a quarrel between the accused and the deceased, P. W. 14 states that there was no quarrel between the two. She however deposed that the accused challenged the deceased by saying that he would kill one of the four brothers including the deceased, and the deceased gave a reply that he was alone there and whom the accused would shoot. If this is construed to be a quarrel, then there is no contradiction. Assuming that this does not evidence any quarrel, the question is whether on account of this contradiction the confessional statement would be declared to be untrue.

The identical question came up for consideration before a Bench of this Court in AIR 1965 Orissa 175 State v. Ramchandra. Their Lordships observed thus:

"As to the statement when Ramchandra hid the gun in the bush near the school and subsequently removed it to the place where it was found, there is some discrepancy between the prosecution evidence and the confessional statement. This is not, however, very significant. The recording of the confessional statement is not conducted like deposition of witness in court. The accused goes on making statement in his own way. It is not subjected to cross-examination or clarification by re-examination and the accused cannot be directed to follow the chronology, exactly in the manner it happened. If the contradiction goes to the root of the matter on a material link of the case, it may be vital. A part of the confessional statement might, however, be rejected and other part accepted if the part to be rejected is proved to be false by other prosecution evidence. No hard and fast rule can be laid

down. The ultimate conclusion will depend upon the facts and circumstances of each case. The discrepancy leading to the findings is not, however, very material." The question for consideration in this case is that even assuming that the prosecution evidence is at variance to the confessional statement as to whether there was a quarrel between the accused and the deceased, it does not constitute such a vital link in the prosecution story as to hold that the confessional statement is untrue. In all essential particulars the confessional statement is fully corroborated and not merely in material particulars. In the facts and circumstances of this case we do not attach much importance to this discrepancy and we hold that the confessional statement is true.

As has already been stated, the conviction can be sustained on the evidence of the eye-witness P. W. 14 corroborated by that of P. W. 4 and the fact of absconding of the accused for about 2 years from the village. It is not necessary to take in aid the confessional statement to sustain the conviction. The conviction can also be based on the confessional statement as it stands corroborated in the manner already discussed.

7. The appeal has no merit and is accordingly dismissed.

8. ACHARYA, J.: I agree.

Appeal dismissed.

AIR 1970 ORISSA 56 (V 57 C 26)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Banchchanidhi Patnaik, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. No. 217 of 1966, D/- 25-7-1966.

Constitution of India, Art. 311 (2) — Reasonable opportunity — What is — No date fixed calling upon delinquent to cross examine witnesses — No enquiry after denial of charges — Order of dismissal cannot stand.

It is well settled that after the charges are framed, the delinquent should be given a reasonable opportunity to file an explanation and thereafter the appointing authority should fix a date for enquiry wherein witnesses would be examined, to be cross-examined by the delinquent, and the delinquent would be given a further opportunity of giving evidence in his own defence. It is only after these opportunities are given that the delinquent can be dismissed from service if he is found to be guilty. Where no date was fixed calling upon the delinquent to cross-examine the witnesses and

to make comments upon the documents presented on behalf of the appointing authority, and there was no enquiry after the denial of the charges, it could not be said that the delinquent did not avail of the opportunity though given. Under the circumstances, the order of dismissal could not stand. AIR 1958 SC 300 and AIR 1970 Orissa 1, Ref. (Paras 4, 5)

Cases Referred: Chronological Paras

(1970) AIR 1970 Orissa 1 (V 57)=
OJC No. 327 of 1965 D/- 9-7-1965,
Puran Chandra Das v. Chairman,
State Transport Authority 4
(1958) AIR 1958 SC 300 (V 45)=
1958 SCR 1080, Khemchand v.
Union of India 4

L. Rath and B. B. Rath, for Petitioner;
Advocate General, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner was served with the following charges:

"Charge No. 1. You have disobeyed the Government order of transfer, transferring you to Dhenkanal Power House in office order No. 4795 dated 16-9-50 of the Executive Engineer, General Electrical Division, Cuttack, and tried to avoid the transfer by false pretensions.

Charge No. 2. You have not vacated the Government quarters even after receiving your above-mentioned transfer order. Several wild efforts of Government proved futile because of your adamant nature, which proves your disobedience and insubordination. Your claim that the house has been donated to you by the Ex-Ruler of Nayagarh is definitely not correct. The land on which the house stands belongs to the Government. So, the house cannot belong to you. The house was only allotted to you as Engine Driver of the Power House for occupation.

Charge No. 3. You have remained absent from duty wilfully for more than a year after the above transfer and always tried to mangle on false pretence and baseless grounds.

Charge No. 4. You have approached the higher authorities of the State without the permission of the superiors through the proper channel.

Charge No. 5. Your behaviour while you were called upon to explain your grievances by the Chief Engineer, Electricity and the Superintending Engineer, Electrical Circle, Cuttack, was not proper and your attitude towards the officers was repulsive."

2. In his explanation, the petitioner denied the charges and clearly asserted that he was not guilty of any of the charges. Prior to that he had asked for the documents on which some of the charges were based. Though he was given an opportunity to examine the documents, he did not avail of it. The fact, however, remains that he did not

admit his guilt. After receipt of the explanation, the Superintending Engineer who is the appointing authority of the petitioner passed the following order:

"After carefully going through the explanation submitted by Sri Banchchanidhi Patnaik, Engine Driver (under suspension), submitted by him on 10-4-57 and 17-6-57 the undersigned is satisfied that his explanations are vague and do not substantially defend against the charges. The charges framed against him in this office No. 38/Con. dated 22-2-57 have, therefore, been established and Sri Banchchanidhi Patnaik is hereby ordered to be dismissed from his service from the date of receipt of this order by him." This order of dismissal is challenged by the petitioner as being contrary to the provisions of Article 311 (2) of the Constitution.

3. Mr. Rath contends that the petitioner should not have been dismissed except after an enquiry. Article 311 (2) makes the position very clear. It says:

"No such person, as aforesaid, shall be dismissed or removed or reduced in rank, except after an enquiry in which he has been informed of the charges against him, and given a reasonable opportunity of being heard in respect of those charges."

4. It is now settled by a series of decisions of the Supreme Court commencing with AIR 1958 SC 300, Khemchand v. Union of India, that after the charges are framed, the delinquent should be given a reasonable opportunity to file an explanation and thereafter the appointing authority should fix a date for enquiry wherein witnesses would be examined, to be cross-examined by the delinquent, and the delinquent would be given a further opportunity of giving evidence in his own defence. It is only after these opportunities are given that the delinquent can be dismissed from service if he is found to be guilty. In this connection we may refer to our decision in O. J. C. No. 327 of 1965, D/- 9-7-1969, (reported in AIR 1970 Orissa 1), wherein the procedure to be followed has been given in detail. Admittedly, in the present case there was no enquiry after the denial of the charges. The appointing authority says that though opportunity was given to the delinquent he did not defend himself. In fact, no opportunity was given. A date should have been fixed calling upon the petitioner to cross-examine the witnesses and to make comments upon the documents presented on behalf of the appointing authority. No such date was fixed and it cannot therefore be said that the delinquent did not avail of the opportunity though given.

5. On the aforesaid analysis, the impugned order of dismissal cannot stand.

We accordingly issue a writ of certiorari directing the opposite parties to treat the petitioner as continuing in service. It is to be noted that the petitioner has superannuated long since. Our order saying that the petitioner shall be deemed to continue in service would not affect his superannuation having taken perfect (effect?) in law.

The writ application is accordingly allowed but there will be no order as to costs.

6. R. N. MISRA, J.: I agree.
Writ application allowed.

AIR 1970 ORISSA 58 (V 57 C 27)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

M/s. Munilal Ramdayal, Petitioner v. Income Tax Officer, Baripada and others, Opposite Parties.

Original Jurisdiction Case No. 999 of 1968, D/- 12-8-1969.

Income Tax Act (1961), Ss. 147 and 148 — Duty of assessee questioning jurisdiction of I. T. Officer — Conditions precedent — Duty to disclose primary facts, extent of — Consequences of failure — Reasons to issue notice need not be disclosed.

The following propositions have been firmly established and are no longer in doubt.

(i) It is the duty of the assessee who wants the Court to hold that jurisdiction of the Income Tax Officer to issue notice under S. 148, was lacking, to establish that the Income-tax officer had no material before him for believing that there had been non-disclosure.

(ii) Before issue of notice under S. 148, two conditions precedent are to be fulfilled;

(a) The Income Tax Officer must have reason to believe that the income, profits or gains chargeable to income tax have been under-assessed; (b) He must also have reason to believe that such under-assessment occurred by reason of omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year.

(iii) Material facts means primary facts. The duty of disclosing all primary facts relevant to the decision of the question before the assessing authority lies on the assessee. This duty, however, does not extend beyond such disclosure. Once all the primary facts are before the assessing authority, whether on disclosure by the assessee himself, or on scrutiny by the assessing authority, the assessee has no

duty to disclose further facts. The rest is a question of inferences to be reasonably drawn from the primary facts. The inferences are to be drawn by the Income Tax Officer and for that no duty is cast on the assessee to render assistance as to in what manner the inferences are to be drawn.

(iv) The Explanation to the Section 147 makes it abundantly clear that the duty of the assessee to disclose primary facts does not end merely with the production of accounts books and documents. The assessee should specifically bring to the notice of the Income Tax Officer the particular entries and items which are primary facts having bearing on the question in issue.

(v) If the assessee fails to bring to the notice of the Income Tax Officer the primary facts, as revealed from the account books, his defence that the Income Tax Officer with due diligence might have discovered the primary facts, is not acceptable.

(vi) Whether the Income Tax Officer had sufficient grounds for entertaining a reason to believe is not justiciable. The assessee can, however, contend that the Income Tax Officer did not hold the belief at all. The belief must be held in good faith and it cannot be a mere pretence. In other words, it is open to the Court to examine the question whether the reasons for the belief have a rational nexus to the formation of the belief and are not irrelevant or extraneous to the purpose of the section.

(vii) Before issue of notice under Section 148 the reasons are not to be disclosed by the Income Tax Officer. The earlier stages of the proceeding for recording the reasons by the Income Tax Officer and for obtaining the sanction of the Commissioner are administrative in character and are not quasi judicial. The reason why a proceeding is initiated by issuing a notice under Section 148 of the Act need not be communicated to the assessee. AIR 1967 SC 523 & AIR 1967 SC 587, Rel. on. (Para 5)

Held on facts that conditions necessary were fulfilled before notice under S. 148 was issued and with jurisdiction.

(Paras 9, 10 and 11)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 523 (V 54)=
1967-1 SCR 590, S. Narayanappa
v. Income Tax Commr. 5
(1967) AIR 1967 SC 587 (V 54)=
1967-1 SCR 984, Kantamani &
Sons v. Income Tax Officer,
Rajahmundry 5
(1961) AIR 1961 SC 372 (V 48)=
1961-2 SCR 241, Calcutta Dis-
count Co. Ltd. v. Income Tax
Officer 5

D. P. Dal, S. Patnaik and K. K. Patnaik, for Petitioner; D. Mohanty, Standing Counsel, for Opposite Parties.

G. K. MISRA, C. J.: Messrs. Munilal Ramdayal is a firm registered under the Indian Partnership and Indian Income-Tax Act. It carries on business of grain procurement, rice milling, distillation of country liquor, sale of excise drugs, grocery articles and forest products, and contract business. Ramdayal Shah, Jogeshwar Shah and Raghunandan Shah are the three partners of this firm each having one-third share. For the assessment year 1952-53 (the relevant accounting year ending with 31-3-52) the firm was assessed on a total income of Rs. 1 lakh and odd, though the petitioner submitted a return showing a total income of Rs. 33,000/- and odd. It is unnecessary to give further details. In appeal before the Appellate Assistant Commissioner and the Income Tax Tribunal the original assessment was reduced.

On 26-7-68 the Income Tax Officer, Baripada, issued a notice under Section 148 of the Indian Income Tax Act, 1961, (hereinafter referred to as the Act) which may be quoted:

"Whereas I have reason to believe that your income in respect of which you are chargeable to tax for the assessment year 1952-53 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961,

I therefore propose to reassess the income for the said assessment year, and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your income assessable for the said assessment year.

This notice is being issued after obtaining the necessary satisfaction of the Central Board of Revenue".

On 26-8-68, the petitioner sent a reply asserting that there was no justification for reopening the assessment and that the conditions precedent for assumption of jurisdiction by the Income Tax Officer, under section 147 were not present in the case. This writ application has been filed under Articles 226 and 227 of the Constitution challenging the jurisdiction of the Income-Tax Officer in issuing the impugned notice.

2. The facts relevant for the appreciation of the points in issue may be stated shortly. On 22-12-39 there was a partnership between Sri Ram Chandra Bhanja Deo and Ramdayal Shah whereby a rice mill known as "Prabir Chandra Rice Mill" was started at Jugurpara. The share of Sriram Chandra Bhanja Deo was 10 annas and that of Ramdayal Shah 6

annas. Prabir Chandra Rice Mills was being regularly assessed under the Income Tax Act. On 25-8-1950, the share of Prafulla Chandra Bhanja Deo successor of Sriram Chandra Bhanja Deo which was fixed at 8 annas was purchased along with the entire book debts, plant machinery and land by Ramdayal Shah for Rs. 50051/- being the value of the stock in trade and for another Rs. 50,000/- towards outstanding dues of the mill. "Prabir Chandra Rice Mill" was re-named as "Munilal Rice Mill". It is to be noted that the petitioner had 6 annas interest in the Prabir Chandra Rice Mill before the purchase in the name of Ramdayal Shah. On 23-12-52, the assessment of the petitioner firm was completed under section 23 (3) of the Income Tax Act, 1922 (hereinafter to be referred to as the old Act). The case of the petitioner is that at the time of the assessment in 1952, Sri K. C. Mohanty the Accountant of the petitioner, appeared before the Income Tax Officer Sri A. K. Jana who enquired into the nature and source of the purchase of the mill and its good debts. Sri K. C. Mohanty explained at that time that the head office account was credited with the amount realised out of the book debts of Prabir Chandra Rice Mill and that the accounts of the parties were debited and closed. Accordingly, in the balance-sheet for the year 1950-51 closing on 29-10-51, Sri A. K. Jana made the following endorsement:

"Running account of the mill with main Baripada account. The two banking accounts won't tally because the accounting year differs. A few items compared and tallied".

The petitioner thus asserts that it had fully and truly disclosed all material facts necessary for assessment for the year 1952-53 and that the income chargeable to tax has not escaped assessment for that year and that the present Income Tax Officer Sri S. D. Sahay could have no reason to believe that the petitioner did not make a full and true disclosure of all material facts before the then Income-tax Officer, Sri A. K. Jana,

3. On behalf of the opposite parties an affidavit was initially filed by Sr. S. D. Sahay the Income Tax Officer who issued the notice under Section 148 of the Act. In Paragraphs 15 to 17 of the affidavit the facts on the basis of which he had reason to believe that the petitioner did not disclose all material facts fully and truly have been averred. The sum and substance of these averments may be indicated in brief.

In course of examination of accounts for the assessment year 1963-64 the following entries in the account book of the branch business of Munilal Rice Mill were noticed.

CREDIT

Munilal Ramdayal
Baripada ... Rs. 144, 813.32

DEBIT

1. Achutananda Behera	21,790.25
2. Upendranath Gire	57,778.17
3. Udala Depot	18,708.59
4. Jaida Depot (Sheosai Genesh Lall)	2,743.32
5. Ranchandra Kabinath	1,276.56
6. Upendranath Sahu	10,475.38
7. Lal Mohan Mahanty	1,405.81
8. Dukura Hammar	3,708.12
9. Badampur Hammar	7,987.10
10. Gordhanbhai Amabalal	11,382.67
11. Cultivation A/co.	7,566.95

1,44,813.32

While an amount of Rs. 1,44,813.32 P. was credited in the branch books in the name of the head office, there was no corresponding debit entry in the books of account of the head office. In other words, no cash amount passed out of the head office account corresponding to the credit in the account of the branch books. At the time of assessment for 1952-53, this fact escaped notice as the balance-sheet of the rice mill (branch) closed on Diwali day while that of the head office closed at the end of the financial year, that is, 31st March. The balance on these different dates naturally would not tally. This fact of difference in the two accounts was not noticed by the Income-Tax Officer in 1952 and was not apparent until examination of the accounts for the assessment year 1963-64. On 30-9-62 Ramdayal Shah, one of the partners, died. At that time the balance sheets of the accounts of the head office and branch were prepared. Those two accounts were tallied and the discrepancies came to light. Necessary entries were made in the accounts on 30-9-62 to reconcile the discrepancy.

In the counter-affidavit the Income Tax Officer thus asserts that though admittedly paddy worth Rs. 1,44,813 had been purchased, the accounts relevant to the year 1952-53 did not indicate that the amount had been advanced by the firm Prabir Chandra Rice Mill prior to its purchase. On an examination of the accounts Sri Sahay had reason to believe that the paddy purchases were made with cash outside the books of account, out of the secreted profits from undisclosed sources of income and this amount was introduced in the books of account for 1963-64 to cover up the concealment. Thus, in 1952-53 the assessee failed to disclose fully and truly this material fact which resulted in under-assessment.

4. It will be profitable at this stage to examine the law on the point. Sec-

tion 147 of the Act, so far as is relevant, runs thus:

"147 Income escaping assessment. If (a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year,

** ** **

he may, subject to the provisions of Sections 148 to 153, assess or re-assess such income or re-compute the loss or the depreciation allowance, as the case may be, for the assessment year concerned.

** ** **

Explanation 2. — Production before the Income-tax Officer of account-books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section".

5. The corresponding Section 34 of the old Act came up for consideration in a series of cases before the Supreme Court. The following propositions have been firmly established and are no longer in doubt.

(i) It is the duty of the assessee who wants the Court to hold that jurisdiction was lacking, to establish that the Income-tax Officer had no material before him for believing that there had been such non-disclosure.

(ii) Before issue of notice, two conditions precedent are to be fulfilled:

(a) The Income Tax Officer must have reason to believe that the income, profits or gains chargeable to income tax have been under-assessed;

(b) He must also have reason to believe that such under-assessment occurred by reason of omission or failure on the part of an assessee to disclose fully and truly

all material facts necessary for his assessment for that year.

(iii) Material facts means primary facts. The duty of disclosing all primary facts relevant to the decision of the question before the assessing authority lies on the assessee. This duty, however, does not extend beyond such disclosure. Once all the primary facts are before the assessing authority, whether on disclosure by the assessee himself, or on scrutiny by the assessing authority, the assessee has no duty to disclose further facts. The rest is a question of inferences to be reasonably drawn from the primary facts. The inferences are to be drawn by the Income Tax Officer and for that no duty is cast on the assessee to render assistance as to in what manner the inferences are to be drawn.

(iv) The Explanation to the Section makes it abundantly clear that the duty of the assessee to disclose primary facts does not end merely with the production of Account books and documents. The assessee should not merely produce the account books but should specifically bring to the notice of the Income Tax Officer the particular entries and items which are primary facts having bearing on the question in issue.

(v) If the assessee fails to bring to the notice of the Income Tax Officer the primary facts, as revealed from the account books, his defence that the Income Tax Officer with due diligence might have discovered the primary facts, is not acceptable.

(vi) Whether the Income Tax Officer had sufficient grounds for entertaining a reason to believe is not justiciable. The assessee can, however, contend that the Income Tax Officer did not hold the belief at all. The belief must be held in good faith and it cannot be a mere pretence. In other words, it is open to the Court to examine the question whether the reasons for the belief have a rational nexus to the formation of the belief and are not irrelevant or extraneous to the purpose of the section.

(vii) Before issue of notice the reasons are not to be disclosed by the Income Tax Officer. The earlier stages of the proceeding for recording the reasons by the Income Tax Officer and for obtaining the sanction of the Commissioner are administrative in character and are not quasi-judicial. The reason why a proceeding is initiated by issuing a notice under Section 148 of the Act need not be communicated to the assessee.

(See AIR 1961 SC 372 Calcutta Discount Co. Ltd. v. Income Tax Officer; AIR 1967 SC 523, S. Narayanappa v. Income Tax Commissioner; and AIR 1967 SC 587 Kantamari and Sons v. Income Tax Officer Rajahmundry).

6. The sole question for consideration is whether the case of the Department that an amount of Rs. 1,44,813.32 which was credited in the branch office books of Munilal Ramdayal in the name of the head office, was kept concealed before the Income Tax Officer at the time when the original assessment for the year 1952-53 was made. It has already been stated that two conditions precedent are to be fulfilled before assumption of jurisdiction under section 148 of the Act. Dr. Pal does not question the first condition, namely that the Income Tax Officer had reason to believe that the income chargeable to income tax had been under-assessed. This aspect need not, therefore be discussed.

7. The real question for examination is whether the Income Tax Officer had reason to believe that such under-assessment occurred by reason of omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the year 1952-53.

8. On behalf of the petitioner, reliance is placed on the following pieces of materials in support of the contention that all primary facts in respect of the impugned item had been brought to the notice of the then Income Tax Officer, Sri A. K. Jena.

(i) The supplementary affidavit filed by Sri K. C. Mohanty who appeared before the Income Tax Officer on behalf of the petitioner avers that he showed complete extracts from the books of account and specifically brought this particular item to the notice of the Income Tax Officer.

(ii) On examination of the books of account, along with the balance-sheet and profit and loss account produced before him, Sri A. K. Jena was satisfied regarding this item and made the following entry:

"Running account of the mill with main Baripada account; the two banking accounts won't tally, because the accounting years differ. A few items compared and they tally".

(iii) In paragraph 16 of the first affidavit filed by Sri Sahay there is a statement that

"The party's accounts were debited on 29-10-51 giving corresponding credit in the head office account"

(iv) In the balance-sheet, for the year 1951-52, Munilal Rice Mill is credited with the sum of Rs. 1,62,112 and in the balance-sheet for the year 1950-51 item 37 Munilal Ramdayal is credited with the sum of Rs. 77,015/-.

(v) Sri A. K. Jena in his affidavit states that he does not remember as to who appeared before him at the time of

the original assessment and whatever statement he made was true to his knowledge based on official records. His affidavit does not thus challenge the truth of the affidavit made by Sri K. C. Mohanty who swears that the facts are true to his knowledge.

9. In our view, none of the aforesaid features, either individually or (collectively?) establish that the present Income Tax Officer who issued the notice under section 148 had no reason to believe that such under-assessment occurred by reason of omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for 1952-53.

It has already been stated that mere production of the books of account, balance-sheet and profit and loss account would not be enough. It is the duty of the assessee to specifically bring to the notice of the assessing officer all primary facts relating to the impugned item. In this regard due weight must be given to the intrinsic evidence in the case based on records. There is absolutely no intrinsic evidence to show that the impugned primary fact was brought to the notice of Sri A. K. Jana either suo motu or at the instance of the petitioner. The item relates to a heavy amount of about 1.1/2 lakhs of rupees. If the attention of the Income Tax Officer had been rivetted on this transaction, surely the same must have been embodied in the original assessment order; and some discussion, however perfunctory, must have been made in the assessment order relating to this impugned item. That is the strongest circumstance against the petitioner's case that Sri K. C. Mohanty specifically brought to the notice of Sri A. K. Jana.

10. The endorsement of Sri A. K. Jana in relevant account book to the effect:

"Running account of the mill with the main Baripada account. The two banking accounts won't tally because the two accounting years differ. A few items compared and they tally"

also leads us nowhere. It is too vague and does not indicate what items were compared and tallied. If this endorsement would have made some reference to the impugned item, then alone it could serve as a piece of intrinsic evidence. In the absence of any reference to the impugned item, the endorsement does not advance the petitioner's case. The fact that the Income-Tax Officer examined the books would not be enough; in order that the condition precedent must be fulfilled, it must be established that the impugned primary fact was specifically brought to his notice either at the instance of the assessee or otherwise. The endorsement furnishes no clue as a piece of intrinsic evidence.

11. The entries in the balance-sheet showing that Munilal Rice Mill was credited with the sum of Rs. 1,62,112/- for the year 1951-52 and with the sum of Rs. 77,015/- for the year 1950-51 also throw no light as to whether the attention of Mr. A. K. Jana had been focussed on the impugned item. Merely because these two items, containing heavy amounts, were shown in the balance-sheets, no reasonable inference can be drawn that the impugned entry was explained away with reference to these two entries in the balance-sheets. The bearing which these two entries have on the impugned entry has not even been satisfactorily explained to us.

12. The contention that the affidavit of Sri A. K. Jana, stating that he did not remember anything except the material based on official records, cannot whittle down the effect of the affidavit of Sri K. C. Mohanty, has not much force. Sri A. K. Jana passed the assessment order in 1952. His affidavit has been filed in 1969. It will be difficult to expect him to make any statement directly from his knowledge after the lapse of 17 years. Sri K. C. Mohanty's affidavit that the impugned item was brought to the notice of Mr. Jana is a self-serving statement; unless it is corroborated by intrinsic or extrinsic evidence, it cannot be accepted merely because Sri Jana does not remember what happened 17 years ago. In course of discharge of his duties, Sri Jana had to pass orders of assessment in innumerable cases. In the absence of intrinsic evidence and corroborating materials we cannot place any reliance on the affidavit of Sri K. C. Mohanty that the impugned item was brought to the notice of Sri A. K. Jana.

13. Reliance is placed on the statement of Sri Sahay in paragraph 16 of his affidavit to the effect that

"The party's accounts were debited on 29-10-51 giving corresponding credit in the head office account."

But this does not in any way support the case of the petitioner that in the branch office account the impugned amount was noted for the year 1951 and a corresponding credit was given in the head office account. There was in fact no corresponding entry in the Head Office account. This is exactly what is stated by Mr. Sahay and it is for this reason that the amount escaped the notice of Sri A. K. Jana in 1952.

14. On a scrutiny of the aforesaid features, we are unable to accept the contention urged on behalf of the petitioner that there was a full and true disclosure of all the primary facts.

The Income Tax Officer was, therefore, justified in issuing notice under section 148 of the Act. He had reason to believe that paddy was purchased to the tune of Rs. 1,41,813.32 P on payment of cash from secreted income and not by adjustment of advances made by Prabir Chandra Rice Mill and that all material facts had not been fully and truly disclosed by the assessee to Sri A. K. Jena.

15. On the aforesaid analysis, we are clearly of opinion that both the conditions precedent are fulfilled in this case and the notice under section 148 of the Act is not without jurisdiction.

In the result, the writ application fails and is dismissed with costs. Hearing fee of Rs. 250/- (rupees two hundred & fifty only).

16. R. N. MISRA, J.: I agree.
Petition dismissed.

AIR 1970 ORISSA 63 (V 57 C 28)

G. K. MISRA, C. J.,
R. N. MISRA, J.

Sadananda Patnaik, Petitioner v. Vice Chancellor, Berhampur University and another, Opposite Parties.

O. J. C. No. 107 of 1969, D/- 6-8-1969.

Constitution of India, Art. 226 — Enquiry by domestic Tribunal set up by educational institutions like universities — Interference by Court — In absence of rules and regulations, rules of natural justice to be followed — Allegations of bias and mala fides against invigilator — Opportunity should be given to examinee to present his case.

In matters of disciplinary jurisdiction exercised by educational institutions, the educational authorities should be left without interference from Courts and other outside agencies in administering their affairs as long as they act in compliance with the rules of natural justice. It should always be a sound rule of discretion to allow the domestic Tribunals set up by such educational institutions to deal with the students so long as they act in accordance with their rules and regulations. The Court should not extend its jurisdiction over such matters unless the procedure adopted has been contrary to natural justice and the cause of justice, which is paramount, warrants interference. Case law discussed. (Para 4)

The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend, to a great extent, on the facts and circumstances of the case under examination, the consti-

tution of the Tribunal and the rules under which it functions. Where there is no particular rule or regulation which the Mal-practice Committee of the university is to follow in the matter of holding the enquiry into the mal-practices adopted by candidates taking the different examinations under it, a duty is cast on the Committee to act judicially in exercise of such jurisdiction. Case law discussed. (Para 5)

Where in an enquiry against a candidate for having taken recourse to unfair means in Examination Hall, the examinee did not accept the allegations and while refuting the same he imputed bias and mala fides against the invigilator and the materials on record indicated that the candidate was not allowed to participate in such proceedings in which the enquiry by the Mal practices Committee was conducted:

Held that on the facts of the case the allegations against the Invigilator were directly connected with the conduct of the candidate as to whether he was or was not guilty of the charges against him, and as the Mal-practices committee exonerated the Invigilator from the allegations made against him without giving the candidate an opportunity to participate in such enquiry so as to present his case, the canon of natural justice could not be said to have been satisfied. Such a decision was not in keeping with the rules of natural justice as adopted by the Courts in India. (Para 6)

Cases Referred: Chronological Paras.

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| (1969) AIR 1969 SC 198 (V 56) = | |
| 1969-1 SCJ 543, Suresh Koshy v. University of Kerala | 5. |
| (1966) AIR 1966 SC 707 (V 53) = | |
| 1966-1 SCR 974, Principal, Patna College v. K. S. Raman | 4 |
| (1966) AIR 1966 SC 875 (V 53) = | |
| 1963 (3) SCR 767, H. S. & J. E. Board, U. P. v. Baleswar Prasad | 4 |
| (1962) AIR 1962 SC 1110 (V 49) = | |
| 1963-2 SCJ 509, Board of High School v. Ghanshyam Das Gupta | 5. |
| (1954) AIR 1954 SC 217 (V 41) = | |
| 1954 SCR 383, Vice-Chancellor v. S. K. Ghosh | 4 |
| (1949) 1949-1 All ER 109 = 65 | |
| TLR 225, Russel v. Duke of Nor Folk | 5 |
| P. Palit, K. C. Panda and J. N. Patnaik, for Petitioner; R. C. Misra, for Opposite Parties. | |

R. N. MISRA, J.: This is an application under Article 226 of the Constitution of India by a student of the Ramchandra Mardaraj Science College at Khallikote in the district of Ganjam, which is affiliated to the Berhampur University established under the Berham-

pur University Act of 1966. The petitioner appeared at the Pre-University (Arts) Examination of 1968. The said examination was held in the month of July and its results were published on 19-9-68. The petitioner's result, however, was not declared, but before the said date on 2-9-68 the petitioner was called upon by the Assistant Registrar of the University to show cause why action might not be taken against him for having taken recourse to unfair means in the Examination Hall. On 9-9-68 the petitioner submitted his explanation in which he denied all the allegations and imputed bias and mala fides against one Sri Prabhu Prasad Panigrahi, a Lecturer in Political Science of the College where the petitioner studied, and categorically stated that the said Sri Panigrahi, who was the Invigilator, might have inserted the printed page, which was detected from the petitioner's answer book, after the answer paper was submitted by the petitioner to the said Invigilator at the end of the day's examination. The University Authorities did not hold any other enquiry to the knowledge of the petitioner, but ultimately by an order dated 12-12-68 cancelled the result of the petitioner's examination and directed that he be debarred from appearing at any examination of the University prior to the annual examination of 1970. It is against the said order of 12-12-68 that the petitioner has come up to this Court seeking for issue of a Writ of certiorari to quash the said order.

2. The stand taken by the University Authorities would appear from the notice dated 2-9-68 issued to the petitioner. For convenience it is extracted below:

xx xx xx

To

Sadananda Patnaik Roll No. 616 Son of Jayakrishna Patnaik, At/P. O. Khallikote (Ganjam).

It is reported that you brought a piece of printed page relating to English Paper II to the Examination Hall while you were appearing in English Paper II at the Second P. U. Examination, 1968 and you left the said incrimination material in your answer book and handed over the same to the Invigilator. In this connection I am directed to say that the following charges have been made against you:

(1) That, you brought a piece of printed page relating to English paper II to the Examination on 17-7-1968 in the 1st sitting while answering English Paper II with the evident intention of copying from it;

(2) You left the said incriminating material in your answer book and handed over the same to the Invigilator inadvertently;

(3) You were warned before the commencement of the Examination not to bring any paper other than the admit card to the Examination Hall;

(4) You have made use of the document;

You are therefore required to show cause why action will not be taken against you for taking recourse to unfair means in the Examination Hall in spite of repeated warnings by the Centre Superintendent and instructions printed on the back side of the admit card.

xx xx xx

Sd/-

Assistant Registrar"

The Assistant Registrar of the University filed an affidavit in opposition wherein it was further stated,—

"Para 3. . . There was no occasion for the Invigilator or the Centre Superintendent to bring (sic) the notice of the petitioner regarding the 'printing page' and 'making use of it' since in the Examination hall they had not detected mal-practice adopted by the petitioner. In fact, it was no part of the duty of the Invigilator or the Centre Superintendent to verify the answer books of the examinees after they are submitted. In fact, they had no knowledge that the 'printed page' was left inside the answer book of the petitioner. The Chief Examiner while valuing the petitioner's answer book detected the printed page inside the answer book and reported the fact to the Registrar and his report is annexed hereto.

Para 5. . . The Mal-practice Committee appointed by the syndicate went into the question, enquired into the matter in detail and were satisfied that the allegations made by the petitioner against the invigilator were false and rejected his explanation. . ."

Para 6. . . It is submitted that the petitioner in his explanation did state that he got some questions by heart from notes and reproduced them in the aforesaid examination, but the Mal-practice Committee was not satisfied with the explanation offered by the petitioner."

Para 7. . . The explanation is absurd and it is highly unbelievable that the Invigilator knew that questions the petitioner got by heart. . ."

Para 10. . . The allegations made by the petitioner against the Invigilator were thoroughly enquired into by the Mal-practice Committee appointed by the Syndicate of the Berhampur University, and after the said enquiry the Committee was satisfied that the allegations made by the petitioner against the Invigilator were thoroughly false and baseless."

3. It may not be out of place to mention here that the petitioner applied to

AIR 1970 PATNA 97 (V 57 C 13)

G. N. PRASAD, J.

Mithila Saran Singh and another, Petitioners v. Nihora Singh and others, Opposite Parties.

Criminal Revn. No. 1649 of 1968, D/- 23-1-1969, against order of 1st Class Magistrate, Dinapur, D/- 1-8-1968.

(A) Criminal P. C. (1898), Ss. 146 (1) and 145 (4) — Incompetent reference by Magistrate — Civil Court is not clothed with any jurisdiction so that it can neither record any finding nor give directions to Magistrate as to what course he should adopt — Proper course for Civil Court is to return the reference — Magistrate, after return of reference proceeding under S. 145 (4) instead of making a proper reference — Order cannot be said to be without jurisdiction. AIR 1965 Pat 411, Foll.

(Paras 9 and 10)

(B) Criminal P. C. (1898), S. 145 (4) — Competency of witnesses to speak about possession is no ground to rely upon them — Magistrate refusing to rely upon such witnesses does not commit any error of law.

(Para 12)

Cases Referred: Chronological Paras (1965) AIR 1965 Pat 411 (V 52) =

1965 (2) Cri LJ 527, State of

Bihar v. Hari Mishra

7

A. K. Roy, for Petitioners; Ram Saroop Sinha and B. N. Chatterji, for Opposite Parties.

ORDER:— The petitioners were the first party in a proceeding under S. 145 of the Code of Criminal Procedure with respect to several plots of land appertaining to Khata numbers 44, 121 and 137 and situated in village Makhdumpur, Police station Bihta, district Patna. They are aggrieved by the final order passed by the learned Magistrate declaring the second party in possession over the disputed lands.

2. It is common ground that there were two brothers Triloki and Sheo Lochan. Triloki had a son, Kuar Singh who died leaving behind his widow Askueri Kuer. Kuar Singh had a son, Sundar Singh who died leaving behind his widow Dularo Kuer, opposite party no. 6. In the other branch, Hathi Ram was son of Sheo Lochan. Mithila Saran Singh, petitioner no. 1, is the son of Hathi Ram and Rajeshwar Singh, petitioner no. 2, is the surviving son of Mithila Saran Singh who had another son, Mahanand Singh who is dead. The parties are at variance with respect to the family of Rainu Singh. According to the first party, Rainu Singh was full brother of Hathi Ram (father of petitioner no. 1). But according to the second party, Rainu Singh was not the second son of Sheo

Lochan but the second son of Triloki. Both the parties, however, are agreed that Rainu Singh had a daughter, Piyari Kuer, whose husband Nihora Singh is opposite party no. 1 in this Court. Opposite party no. 5, Sheo Prasad Singh, is son of Nihora Singh, Opposite party no. 1.

3. It is also undisputed in this case that Nihora Singh, opposite party no. 1, and Dwarka Singh, opposite party no. 2, are full brothers. The case of the second party is that Kuar Singh had also left behind a daughter, named, Balo Kuer and this Balo Kuer was married to Dwarka Singh, opposite party no. 2. According to the case of the first party, however, Kuar Singh had left behind no such daughter. There is, however, no dispute that Upendra Singh and Bhupendra Singh, opposite party numbers 3 and 4 respectively, are sons of Dwarka Singh, Opposite party no. 2.

4. Briefly stated the case of the first party petitioners was that after the death of Sundar Singh, there was no male member to assist the two ladies, Askueri Kuer and Dularo Kuer (opposite Party no. 6) in management of the lands left behind by Sundar Singh. Accordingly Mithila Saran Singh, petitioner no. 1, began to manage their properties and was virtually in possession over the disputed lands. However, on the 7th December, 1961, Dularo Kuer, Opposite party no. 6, executed a deed of gift in respect of the entire disputed lands in favour of the two sons of Mithila Saran Singh, namely, Rajeshwar (Petitioner no. 1) and Mahanand (since deceased). Thus, the members of the first party were in actual possession over the entire disputed lands at the time when the present proceeding was drawn up under the orders of the court, dated the 31st March, 1962.

5. The case of the second party was that Sundar Singh had predeceased his father Kuar Singh, and having none to assist him in his old age to manage his properties, he kept his son-in-law, Dwarka Singh, opposite party no. 2, with himself and thus, it was Dwarka Singh who was in possession over the lands of Kuar Singh. Kuar Singh had also surrendered his properties in favour of Dwarka Singh. Dwarka Singh, used to maintain Askueri Kuer and Dularo Kuer out of the income of the lands of Kuar Singh over which he was in possession. Somehow or the other, Dularo Kuer, opposite party no. 6 was brought in collusion of the first party who took a deed of gift from her on the 7th December, 1961 and raised a dispute as to possession, ultimately giving rise to the present proceeding.

6. It is hardly necessary to add that the learned enquiring Magistrate has accepted the claim of possession over the

disputed property put forward by the second party.

7. Mr. A. K. Roy, appearing on behalf of the petitioners, has put forward the contention that the decision of the learned Magistrate is without jurisdiction and, as such, it cannot be sustained. Learned counsel pointed out that by an order, passed on the 30th December, 1963, the enquiring Magistrate had made a reference to the civil Court under Section 146 (1) of the Code of Criminal Procedure, but the civil Court by its order, dated the 22nd February, 1964, returned the records of the case to the Magistrate as the order of reference was not in accordance with law. After that, the Magistrate instead of rectifying the defect in the order of reference to the civil Court took upon himself the responsibility of deciding the proceeding. This, according to Mr. Roy, the Magistrate was not empowered to do. The argument is that on receipt of the records from the civil Court in February, 1964, the only course open to the learned Magistrate was to make a proper reference in the light of the observations contained in the order of the civil Court, dated the 22nd February, 1964. To illustrate his point, Mr. Roy has drawn my attention to a Bench decision of this Court in State of Bihar v. Hari Mishra, AIR 1965 Patna 411 to which I was a party.

8. To appreciate the contention of Mr. Roy, it is necessary to keep in mind the precise circumstances under which the records were returned by the Civil Court under its order, dated the 22nd February, 1964. The order of the enquiring Magistrate, dated the 30th December, 1963 was in the following terms:

"I have gone through the record. The possession of none has so far been found and it requires further enquiry which cannot be decided under section 145 Cr. P. C. As such the proceedings are converted to one under section 146 Cr. P. C. and a reference is made to competent civil court for deciding the claim according to law. Lands are attached under section 146. Send the record to Registrar, Civil Court for needful. Parties to appear before Registrar, Civil Court on 1-2-64."

In the very next order, which is to be found in the order-sheet, the learned Munsif, 3rd Court, Patna, pointed out that the reference to the Civil Court had not been validly made inasmuch as the Magistrate had not drawn up a statement of the facts of the case and the order, dated the 30th December, 1963 also did not show what evidence, oral or documentary, on the point of possession had been produced before the Magistrate. The learned Munsif emphasised that it was the duty of the Magistrate to draw up

a statement of the facts of the cases of the parties and to deal with the evidence adduced by them in support of their respective cases so that the Civil Court might be in a position to apply its mind to the reference in question. The learned Munsif concluded his order, dated the 22nd February, 1964, by observing as follows:

"... If the Act provides that a certain thing has to be done in a certain way, that thing must be done in that very way or it should not be done at all. As the law stands, a reference without drawing up statement of the facts of the case is incomplete and improper.

Therefore I have no option but to send back the record of the case to the learned Magistrate concerned who would proceed in accordance with law."

The point raised by Mr. Roy will have to be decided in the light of the effect of the order of the learned Munsif, dated the 22nd February, 1964. Mr. Roy contends that the direction of the learned Munsif was that the Magistrate should act in accordance with law by complying with the requirements of sub-section (1) of section 146 of the Code of Criminal Procedure relating to making a reference of the matter to the Civil Court. In support of his contention, Mr. Roy urged that the earlier order of the learned Magistrate, dated the 30th December, 1963 was not incompetent but merely improper and all that he was called upon to do by the order of the Civil Court was to remove the defect in the referring order so that the reference might become a proper reference in the eye of law. The fallacy in the contention of Mr. Roy is that the Civil Court had no jurisdiction to make any direction to the learned Magistrate. The civil Court was not sitting in appeal over the Magistrate dealing with the proceeding.

9. As pointed out in the Bench decision relied upon by Mr. Roy, "the Civil Court, not being a court of appeal of the Magistrate's court, is not competent and has no jurisdiction to decide the propriety of any reference made by a magistrate under section 146 (1) of the Code of Criminal Procedure. The question whether such a reference by the Magistrate is proper or improper has to be decided by a higher Court, having necessary jurisdiction. The learned Munsif, therefore, adopted the right course to have brought this matter to the notice of the court although there is no provision in the Code of Criminal Procedure for making of any reference by a Munsif. . . Although the civil Court is not competent to decide about the competence or otherwise of any reference by a judicial pronouncement, it can nevertheless bring to the

notice of the Magistrate its opinion about the incompetent nature of the reference by means of a letter and the Magistrate may recall such a reference, if he accepts the Munsif's opinion. Such a course will save time and also the parties from unnecessary harassment in coming to the High Court."

It will thus appear that the civil Court in the present case purported to follow the second course indicated in the Bench decision aforesaid. In that very decision, it has been pointed out that the reference of the kind made in the present case was not merely irregular but incompetent and that if in such circumstances the civil Court would have proceeded to give its decision on the question of possession then that would have been without jurisdiction. In other words, in the present case, there was no valid reference to the civil Court at all so as to have clothed it with jurisdiction to give its finding on the question of possession. In the absence of jurisdiction having been conferred upon the civil Court in accordance with law, the learned Munsif could neither record his finding nor make any direction to the learned Magistrate as to what course he should adopt after the return of the records from the civil Court.

To put it differently, the purported reference to the civil Court made under the order of the 30th December, 1963 was abortive and it wholly failed to deprive the learned Magistrate of his normal jurisdiction to decide the proceeding in accordance with section 145 (4), Criminal Procedure Code and to transfer that jurisdiction to the civil Court under section 146 (1) of the Code. It is also well known that the primary jurisdiction in such matters is that of the Magistrate. That is why, even after the civil Court returns its finding to the Magistrate, it is the duty of the Magistrate to pass the final order in the proceeding in the light of the decision of the civil Court. Therefore, since the order of the 30th December, 1963 could not validly confer any jurisdiction on the civil Court to record its decision, the conclusion must inevitably be that the jurisdiction over the proceeding continued in the Magistrate as before. Therefore, after the receipt of the record from the civil court, it was for the Magistrate to decide as to what course he ought to adopt, whether to make a proper reference to the civil Court under section 146 (1) of the Code or to proceed under section 145 (4).

10. I am unable to accept the contention that by reason of the order of the Civil Court, the Magistrate was left with no option but to make a valid reference under section 146 (1) of the Code. I am, therefore, clearly of the opinion that the

Bench decision of this Court, relied upon by Mr. Roy, is really of no avail to him, and in any event, the final order made by the learned Magistrate cannot be struck down as 'without jurisdiction' on the ground urged by Mr. Roy.

11. The next contention of Mr. Roy is that the decision of the learned Magistrate is vitiated on account of failure to consider two of the documents filed before him on behalf of the petitioners, namely, (i) original summons or Mosanna in the name of Mithila Saran Singh in case no. 480 of 1938 and (ii) certified copy of deposition of Moti Singh, dated the 18th August, 1948 in title suit no. 9/3 of 1947-48. As regards item no. (i), the contention of Mr. Roy is not correct since the learned Magistrate had made reference to it at page 9 of the certified copy of his judgment. Mr. Roy has rightly contended that the deposition of Moti Singh in title suit no. 9/3 of 1947-48 has not been considered by the learned Magistrate. On looking into the deposition, however, I do not find anything there which could be relevant for deciding the question of possession in the present proceeding. The non-consideration of this document, therefore, is of no consequence at all. This branch of Mr. Roy's argument accordingly fails.

12. Mr. Roy has then made a grievance of the treatment of the affidavits of the witnesses of the petitioners made by the learned Magistrate. Mr. Roy contended that the first party had filed eight such affidavits and not seven as shown in the impugned order. The affidavit said to have been left out of consideration is said to be of one Kapildeo Singh and that is said to be relevant with respect to two of the disputed plots, 241 and 643. Mr. Ram Saroop Sinha appearing for the other side stated that there was no such affidavit on record. Thereupon a search for the alleged affidavit of Kapildeo Singh was made by Mr. Roy, but it was nowhere to be found on the records of the case. Evidently, no such affidavit was before the learned Magistrate requiring his consideration. Mr. Roy then contended that the learned Magistrate could have no justification for not relying upon the affidavits of four of the witnesses of the first party, namely, Brahmadeo Singh, Baikunth Singh, Mithila Singh and Havildar Singh, when he had himself found that they held lands on the boundaries of the disputed plots 22, 1046 and 1054. This argument does not appeal to me at all. The learned Magistrate was not bound to rely upon these witnesses merely because they appeared to be competent to speak about the possession of the petitioners over the three disputed plots. The learned Magistrate had to decide whether they

were truthful witnesses and not merely competent witnesses. The reason is that a competent witness is not necessarily a truthful witness. No error of law can be said to have arisen merely because the learned Magistrate did not feel impressed with the evidence given on affidavits on behalf of the first party.

13. Lastly, Mr. Roy pointed out that Dwarka Singh did not swear any affidavit in this case although he was vitally interested in the dispute. But, it is to be remembered that Dwarka Singh is opposite party no. 2 in this Court and his brother, Nihora Singh (opposite party no. 1) did swear an affidavit in support of the case of the second party in the court below. It was not essential for each and every member of the second party to swear an affidavit in the proceeding. Nothing material, therefore, turns upon the circumstance that Dwarka Singh did not swear any affidavit in the proceeding.

14. In my opinion, no ground has been made out for interfering with the decision of the learned Magistrate. The application fails and is, accordingly, dismissed.

Petition dismissed.

AIR 1970 PATNA 100 (V 57 C 14)

ANWAR AHMAD

AND M. P. VERMA, JJ.

Thakur Dayal Rai and others, Appellants v. Bishundeo Rai and others, Respondents.

A. F. A. D. No. 259 of 1964, D/- 18-2-1969, against decision of 3rd Addl. Sub. J. Muzaffarpur, D/- 15-1-1964.

Limitation Act (1908), Arts. 142 and 144—Possession and dispossession — Possession when follows title — Proof of possession and enjoyment by plaintiff though not satisfactory, not valueless — Title of plaintiff to land admitted by defendant — Plea of title by adverse possession taken by the defendant disbelieved — Plaintiff's possession, held, could be presumed from title.

Presumption of possession arising from title is not available where the land is capable of actual possession by cultivation or otherwise, and there is no evidence of possession or the evidence adduced is unworthy of the credit. But this presumption is available in all cases (1) where the evidence is equally strong and apparently equally well-balanced on both sides so that it is difficult to determine where the truth lies; (2) where the evidence on both sides is weak or unsatisfactory, but not valueless or wholly incredible; (3) where the land is of such a peculiar nature that the evidence of

actual user and enjoyment in the ordinary manner could hardly be expected e.g., lands which are waste, jungle, parti, gora, submerged under water or any other kind of land incapable of cultivation. AIR 1958 Pat 386 (FB) and AIR 1922 Pat 432, Foll.; AIR 1921 Pat 237 (FB), held modified by AIR 1958 Pat 386 (FB).

(Para 7)

The plaintiffs sued to recover possession of certain land alleged to have been taken possession of by the defendants taking advantage of flood waters which washed away a ridge which separated the plaintiffs' land from that of the defendants. The defendants, inter alia, pleaded acquisition of title by adverse possession. The court found that the plaintiffs' evidence though not satisfactory was not valueless. The defendants had admitted title in the plaintiffs.

Held that the plaintiffs' possession could be presumed from the title. Even if Article 142 of the Limitation Act applied, the plaintiffs were still entitled to succeed. An argument that no such presumption should be drawn was not tenable.

(Paras 7 and 8)

Cases Referred: Chronological Paras
(1958) AIR 1958 Pat 386 (V 45) =

ILR 37 Pat 373 (FB), Jaldhari

Mahto v. Rajendra Singh 7

(1922) AIR 1922 Pat 432 (V 9) =

ILR 2 Pat 1, Matuk Singh v.

Tian Sahu 6

(1921) AIR 1921 Pat 237 (V 8) =

6 Pat LJ 478 (FB), Raja Shiv

Prasad Singh v. Hira Singh 6, 7

Shreenath Singh and Madhusudan Singh, for Appellants; Prem Lal, Din Dayal Sinha, Muzaffar Hussain and Arun Bihari Mathur, for Respondents.

JUDGMENT: This appeal by the defendants first party is directed against the decisions of the courts below decreeing the suit of the respondents first party in part, which was for declaration of title to and recovery of possession of 4 kathas 15 dhurs of land bearing survey plot no. 530, Khata no. 122, in village Pojhia in the district of Muzaffarpur. Admittedly, the aforesaid plot stands in the name of the ancestor of the respondents first party and third party in the survey record-of-rights. Plot no. 529 which is adjacent north of plot no. 530, is recorded in the name of the ancestor of the appellants and the respondents second party.

2. According to the case of the respondents first party, there was a ridge in between plots 529 and 530, which was demolished in 1957 by the flood water of river Baghmata. After the flood had receded, the appellants, in collusion with the respondents second party, forcibly and illegally ploughed a portion of plot

no. 530 along with their own plot no. 529 and thus dispossessed the plaintiffs, in the month of Savan, 1364 Fasli.

3. The appellants set up a number of pleas including limitation and non-maintainability of the suit. The main defence, however, was that the area in dispute was a part and parcel of plot no. 529 which belonged to them and it never formed part of plot no. 530. In the alternative, they set up a title in them by adverse possession. They, however, did not give any specific date on which they came in possession of the disputed area of land.

4. The learned Munsif, acting on the report of the Pleader Commissioner, decreed the suit of the respondents first party in respect of 3 kathas 12 dhurs of land, which was found on actual measurement to be a part of plot no. 530. He disbelieved the case of the appellants that they had acquired title by adverse possession. He accepted the case of respondents first party on the points of their possession and subsequent dispossession.

5. On appeal, the learned Additional Subordinate Judge applied Article 144 of the Limitation Act to the facts of the present case and held that there was no reliable evidence to support the plea of adverse possession set up by the appellants. Alternatively, he came to the conclusion that in case Article 142 be held to be applicable, the respondents first party were entitled to recovery of possession as their title was admitted by the appellants and the oral evidence adduced on behalf of the respondents first party, although not satisfactory, was not valueless. In this view of the matter, the learned Additional Subordinate Judge affirmed the findings arrived at by the learned Munsif.

6. Mr. Shreenath Singh, learned counsel for the appellants, very strongly urged that, the suit being in ejectment, the Court of appeal below was wrong in raising the presumption of title in favour of the respondents first party in coming to its conclusion that the respondents first party had succeeded in proving their case as required by Article 142 of the Limitation Act. In the submission of learned counsel, whenever a suit is brought on the basis of possession and subsequent dispossession, Article 142 of the Limitation Act will be applicable and in that case, the plaintiff cannot be allowed to raise the presumption of title in his favour. In this connection, learned counsel relied on *Raja Shiva Prasad Singh v. Hira Singh*, (1921) 6 Pat LJ 478 = (AIR 1921 Pat 237) (FB). We are unable to accept the proposition of law as put forward by learned counsel.

The decision in *Raja Shiva Prasad Singh's case*, (1921) 6 Pat LJ 478 = (AIR

1921 Pat 237) (FB) was explained by Dawson Miller, C. J., who delivered the leading judgment of the aforesaid Full Bench, in *Matuk Singh v. Tian Sahu*, ILR 2 Pat 1 = (AIR 1922 Pat 432) in the following words:

"... The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account. The rule there laid down was that it is only in case where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession, but it must not be considered, merely because, where evidence was given by both sides, the learned Judge who had to determine the case had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence of possession or because he did not consider the evidence altogether satisfactory, he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiffs' title."

7. From what has been stated above, it is clear that, if the evidence adduced by a plaintiff is not valueless, which is not the same thing as to say that no evidence has been led by him on the point, the court of appeal below is entitled to take into account either the probabilities of the case or the presumption arising from his title, if the same is admitted by the defendant. This view of the law now stands settled by a Full Bench decision of this Court reported in AIR 1958 Pat 386 (FB), *Jaldhari Mahto v. Rajendra Singh*.

Paragraph 14 of that judgment runs:

"A review of the aforesaid cases shows that presumption of possession arising from title is not available where the land is capable of actual possession by cultivation or otherwise, and there is no evidence of possession or the evidence adduced is unworthy of the credit. But, this presumption is available in all cases (1) where the evidence is equally strong and apparently equally well-balanced on

both sides so that it is difficult to determine where the truth lies; (2) where the evidence on both sides is weak or unsatisfactory, but not valueless or wholly incredible; (3) where the land is of such a peculiar nature that the evidence of actual user and enjoyment in the ordinary manner could hardly be expected e.g., lands which are waste, jungle, parti, gora, submerged under water or any other kind of land incapable of cultivation. To this extent the general rule laid down by the Full Bench in the case of Raja Shiva Prasad Singh, (1921) 6 Pat LJ 478 = (AIR 1921 Pat 237) (FB) must be deemed to be modified, and in such cases the plaintiff can succeed on the strength of his title alone."

8. So far as the judgment under appeal is concerned the learned Additional Subordinate Judge, as already stated, has completely disbelieved the plea of adverse possession set up by the appellants. He has further found that the evidence adduced on behalf of the respondents first party, although not satisfactory, was not valueless and he was, therefore, right in coming to the conclusion that the evidence adduced on behalf of the respondents first party received support from their title. On the findings arrived at by the learned Additional Subordinate Judge, it cannot be reasonably argued that he erred in law in raising the presumption of title in favour of the respondents first party. The learned Additional Subordinate Judge, having held that the appellants have failed to prove their case of adverse possession over the plot in dispute, was right in observing that "even if Article 142 of the Limitation Act is applicable, even then the plaintiffs are entitled to recovery of possession for the reasons that the title of the plaintiffs is admitted and the oral evidence adduced on their behalf is not valueless."

9. It was also contended by Mr. Shreenath Singh that the Additional Subordinate Judge was obsessed by the idea that he was entitled to apply the provisions of Article 144 of the Limitation Act to the facts of the present case and, with that end in view, he construed the evidence accordingly. In our opinion, this submission of learned counsel is without substance and has to be rejected. A perusal of the judgment under appeal makes it perfectly clear that the Additional Subordinate Judge tried his best to arrive at the right conclusion and the criticisms levelled against his judgment by learned counsel are unfounded. No sufficient ground has been made out for our interference. The appeal is, accordingly, dismissed with costs.

Appeal dismissed.

AIR 1970 PATNA 102 (V 57 C 15)

M. P. VERMA, J.

Mahendra Prasad Singh and others, Petitioners v. State of Bihar and another, Opposite Party.

Criminal Misc. No. 1742 of 1968, D/- 7-2-1969.

(A) Penal Code (1860), S. 379 — Magistrate making a prohibitory order in a proceeding under S. 144 Criminal P. C. — One party violating the order and harvesting the crop — Opposite party complaining to the Magistrate about theft — Held, charge of theft would not lie — (Criminal P. C. (1898), Ss. 144 & 145).

A prohibitory order was issued by a Magistrate in a proceeding under S. 144 Criminal P. C. in respect of land in dispute restraining both the parties from going upon it. One party against the order entered upon the land and harvested the crops. The other party filed a complaint of theft. The Magistrate took cognizance of the complaint.

Held, (1) that the complainant could not be said to be in possession of the land in view of the prohibitory order and therefore the charge of theft was not maintainable. (Para 3)

and (2) that there was not much distinction in the language of the provision under Ss. 144 and 145 of Criminal P. C. in the matter of prohibitory order. When a particular party was restrained from enjoying possession of the land, he must be taken to be out of possession for that period. AIR 1949 Cal 632 Foll.

(Para 3)

(Note:— Contrary view is taken in a case reported in 1963 B. L. J. R. 211 but it seems the case was not cited at the Bar — Ed.)

(B) Criminal P. C. (1898), Ss. 144, 145 and 195 (1) (a) — Prohibitory order under S. 144 or 145 — Violation of — Magistrate to prefer complaint under S. 188 Penal Code — Cognizance by himself not possible — (Penal Code (1860), S. 188).

A violation of the prohibitory order passed under S. 144 or 145 of Criminal P. C. cannot be taken cognizance of by the Magistrate who passed it. He has to prefer a complaint about it under S. 188, Penal Code, as provided for under S. 195 (1) (a) of Criminal P. C. Cri. Revn. No. 398 of 1967 (Pat), Rel. on. (Para 3)

Cases Referred: Chronological Paras
(1967) Cri Revn. No. 398 of 1967 (Pat) 2

(1949) AIR 1949 Cal 632 (V 36) =
51 Cri LJ 97, Osman Mistry v.
Atul Krishna Ghosh 3

Lala Kailash Bihari Prasad, for State; Brajeshwar Prasad Sinha and Bhupendra Nath Sinha, for Petitioners; S. Anwar Ahmad, for Private Party.

ORDER: This petition has been filed against the order of the learned Sub-divisional Magistrate, dated the 10th September, 1968, by which he ousted the jurisdiction of the Gram Cutcherry and himself took cognizance of an offence under section 379 of the Indian Penal Code. The short facts leading to this petition may be summarised as under:

2. The complainant filed a petition of complaint before the Sarpanch of the Gram Cutcherry on the 14th September, 1966, alleging that these petitioners had forcibly cut away and removed Marua crops from some plots of Khata No. 233, situate in village Dihura, within the jurisdiction of Tikari police-station in the district of Gaya. The Sarpanch got the matter enquired into by the Mukhiya of the Gram Panchayat. After receipt of that report, the Sarpanch sent the petition of complaint to the Sub-divisional Magistrate, Gaya. The learned Sub-divisional Magistrate then took cognizance under sections 147 and 379 of the Indian Penal Code, and transferred the case to the file of a Munsif-Magistrate for trial. As against that order of taking cognizance, these very petitioners had come up to this Court with the allegation that the lands in question were the subject-matter of a proceeding under S. 144 of the Code of Criminal Procedure, and both the parties had been restrained from going upon the lands. The alleged cutting of the Marua crop by as many as 28 persons was alleged to have been done within the period of 60 days from the date of issue of the prohibitory order under section 144 of the Code of Criminal Procedure. That matter was heard by this very Court in Criminal Revn. No. 398 of 1967 (Pat) and two observations were made. The first was that, "if the learned Sub-divisional Magistrate wants to oust the jurisdiction of the Gram Cutcherry and direct that this case should be tried by a regular magistrate, he can do so after giving sufficient reasons for the same." The second observation made was that in a case of this nature, where there had been violation of his prohibitory order, the learned Sub-divisional Magistrate should not have taken cognizance himself, but should have made a complaint against the alleged wrongdoers under section 188 of the Indian Penal Code. As laid down under section 195 (1) (a) of the Code of Criminal Procedure, no Court could take cognizance of an offence like this, except on the complaint in writing of the public

servant concerned, or of some other public-servant to whom he is subordinate.

3. The main point which has been argued before me is that at the time of the harvesting of the Marua crops, the complainant could not be said to be in possession of the property, as he as well as these accused persons had been restrained from going upon the land. Learned State-lawyer has tried to make a distinction between the provisions of Section 144 and Section 145 of the Code of Criminal Procedure as regarding the nature of custodia legis concerning the property involved in the proceeding. According to him, under Section 145 (4) of the Code of Criminal Procedure, an attachment is effected and then only the property comes into the custody of the Court or the Magistrate; whereas under Section 144 of the Code, the possession still remains with the complainant, though he is asked not to go upon the land. In my opinion, there is not much distinction between the language used in Sections 144 and 145. When a particular party is restrained from enjoying the possession of the land, he must be taken to be out of possession for that period.

This view of mine finds support from a decision of the Calcutta High Court in *Osman Mistry v. Atul Krishna Ghosh*, AIR 1949 Cal 632. The facts of that case appear to be on all fours with the facts of the case in hand. There, paddy had been harvested while a prohibitory order under section 144 of the Code of Criminal Procedure was in force. It was pointed out in that case that a charge of theft could not lie inasmuch as the paddy was then not in possession of the opposite parties by reason of the fact that there was an order under section 144 of the Code of Criminal Procedure prohibiting both parties from going on the land and exercising acts of possession thereon; and it was held that "At the time of the alleged cutting of the paddy, therefore, it cannot be said that it was in the possession of the opposite parties. An offence of theft cannot be committed unless the property is moved out of possession of a person. On this ground also the charge of theft would not be maintainable." Nothing has been shown to me against this view, or the view I had taken in the previous case. I would, therefore, once again draw the attention of the learned Sub-divisional Magistrate to the legal position obtaining in this case. If he thinks that his order has been violated and injustice has been done to the complainant, he may file a complaint according to the legal procedure. He himself could not take cognizance in a case like this; and so his order of taking cognizance is quashed.

4. In the result, this petition succeeds and the impugned order of the learned Magistrate is quashed.

Petition dismissed.

AIR 1970 PATNA 104 (V 57 C 16)

B. P. SINHA, J.

Rewati Raman Sharma, Petitioner v. Jamshedpur Notified Area Committee, Opposite Party.

Criminal Revn. No. 2054 of 1968, D/- 11-2-1969, against order of 3rd Addl. S.J. Singhbhum Camp, Jamshedpur, D/- 8-7-1968.

(A) Criminal P. C. (1898), S. 423 — Judgment affirming conviction—No finding regarding necessary ingredient constituting offence — Order is vitiated.

In a criminal matter the appellate court irrespective of the fact whether any finding of the trial court is challenged or not, has to come to its own finding about the facts which are alleged to have constituted the offence. If there is lack of finding of any necessary ingredient constituting an offence, the order of the appellate court affirming conviction becomes vitiated. (Para 5)

(B) Prevention of Food Adulteration Act (1954), Ss. 16 (1) (b) and 10 — Expression "to prevent" — Mere refusal to sell article does not amount to prevention.

Section 10 of the Act empowers a Food Inspector to take the sample. It does not create any obligation on the part of the salesman or any other person mentioned therein to actively co-operate with the Food Inspector in taking the sample by physically handing over the article to him. Thus simply not co-operating by not handing over any article to the Food Inspector will not amount to preventing him from taking the sample. Mere refusal to sell the article unaccompanied by any gesture indicating that the Inspector would not be allowed to take the sample does not amount to prevention as contemplated by section 16 (1) (b). AIR 1961 All 103, Disting.; AIR 1957 Punj 99 and AIR 1967 Guj 61 Foll. (Paras 6, 7)

Cases Referred: Chronological Paras
(1967) AIR 1967 Guj 61 (V 54)=
1967 Cri LJ 376 (1), State of Gujarat v. Laljibhai Chaturbhai 7
(1961) AIR 1961 All 103 (V 48)=
1961 (1) Cri LJ 204, Municipal Board Sambhal v. Jhamman Lal 7
(1957) AIR 1957 Punj 99 (V 44)=
1957 Cri LJ 656, Bishan Dass Telu Ram v. State 7
(1954) AIR 1954 Mad 199 (V 41)=
1954 Cri LJ 197, Public Prosecutor v. Murugesan 7

L. M. Sharma and Babhunath Roy, for Petitioner; L. K. Choudhary and S. K. Choudhary, for Opposite Party.

ORDER: A complaint was filed against Tejmal Sharma, proprietor of the grocery shop at Baridih, P. S. Golmur, Jamshedpur and Rewati Raman Sharma, alleging that on 23-12-1966 when the Food Inspector Upendra Narain Sinha (P. W. 2) went to the shop and wanted to take sample of mustard oil and Haldi for chemical analysis, the accused persons refused to sell the same to him and thereby prevented him from taking sample. On this complaint the prosecution was started against both the aforesaid accused persons under section 16 (1) (b) of the Prevention of Food Adulteration Act (hereinafter referred to as the Act).

2. The defence of Tejmal Sharma was that he was not present at the shop at the time of the arrival of the Food Inspector and that he did not prevent the Food Inspector from purchasing sample. The defence of Rewati Raman Sharma was that he had no concern with the shop. He was kept in charge of the shop just as a care-taker in the absence of his brother Tejmal Sharma, who was the proprietor thereof. His further defence was that his act of refusal to sell the articles to the Food Inspector, under the circumstances, did not amount to preventing him from taking the sample and as such no offence was committed by him.

3. The trial court held that accused Rewati Raman Sharma was working as salesman in the shop in question on 23-12-1966 when the Food Inspector wanted to take the sample of the mustard oil and Haldi for chemical analysis and that he refused to sell the same. It further held that this refusal amounted to preventing the Food Inspector from taking the sample. Hence it found him guilty of offence under section 16 (1) (b) of the Act and convicted and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000/-, in default to undergo rigorous imprisonment for a further period of six months. So far Tejmal Sharma was concerned, the learned Magistrate found that he was found on the counter and was receiving the payment for the articles sold. Further he held that even assuming that he was not present in the shop at the time of occurrence, he would be liable of any act done by his servant or salesman. With such findings he held him also guilty under section 16 (1) (b) of the Act and imposed the same sentence on him as well. On appeal, the appellate court did not accept the finding about presence of Tejmal Sharma at the time the Food Inspector visited the shop and it rejected the contention

that he had any vicarious liability for what was done by Rewati Raman Sharma. Consequently it acquitted him. The appellate court, however, affirmed the conviction and sentence of Rewati Raman Sharma. Rewati Raman Sharma has, therefore, filed this revision application.

4. Learned Counsel, for the petitioner, has submitted that the appellate court did not record any finding as to whether the petitioner, Rewati Raman Sharma was working as salesman in the shop at the relevant time and as such by refusing to sell the article to the Food Inspector he did not commit any offence. His next submission is that even assuming that Rewati Raman Sharma was the salesman at the relevant time, his mere refusal to sell the article did not amount to preventing the Food Inspector from taking the sample.

5. So far the first point is concerned, on perusal of the order of the appellate Court, I find that the contention is correct. Nowhere in the judgment the appellate court has held that Rewati Raman Sharma was the salesman at the relevant time in the shop in question. The appellate court has simply discussed the defence of Rewati Raman Sharma to the effect that he had been to the shop as his service was requisitioned for performing Pooja and that he was left there to wait in the shop as a caretaker of the articles. Rejection of that defence does not amount to a positive finding that Rewati Raman Sharma was working as salesman at the relevant time. This finding is wanting in this case. Learned Counsel for the opposite party has, however, submitted that there was positive finding by the trial court that Rewati Raman Sharma was working as salesman in the shop in question on 23-12-1966 and as this part of the finding was not specifically challenged and argued by the appellants in the lower appellate court and the judgment is of affirmance it must be taken that the appellate Court affirmed this finding as well. I do not see any force in this contention. In a criminal matter the appellate Court, irrespective of the fact whether any finding of the trial Court is challenged or not, has to come to its own finding about the facts which are alleged to have constituted the offence. If there is lack of finding of any necessary ingredient constituting an offence, the order of the appellate court affirming conviction becomes vitiated.

6. The second point urged by the learned Counsel for the petitioner needs careful consideration. The allegation against the petitioner in the complaint

petition is that on 23-12-1966 the petitioner refused to sell to the Food Inspector the sample of mustard oil and Haldi which were kept in the shop for sale and thereby prevented him from taking the sample for chemical analysis. In the evidence also the Food Inspector stated that he demanded the sample from Rewati Raman Sharma, for which he was prepared to pay the price, but Rewati Raman Sharma refused to give him the sample. He recorded this refusal in writing. There is no provision in the Act that mere refusal to sell by itself is an offence. It will be offence only when it amounts to prevention as contemplated by section 16 (1) (b) of the Act. The relevant part of section 16 is as follows:

"(1) If any person,

(b) prevents a food inspector from taking a sample as authorised by this Act," The Food Inspector is authorised to take a sample under section 10 of the Act. That section reads as follows:

"(1) A food inspector shall have power—

(a) to take samples of any article of food from

(i) any person selling such articles,

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee,

(iii) a consignee after delivery of any such article to him".

Therefore this section empowers a Food Inspector to take sample of any article of food from any person selling such article. Even if it be assumed that petitioner Rewati Raman Sharma was selling the articles on the relevant date and at the relevant time it has to be seen if his refusal to sell amounted to prevention as contemplated by Section 16 of the Act. Section 10 of the Act empowers a Food Inspector to take the sample. It does not create any obligation on the part of the salesman or any other person mentioned therein to actively co-operate with the Food Inspector in taking the sample by physically handing over the article to him. It was for the Food Inspector to take the sample and if the salesman prevented him from doing so, he could be liable for an offence under section 16 (1) (b) of the Act.

7. The dictionary meaning of "to prevent" according to Oxford English Dictionary is to stop, keep, or hinder from doing something, to render an act or event impracticable or impossible by anticipatory action, to frustrate, defeat, bring to naught, render void or nugatory (an expectation, plan, etc). This means

that there must be some action on the part of the person preventing any act, which would render the performance of that act impracticable or impossible. Such action of that person may be in the shape of physical obstruction or show of force or threat or show of any gesture which hinders performance of the act. Simply not co-operating by not handing over any article to the Food Inspector will not amount to preventing him from taking the sample. Mere refusal to sell the article unaccompanied by any gesture indicating that the Inspector would not be allowed to take the sample does not amount to prevention as contemplated by section 16 (1) (b). This view gets support from some cases cited on behalf of the petitioner. The first case referred to is a decision in *Bishan Dass Telu Ram v. State*, AIR 1957 Punj. 99. In that case also the accused had refused to give sample even on payment and it was held:

"that is not the same thing as prevention which need not have an element of physical obstruction, but it does involve some act which hinders an inspector from taking a sample".

Another case referred to is a decision in *State of Gujarat v. Laljibhai Chaturbhai*, AIR 1967 Guj 61. It was held therein:

"Whether the Food Inspector was prevented or not would depend on the facts of the case in order to constitute the offence. There must be a physical obstruction or threat or an assault. Mere refusal to give a sample would not amount to such prevention. Nor would merely leaving the shop, we do not know for what purpose, amount to prevention".

As against this, the learned Counsel for the opposite party has relied upon a decision of the Allahabad High Court in *Municipal Board Sambhal v. Jhamman Lal*, AIR 1961 All 103 in support of his contention that mere refusal to give the sample amounted to prevention as contemplated by section 16 (1) (b) of the Act. In this case when the Food Inspector reached the shop and demanded sample, Jhamman Lal instead of giving it to him left the shop and promised to come shortly. The Food Inspector waited for some time but he did not turn up. Then he asked one Tota Ram, who was sitting there in the shop, to supply the sample. This man also did not give him the sample saying that it would be given by Jhamman Lal and he was going to call him. He also left the shop. The Food Inspector prosecuted both of them for offence under section 16 (1) (b) of the Act. It was contended on behalf of the accused that before there

could be prevention, there should be some kind of overt act. In that connection it was held:

"If a person disappears from the shop, in our opinion, he has done an overt act by means of which he made it impossible for the Food Inspector to obtain a sample from him. Apart from this fact we do not think that in cases of prevention an overt act is necessary".

In making the above observation, the learned Judge relied upon a decision of the Madras High Court in the case of *Public Prosecutor v. Murugesan*, AIR 1954 Mad 199. In that Madras case, however, the conduct of the accused was interpreted as sufficient overt act on his part to render the taking of sample impracticable. A sample of milk was demanded from the accused. He did not give it to the authority concerned. He went to the hotel and handed over the milk to the servant of the hotel. The milk was put into the milk pan in which milk was boiling. Therefore the whole conduct was such as made it difficult for the authority to take the sample for analysis. It is in that connection that it was held:

"On the facts alleged there could be no doubt that this accused, in the manner set out above and which need not be repeated, has effectively prevented the local executive officer from taking the sample and for this no further overt act is necessary than what has happened". This observation does not say that no sort of overt act was necessary to constitute prevention as contemplated by section 16 (1) (b) of the Act. In the Allahabad case referred to above so far Jhamman Lal was concerned, his disappearance from the shop was treated as an overt act by means of which he made it impossible for the Food Inspector to obtain a sample from him. It is for that reason that the aforesaid Punjab case which was cited before their Lordships of the Allahabad High Court was distinguished by making the following observations:

"With respect we might say that the learned single Judge did not consider the point that by disappearance, the accused had made it impossible for the Food Inspector to obtain sample "from the persons selling such article" which he was entitled to obtain under section 10 (1) and thereby he had prevented the Food Inspector in taking the sample as authorised by the Act".

The learned Judges did not observe that the view taken by the Punjab High Court was wrong. They simply distinguished it by saying that disappearance of the accused amounted to prevention.

So far Tota Ram, who had refused to give the sample, was concerned, it was observed that it was not clear from the evidence that he was selling the oil and that he refused to give sample and had prevented the Food Inspector from taking the sample from any person, who was selling such article. The point whether mere refusal to sell would amount to prevention was not considered in that Allahabad decision. This case is, therefore, no authority for the proposition that mere refusal to sell the article as sample to the Food Inspector amounts to preventing him from taking the sample as contemplated by section 16 (1) (b) of the Act.

8. In the instant case the allegation in the complaint is that the accused refused to sell the sample to the Inspector. There is no evidence that the Inspector insisted on taking sample and that the accused spoke that he would not allow him to do so. Rewati Raman Sharma did not offer any physical obstruction. There is no evidence that he gave any threat or showed any undesirable gesture. He quietly wrote out his refusal to sell the articles when asked to do so. He did not do any thing from which it could be inferred that he would not allow the Inspector to take the sample if he wanted to do so. In my opinion, the facts alleged and proved did not amount to preventing the Food Inspector from taking the sample, and as such no offence under section 16 (1) (b) is made out.

9. The result is that the revision application is allowed. The order of conviction and sentence passed against the petitioner is set aside. He is discharged from the bail bond. Fine, if realised, shall be refunded.

Revision allowed.

AIR 1970 PATNA 107 (V 57 C 17)

B. P. SINHA, J.

Balkishun Sao and others, Petitioners
v. Munno Khan, Opposite Party.

Criminal Revn. No. 2020 of 1968, D/- 24-2-1969, from order of Sub-Divisional Magistrate, Patna City, D/- 22-7-1966.

(A) Criminal P. C. (1898), Ss. 112 and 107 — Substance of the information — Order of the Magistrate not indicating the nature of the information received which induced him to take action under section 107 of the Code is bad. AIR 1953 Cal 491, Rel. on. (Para 3)

(B) Criminal P. C. (1898), Ss. 439, 112 and 107 — Revision of orders in proceedings under Ch. 8 — Initial order draw-

ing up proceeding under S. 107 and calling on other side to show cause — Specification required under law not mentioned in order — Revision against order is not premature and it can be entertained — Cri. Rev. No. 351 of 1954, D/- 18-11-1954 (Pat), Not followed; AIR 1929 Pat. 67, Followed. (Para 5)

(C) Criminal P. C. (1898), Ss. 439, 112 and 107 — Revision of orders in proceedings under Ch. 8 — Order asking party to show cause why he should not execute bond for keeping peace for one year — Order not directing that the period of one year should commence from any particular date — Fact that the period of one year from date of passing the order had already elapsed by the time revision is heard does not mean that the order has to be set aside. AIR 1949 All 21, Dissented from. (Para 6)

Cases Referred: Chronological Faras (1954) Criminal Revn. No. 351 of

1954, D/- 18-11-1954 (Pat), Zahur-
uddin v. State 4, 5

(1953) AIR 1953 Cal 491 (V 40)=
1953 Cri LJ 1165, Birdhaj Roy
v. State 3

(1949) AIR 1949 All 21 (V 36)=
50 Cri LJ 78, Baburam v. Rex 6

(1929) AIR 1929 Pat 67 (V 16)=
30 Cri LJ 492, Amanat Ali v.
Emperor 5

Surendra Prasad (No. II) and Zakir
Hussain Mirza, for Petitioners; Naseem
Ahmad, for Opposite Party.

ORDER: This application is directed against an order passed by the Sub-divisional Magistrate of Patna City on the 22nd July, 1966, drawing up a proceeding under section 107 of the Code of Criminal Procedure (hereinafter referred to as the Code) against the petitioners calling upon them to show cause by the 6th August, 1966, as to why they should not be ordered to execute bonds of rupees one thousand with two sureties of the like amount each for keeping peace for a period of one year. It appears that this order was passed on the basis of a police report of the Malsalami Police station that there was an apprehension of the breach of the peace due to old enmity for a piece of land, which is a graveyard.

2. Learned Counsel for the petitioners has submitted that the order of the Court below is vague and the notices served upon the petitioners did not disclose as to what was the substance of the informations which they were to answer. In this connection he has referred to section 112 of the Code, which provides that when a Magistrate acting under Section 107 of the Code deems it necessary to require any person to show cause, he shall make an order in writing, setting forth the substance of

the information received, the amount of the bond to be executed, the term for which it is to be in force, etc. I think the contention of the learned counsel is well founded.

3. Under Section 107 of the Code, whenever a Magistrate is informed that any person is likely to commit a breach of the peace he may require such person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for a period not exceeding one year. This has to be done in the manner provided in the subsequent sections and the manner is provided in S. 112 of the Code. That section requires a Magistrate to make an order in writing setting forth the substance of the information received.

Here, in the instant case, it appears that the learned Magistrate has not given the substance of the information received in the order. He has simply passed orders in the following terms:

"Perused the police report of Malsalami P. S. and duly forwarded by D. I. Police, Patna City, for action under section 107 Cr. P. C.

Whereas, I am satisfied from the police report of Malsalami P. S. that there is a serious apprehension of breach of peace at the hands of members of O. P. due to old enmity for piece of land which is graveyard which may disturb the public peace and tranquillity in a place which lies within the local limits of my jurisdiction.

Draw up proceeding under section 107 Cr. P. C. against the members of O. P."

It is not stated in this order as to what was the substance of the report of the police and in what manner the petitioners were likely to commit breach of the peace. It is also not stated as to with regard to which graveyard there was apprehension of breach of the peace. All these things have been left vague. The notices to show cause served on the petitioners were in these very terms. Therefore, it was not clear from the contents of the notices as well as to what allegations the petitioners were to answer.

Such order which does not contain the substance of the information received has been held to be bad in a decision of the Calcutta High Court in the case of Birdhaj Roy v. State, AIR 1953 Cal 491, which has been referred to by the learned Counsel for the petitioners. It has been held therein that the order of the Magistrate not indicating the nature of the information received which induced him to take action under section 107 of the Code is bad. No decision counter to it could be pointed out by the learned Counsel for the opposite party.

4. It has, however been submitted by the learned Counsel for the opposite party that the revision application is premature inasmuch as the petitioners have only been called upon to show cause and that stage is to come when, after the perusal of the show cause the Magistrate would take a decision whether to proceed with the proceeding or not. In this connection, learned Counsel for the opposite party has relied upon a decision of this Court in Criminal Rev. No. 351 of 1954 (Pat) Zahuruddin v. State, decided on the 18th November, 1954. In that case also a proceeding was started under Section 107 of the Code and the petitioners were called upon to show cause as to why they should not be ordered to execute a bond. It was observed that it would be premature for this Court to say whether the allegations did or did not warrant a proceeding under Section 107 of the Code, the learned Magistrate having complete jurisdiction to issue notices under that section.

5. In answer to this, learned Counsel for the petitioners has referred to an earlier decision of this Court in the case of Amanat Ali v. Emperor AIR, 1929 Pat 67. In that case also against the very initial order drawing up a proceeding under section 107 of the Code and calling upon the other side to show cause, a revision was filed and that was allowed on the ground that specifications as required under the law were not indicated in the order, that is to say, the petition in revision was entertained against the initial order calling upon the other side to show cause. This decision is counter to the aforesaid decision in the case of Zahuruddin, Criminal Revn. No. 351 of 1954 D/- 18-11-1954 (Pat), referred to by learned Counsel for the opposite party, in which the revision was characterised as premature at that stage. The decision in the case of Amanat Ali AIR 1929 Pat 67 was not referred to in that decision, which has been relied upon by the learned Counsel for the opposite party. The decision in the case of Amanat Ali being an earlier decision and having not been overruled by a Bench decision of this Court has to be followed. Therefore, I hold that the present revision application is not premature.

6. Another contention of the learned Counsel for the petitioners has been that the petitioners were called upon to show cause why they should not execute a bond for keeping peace for a period of one year and this period must be taken to have begun from the date of the order, that is to say, from the 22nd July, 1966, and, since that period has already elapsed, the order is fit to be set

aside now. In this connection he has relied upon a decision of the Allahabad High Court in the case of Baburam v. Rex, AIR 1949 All 21. In that case the initial order requiring the parties concerned to furnish security for a period of three months commenced from the 18th August, 1947, when it was observed that that period having already expired, if the learned Magistrate was to hear the case upon merits under section 117 of the Code, he would not be in a position to pass a final order in confirmation of the previous order and he would have to drop the proceeding. With such observations, the proceeding was quashed.

It would, however, appear that in that particular case, the period of three months was directed to commence from a particular date. That is not the case in the case under consideration. Further, if such be the intention of law, then in every case, by coming in revision and dealing the matter, the person proceeded against would evade the execution of the bond. Learned Counsel has not been able to cite any decision of this Court on this point. With respect, I am not inclined to agree with the decision referred to above.

7. In view of what has been said above, the application is allowed and the order of the learned Magistrate dated the 22nd July, 1966, is set aside on the ground that it is vague. I would, however, like to make it clear that it is always open to the learned Magistrate to take appropriate action in a legal way if any such occasion arises.

Petition allowed.

AIR 1970 PATNA 109 (V 57 C 18)

**S. N. P. SINGH AND
SHAMBHU PRASAD SINGH, JJ.**

Dehri Rohtas Light Rly. Co. Ltd., Petitioner v. Union of India and another, Opposite Party.

Civil Writ Jurisdiction Case No. 545 of 1968, D/- 26-2-1969.

(A) Railways Act (1890), Ss. 29 and 42 — Constitution of India, Art. 245 — Powers of Central Government under Ss. 29 and 42 are not absolute—Although sections do not provide any guide-lines legislative policy can be gathered from the whole Act. ¶

Sections 29 and 42 are not invalid on the ground that in those sections absolute power has been given to the Central Government to regulate the rates of freight etc. applicable to all Railways

including the non-Government railways. (Para 19)

It is true that in the two impugned sections the Legislature has not provided any guide-line in the matter of regulation of rates of freight etc. by the Central Government. The preamble of the Act also does not lay down any legislative policy and as such it is not possible to gather any guide-line from the preamble of the Act in this regard. But it is well settled that the legislative policy behind a particular enactment can be gathered from the entire provisions of the Act. From the provisions of Ss. 27-A, 28 and 41 of the Act it can be gathered that "reasonableness", "interest of the public" and "avoidance of discrimination" are the basic legislative policy behind the enactment as contained in Chapter V of the Act. There is thus a binding rule of conduct in sections 27A, 28 and 41 of the Act in the light of which the Central Government have to exercise the powers conferred on them under Sections 29 and 42 of the Act. It is, therefore, difficult to hold that the Legislature has delegated its authority to the Central Government in the matter of regulation of rates of freight etc., applicable to Railways including the non-Government Railways by surrendering its essential legislative functions in favour of the Central Government. AIR 1967 SC 1895, Dist.; AIR 1960 SC 475, Rel. on. (Para 15)

(B) Railways Act (1890), Ss. 29 and 42 — Orders under — Quasi-judicial nature — Record of evidence.

The power which is vested in the Central Government under Sections 29 and 42 of the Act is quasi-judicial in nature in so far as it affects the rights of the Companies running non-Government Railways and such a power in the case of non-Government Railways has to be exercised in conformity with the principles of natural justice. Though the Act does not expressly cast a duty on the Central Government to act judicially, as the orders of the Central Government have to be passed on the materials placed before them and such orders might seriously affect the rights of the Companies running non-Government Railways, it is implied that a duty is cast on the Central Government to act judicially in the matter of regulation of rates etc. applicable to non-Government Railways. AIR 1962 SC 1110 and AIR 1967 SC 1398, Foll. (Paras 23 and 26)

(C) Railways Act (1890), Ss. 29 and 42 — Constitution of India, Art. 226 — Speaking orders — Orders of Central Government — Principles to be observed.

Where a statute or any rule framed thereunder in specific terms requires an

authority to give reasons for its decision, the authority is bound to give a reasoned decision. An order passed in contravention of such a mandatory provision would render its decision invalid. The two impugned sections of the Act although do not provide for giving reasons, and the question of the violation of the statutory provision does not arise yet the authority should give reasons in support of its decision as a rule of prudence. Case law discussed.

(Paras 28, 30)

(D) Railways Act (1890), Ss. 28 and 29 — Constitution of India, Art. 14 — Government railway and non-Government railway — Government can be put in a separate class — Discrimination between non-Government railways alleged — Burden of proof is on petitioner.

The Government can be legitimately put in separate class by itself. There can be no two opinions on the question that the profits earned by Government Railways accrue to the benefit of the general public whereas the profits earned by a non-Government Railways accrue to the benefit of a particular individual or a set of individuals. It cannot also be doubted that a Government Railway provides better facilities to the travelling public than a non-Government Railway in several respects. The Government Railways, therefore, can legitimately be put as a class by themselves and as such there will be no violation of Article 14 of the Constitution when the Central Government differentiates between the Government Railways and the non-Government Railways in the matter of fixation of rates of freight etc.

(Para 33)

However, where the petitioner alleges that a discrimination is made between itself and non-Government railways it is for the petitioner to prove by placing sufficient materials before the Court.

(Para 35)

(E) Constitution of India, Art. 226 — Affidavits — New point — Principles.

Ordinarily a new point taken in the rejoinder to the counter-affidavit should not be entertained by the court unless the petitioner with the permission of the court amends the main application. But facts stated in the counter-affidavit of the other side which support a point taken in the petition can always be relied on. Further where a particular point is taken in the main application and what is stated in reply to it in the counter-affidavit of the other side is not factually correct, statements in the rejoinder to the counter-affidavit pointing out the incorrectness of the allegations in the counter-affidavit should also be taken into consideration. If it is open to the plaintiff to a suit to deny in his deposi-

tion the averments in the written statement, there appears no reason why statements in the counter-affidavit not factually correct cannot be denied by filing a rejoinder to it by the petitioner in a writ application. (Para 37)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 414 (V 56) = Writ Petn. No. 118 of 1968, D/- 20-9-1968, Som Datt Datta v. Union of India 20
- (1968) AIR 1968 SC 850 (V 55) = 1968-2 SCR 186, Union of India v. P. K. Roy 25
- (1967) AIR 1967 SC 361 (V 54) = 1968-1 SCJ 198, Bharat Barrel and Drum Mfg. Co. v. L. K. Bose 25
- (1967) AIR 1967 SC 1398 (V 54) = 1967-2 SCR 732, State of Assam v. Gauhati Municipal Board, Gauhati 26
- (1967) AIR 1967 SC 1606 (V 54) = 1967-3 SCR 302, Bhagat Raja v. Union of India 29
- (1967) AIR 1967 SC 1895 (V 54) = 1967-3 SCR 557, Devi Das v. State of Punjab 16
- (1967) Civil Appeal No. 2340 of 1966, D/- 2-2-1967 (SC), State of Maharashtra v. Babulal Kripa-ram Takkamore 40
- (1966) AIR 1966 SC 671 (V 53) = 1966-1 SCR 466, M. P. Industries Ltd. v. Union of India 29
- (1965) AIR 1965 SC 1222 (V 52) = 1965-1 SCR 678, Govindrao v. State of M. P. 29
- (1964) AIR 1964 SC 1179 (V 51) = 1964-6 SCR 846, State of M. P. v. Bhopal Sugar Industries Ltd. 35
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Lal Narayan Sinha, R. P. Katriar and
K. Srinivasan; for Petitioner; Dr. V. A.
Seyid Muhammad, S. Sarwar Ali, Sashi
Kumar Sinha and Shyameshwar Dayal,
for Opposite Party.

S. N. P. SINGH, J.: This is an application
under Articles 226 and 227 of the Con-
stitution of India in which the validity of
the order of the Government of India,
Ministry of Railways (Railway Board),
contained in letter No. TCR/1078/66/DRL,
dated 2-4/5-1968 (Annexure 13) addressed
to the petitioner has been challenged.

2. The relevant facts which are not
in dispute are these. The petitioner.
Dehri Rohtas Light Rly. Co. Ltd., here-
after to be called the petitioner Com-
pany, is a Company registered under the
Indian Companies Act, 1882, having its
registered office at Dalmianagar in the
State of Bihar and it carries on busi-
ness of transport of goods and passengers
by the Dehri Rohtas Light Railway in
the district of Shahabad. Sometime in
the year 1908 Messrs Octavius Steel &
Company, Calcutta, the promoters of a
Company to be called the Dehri Rohtas
Tramway Company Ltd., made an appli-
cation to the Government of Bengal for
sanction to the construction of a line of
Tramway between Dehri-on-Sone on the
East Indian Railway and the village of
Akbarpore within the District of Shaha-
bad. The Government of Bengal by
Notification No. 24 R, dated the 10th of
November, 1908, granted the application
and made an order under section 5 of
the Bengal Tramways Act (III of 1883)
called the Dehri Rohtas Tramway Com-
pany Order (Annexure 1). By the said
order the Government of Bengal reserv-
ed to itself full control over charges of
all kinds for the use of the tramway. An
agreement dated the 4th of June, 1909,
between the District Board of Shaha-
bad, Octavius Steel & Company and the
Dehri Rohtas Tramway Company Ltd.,
was entered into (Annexure 2) and there-
after Dehri Rohtas Light Railway was
constructed. When the Government of
India Act, 1935, came into force, the con-
trol over Dehri Rohtas Light Railway
vested in the Federal Railway Authority
(which before its establishment meant the
Central Government) by virtue of the pro-
visions of Section 311 (2) of the Govern-
ment of India Act, 1935. Thereafter the
petitioner Company is governed by the
provisions of Indian Railways Act, 1890
(Act IX of 1890), hereafter called "the
Act", and is included in the definitions
of "Railway Company" and "Railway
Administration" within the meaning of
Section 3 of the Act. In exercise of the
powers conferred on the Central Govern-
ment by Section 29 of the Act, the Cen-
tral Government fixes the maximum and
minimum rates from time to time appli-
cable to Government Railways and other
private Railways including the petitioner
Company. The Central Government also
by virtue of the provisions contained in
Section 42 of the Act classifies any
commodity, which has not been classified
before, or re-classifies any commodity
and increases or reduces the level of class
rates and other charges applicable to
Government Railways and other private
railways including the petitioner Com-
pany.

3. It appears that there was a general revision of classification and rates by the Central Government in the year 1958 and accordingly the petitioner Company also revised the freight rate in 1958. The Central Government permitted to levy five per cent surcharge on the basic rates as revised in 1958 with effect from the 1st of April, 1960, to all Railways including the petitioner Company. By order No. TC. I/1078/62 dated the 2nd of May, 1962, the Railway Board revised the basic freight rates for goods, coal and livestock traffic in respect of all Government Railways and forwarded the copy of the order to all non-Government Railways including the petitioner Company asking them whether they also desired that the proposed increase should be made applicable to them as well and to furnish full justification for the same to enable the Board to examine the question further (Annexure 4). It appears that the petitioner Company sent a representation dated the 5th July, 1962, in which the petitioner Company made a request for making the increased freight rates applicable to it (Annexure 5). The Railway Board, however, rejected the representation of the petitioner Company and by their letter no. TCI/1078/62, dated the 20th of August, 1962, informed the petitioner Company that after considering all the points raised in the letter of the petitioner Company the Board came to the conclusion that no increase in the rates in force over the Dehri Rohtas Light Railway was called for (Annexure 6). The request made by the other non-Government Railways for the increase in rates and freights was acceded to and they were allowed the same increase in rates and freights as were applicable to the Government Railways.

4. It appears that in 1963 in respect of Government Railways the supplementary charge on goods traffic was increased from 5% to 10 p. c. and a surcharge of 10% was introduced on parcels traffic. All non-Government Railways including the petitioner Company and Port Trust Railways made a request for similar increase in the rate of supplementary charge. The request made by the petitioner Company was turned down by the Railways Board whereas the request made by the other non-Government Railways and Port Trust Railways was acceded to and they were allowed to implement the same increase in the rate of supplementary charge from different dates as was made applicable in the case of Government Railways.

5. In the year 1964 there was a further increase in the rate of supplementary charge from 10% to 12% on goods freight with effect from the 1st of April, 1964, in respect of Government Railways.

All non-Government Railways including the petitioner Company made representations for similar increase in the rate of supplementary charge. The increase in the rate of supplementary charge was sanctioned to all non-Government Railways except the petitioner Company from different dates. The request made by the petitioner Company for increase in the rate of supplementary charge was finally turned down by the Ministry of Railways by their letter No. TCI/1078/64 DRL dated the 8th of June, 1965 (Annexure A).

6. It is alleged that by Circular No. TCI/1078/65 dated the 27th of February, 1965, and the 12th of March, 1965, the Railway Board ordered various adjustments in freight rates with effect from the 1st of April, 1965, both upward and downward, by way of reclassification of certain commodities, introduction of some new classes and merging of the supplementary charges in the basic rates which had been permitted earlier to Government and some non-Government Railways. It is further alleged that the petitioner Company was required to show the supplementary charges separately and was not permitted to merge with the basic freight as was done in the case of all Government Railways and other non-Government Railways, although the reclassifications, upward and downward, were made applicable to the petitioner Company. It is stated in the counter-affidavit filed on behalf of the opposite party that the petitioner Company was permitted to revise the rates merging the 5% supplementary charge and to notify them with effect from the 1st of May, 1965. In support of the above statement, the copy of letter no. TCI/1078/65, dated the 9th of April, 1965, from the Ministry of Railways, addressed to the Managing Agents, Dehri Rohtas Light Railway, Dalmianagar, has been enclosed with the counter-affidavit (Annexure B).

7. In the year 1966 a supplementary charge of 3% was introduced with effect from the 1st of April, 1966, on goods traffic subject to certain exceptions in respect of Government Railways. All non-Government Railways including the petitioner Company made representations for similar increase in the supplementary charge. The representations made by other non-Government Railways, namely, Shahadra-Saharanpur, Arrah-Sasaram, Futwa-Islampur, Howrah-Amta and Howrah-Sheakala, were made applicable to them with effect from the 15th of December, 1966. The representation made by the petitioner Company dated the 18th of October, 1966 (Annexure 7) was turned down by the Ministry of Railways by their letter No. TCR/1078/65/

DRL, dated the 9th of January, 1967 (Annexure 8).

8. It appears that in the year 1967 also there was some increase in the charges in respect of Government Railways. All non-Government Railways including the petitioner Company made representations for permitting the same increase and all the non-Government Railways except the petitioner Company were allowed the same increase from different dates. The representation of the petitioner dated the 17th of June, 1967 (Annexure 9) was turned down by letter No. TCR/1078/66 DRL dated the 27th of December, 1967, of the Ministry of Railways (Annexure 10). It appears that the petitioner Company again sent a letter dated the 21st of February, 1968, to the Railway Board for reconsideration of the aforesaid order dated the 27th of December, 1967, and made a request for increase in freights and fares as were applicable to the other Railways (Annexure 11). In response to the letter of the petitioner Company (Annexure 11), the Government of India. Ministry of Railways (Railway Board) by the impugned order, as contained in their letter no. TCR/1078/66/DRL, dated 2-4/5-1968. (Annexure 13), accorded sanction for the increase in freight rates for goods traffic and passenger fares with effect from the 1st June, 1968, in respect of the petitioner Company on the following basis:

(a) The supplementary charge leviable on goods traffic to be increased from 5% to 10%.

(b) The basis for first class passenger fares to be increased from 5.18 paise per kilometre to 6 paise per kilometre, for second class from 2.91 paise per kilometre to 3.5 paise per kilometre and for the third class from 1.94 paise per kilometre to 2.25 paise per kilometre.

9. In the meantime the Railway Board revised the freight rates of passenger fares in respect of Government Railways with effect from the 1st of April, 1968, and all the non-Government Railways with effect from the 11th April, 1968. The petitioner Company thereupon made a representation by letter dated the 20th April, 1968, in which they made a request for the same increase in freights and fares (Annexure 12).

10. It appears that the petitioner Company, not being satisfied with the decision of the Railway Board as conveyed in their letter (Annexure 13), sent a letter by way of representation to the Railway Board on the 11th of May, 1968, in which they made another request for making the freight rates at par with the rates applicable to Government and other non-Government Railways (Annexure 16). On the 27th of May, 1968, the petitioner Company sent a telegram to the Railway

Board to expedite the sanction (Annexure 17). A letter was also sent by the petitioner Company on the 17th of June, 1968, in which a request was made for an early decision on their representation. The Railway Board by their letter no. TCR/1078/66/DRL, dated the 23rd of July, 1968 ultimately rejected the representation made by the petitioner Company and expressed their inability to accede to any further enhancement in fares and freights (Annexure D). The above-mentioned letter of the Railway Board was sent to the petitioner Company after the present application was filed in this Court on the 22nd of July, 1968.

11. It is alleged that the freight rates which are applicable to the petitioner Company after the increase made by the order of the Railway Board dated 2-4/5-68 are almost equal to the freight rates which were applicable in the case of Government Railways with effect from the 1st of July, 1962. Statements showing the year to year increase in the freight rates applicable to Government Railways and those applicable to the petitioner Company in regard to some major commodities, such as, limestone and cement, have been filed as Annexures 14 and 15. According to the petitioner Company, the Central Government has made a discrimination against the petitioner Company by allowing them only the increase in the rates which had been allowed to the Government Railways as far back as 1962 instead of allowing them to charge the same rates as are at present charged by the Government and other non-Government Railways.

12. In their application the petitioner Company has challenged the validity of the order (Annexure 13) on various grounds. In their counter-affidavit the opposite party have alleged that the petitioner Company stands in a class by itself and that the reasons, which led to increase in the freight rates etc., from time to time in respect of Government Railways, are not applicable to the petitioner Company. It is further alleged that the Central Government in granting increase in freight rates etc., to other non-Government Railways have taken into consideration their financial position.

13. Mr. Lal Narayan Sinha, learned counsel appearing for the petitioner Company without disputing the position that the petitioner Company is governed by the provisions of the Act, at the time of argument raised the following contentions.

(a) That sections 29 and 42 of the Act are invalid in so far as they empower the Central Government to regulate the rates of freight etc., applicable to non-Government Railways.

(b) That the power, which is vested in the Central Government under Ss. 29

and 42 of the Act, is quasi-judicial in nature and it has to be exercised in conformity with the principles of natural justice which has not been done while fixing the rates of freight etc. of the petitioner Company.

(c) That the Central Government while exercising quasi-judicial power under sections 29 and 42 of the Act have to pass reasoned orders which have not been done in the case of the petitioner Company.

(d) That the Central Government in fixing the rates of freight etc., have made a discrimination between the petitioner Company and the Government Railways as well as between the petitioner Company and other non-Government Railways without any reasonable basis.

(e) That the Central Government have taken into consideration irrelevant factors and have left out of consideration relevant factors in fixing the rates of freight etc., applicable to the petitioner Company.

14. I shall now proceed to consider the points raised seriatim. The validity of sections 29 and 42 of the Act has been challenged on the ground that in the two sections absolute power has been given to the Central Government to regulate the rates of freight etc. applicable to all railways including the non-Government railways. Mr. Sinha urged that the two sections may be valid in so far as they empower the Central Government to regulate the rates of freight etc. applicable to Government railways inasmuch as the Central Government have the absolute right to regulate the rates of freight and fare applicable to their own Railways but the sections are invalid in so far as they empower the Central Government to regulate the rates of freight and fare applicable to non-Government Railways because the Legislature has not provided any guidance in the matter of fixation of rates. According to Mr. Sinha there is a complete delegation of the Legislative functions in the Central Government in regard to the question as to what would be the guiding principles in the matter of fixation of rates of freight and fare applicable to non-Government Railways. Section 29 of the Act reads as follows:

"(1) The Central Government may by general or special order fix maximum and minimum rates for the whole or any part of a railway, and prescribe the conditions in which such rates will apply.

(2) The Central Government may, by a like order, fix the rates of any other charges for the whole or any part of a railway and prescribe the conditions in which such rates of charges shall apply.

(3) Any complaint that a railway administration is contravening any order

issued by the Central Government under sub-section (1) shall be determined by the Central Government."

It is clear from the provisions of S. 29 that no guiding principles have been provided there in the matter of fixation of maximum and minimum rates or the rates of any other charges applicable to the whole or any part of a railway and for prescribing the conditions in which the rate and rates of charges are to be applied. Section 42 of the Act runs as follows:

"The Central Government alone shall have power—

(a) to classify or reclassify any commodity;

(b) to increase or reduce the level of class rates and other charges."

Similarly no guiding principles have been provided in section 42 itself in the matter of classification or reclassification of the commodities or in the matter of increase or reduction in the level of class rates and other charges by the Central Government. Thus, in the two impugned sections the Legislature has not provided any guide-line in the matter of regulation of rates of freight etc. by the Central Government. The preamble of the Act does not lay down any legislative policy and as such it is not possible to gather any guide-line from the preamble of the Act in the matter of regulation of rates of freight etc. by the Central Government.

15. The next question which falls for consideration is whether any legislative policy has been laid down in the other relevant sections of the Act. It is well settled that the legislative policy behind a particular enactment can be gathered from the entire provisions of the Act (See the cases of *Union of India v. Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 and *Vasanlal Maganbhai Sanjanwala v. State of Bombay*, AIR 1961 SC 4). Chapter V of the Act in which the two impugned sections occur is headed as "Traffic Facilities". Section 27 imposes an obligation on a Railway Administration to arrange for receiving and forwarding traffic without unreasonable delay and without partiality. Section 27A empowers the Central Government in the public interest to give directions in regard to transport of goods by a Railway Administration. Section 28 lays down as follows:

"A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or un-

reasonable prejudice or disadvantage in any respect whatsoever."

Section 41 of the Act reads thus:

"(1) Any complaint that a railway administration—

(a) is contravening the provisions of section 28,

(b) is charging for the carriage of any commodity between two stations a rate which is unreasonable, or

(c) is levying any other charge which is unreasonable,

may be made to the Tribunal, and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this Chapter.

(2) In the case of a complaint under clause (a) of sub-section (1),

(i) whenever it is shown that a railway administration charges one trader or class of traders or the traders in any local area lower rates for the same or similar animals or goods or lower rates for the same or similar services, than it charges to other traders or classes of traders, or to the traders in another local area, the burden of proving that such lower charge does not amount to an undue preference shall lie on the railway administration.

(ii) in deciding whether a lower charge does or does not amount to an undue preference, the Tribunal may, in addition to any other considerations affecting the case, take into consideration whether such lower charge is necessary in the interests of the public.

(3) In the case of a complaint under clause (b) or clause (c) of sub-section (1), the Tribunal may fix such rate or charge as it considers reasonable:

Provided that the rate to be fixed under clause (b) of sub-section (1) shall be within the limit of the Government under sub-section (1) of section 29.

(4) A complaint under this section may be made jointly against two or more railway administrations".

From the provisions of sections 27A, 28 and 41 of the Act it can be gathered that "reasonableness", "interest of the public" and "avoidance of discrimination" are the basic legislative policy behind the enactment as contained in Chapter V of the Act. There is thus a binding rule of conduct in sections 27A, 28 and 41 of the Act in the light of which the Central Government have to exercise the powers conferred on them under sections 29 and 42 of the Act. It is, therefore, difficult to hold that the Legislature has delegated its authority to the Central Government in the matter of regulation of rates of freight etc., applicable to Railways including the non-Government Railways by surrendering its essential legislative functions in favour of the Central Government.

16. Mr. Sinha appearing for the petitioner company strongly relied on a decision of the Supreme Court in the case of *Devi Das v. State of Punjab*, AIR 1967 SC 1895. In that case section 5 of the East Punjab General Sales Tax Act, 1948, as it originally stood, was held to be void. The learned Chief Justice while dealing with the question regarding the validity of section 5 of the Punjab Act observed as follows:

"Under section 5 of the Punjab General Sales Tax Act, 1948, as it originally stood, an uncontrolled power was conferred on the Provincial Government to levy every year on the taxable turnover of a dealer a tax at such rates as the said Government might direct. Under that section the Legislature practically effaced itself in the matter of fixation of rates and it did not give any guidance either under that section or under any other provisions of the Act...no other provision was brought to our notice. The argument of the learned counsel that such a policy could be gathered from the constitutional provisions cannot be accepted, for, if accepted, it would destroy the doctrine of excessive delegation. It would also sanction conferment of power by Legislature on the executive Government without laying down any guide-lines in the Act. The minimum we expect of the Legislature is to lay down in the Act conferring such a power of fixation of rates clear legislative policy or guide-lines in that regard. As the Act did not prescribe any such policy, it must be held that Section 5 of the said Act, as it stood before the amendment, was void." The case relied upon by learned counsel appearing for the petitioner is distinguishable on the ground that in that case no legislative policy or guide-lines were found under any other provisions of the impugned Punjab Act. As I have already indicated, a clear legislative policy and guide-lines have been laid down under other provisions of the Act, namely, Sections 27-A, 28 and 41 of the Act.

17. Dr. V. A. Seyid Muhammad appearing for the opposite party relied on the following cases, namely, *N. T. F. Mills Ltd. v. 2nd Punjab Tribunal*, AIR 1957 SC 329, *Jyoti Pershad v. Union Territory of Delhi*, AIR 1961 SC 1602 and *Abdul Wajid v. State of U. P.*, AIR 1955 All 708 for the proposition that the basic idea underlying all the provisions of the Act has to be taken into consideration for judging the vires of the Act. The decisions in the cases referred to and relied upon by the learned counsel appearing for the opposite party support his contention.

18. Dr. V. A. Seyid Muhammad put forward an alternative argument that even if it be held that the Legislature

has not given sufficient guidance to the Central Government in the matter of fixation of rates of freight etc., the discretion to exercise the powers being vested in a high authority, the Court will assume that the authority will exercise the power conferred upon it reasonably. According to learned counsel, mere possibility of the abuse of power is not a sufficient ground to strike down the provisions of the Act as unconstitutional. In support of his above contention, he relied on the following cases, namely, *Pannalal Binraj v. Union of India*, AIR 1957 SC 397, *Virendra v. State of Punjab*, AIR 1957 SC 896 and *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318. Learned counsel further relied on the following passage in "Willis on Constitutional Law" (1936 Edition) at pages 586-587:

"... Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by those upon whom conferred. If this is the correct position, the only question that would then arise would be the delegation of legislative power. If a statute declares a definite policy, there is a sufficiently definite standard for the rule against the delegation of legislative power, and also for equality if the standard is reasonable. If no standard is set up to avoid the violation of equality, those exercising the power must act as though they were administering a valid standard."

It is not necessary to consider the alternative argument of learned counsel for the opposite party in any detail in view of the fact that, as found above, there is a sufficient legislative policy in the Act itself in the light of which the Central Government have to exercise the powers conferred upon them under the two impugned sections of the Act.

19. It will be relevant to refer to some of the passages in the Report of the Railway Freight Structure Enquiry Committee 1955-57, Volume I (Part-I), which reveal the legislative history of the Act. Paragraph 278 of the Report shows that when more railways were established and when more Companies were formed, the necessity for a check on the rating policy of the Companies to safeguard the interest of both the railways and the public was felt.

Paragraph 278 of the Report runs thus:

"In the early days of railways in this country the need for detailed control by Government was not felt. As more railways were established and more railway companies were formed, there was a growing desire that Government should have a check on the rating policy of the companies to safeguard the interest of both the railways and the public. By a

resolution of the Government of India, of 12th December, 1887, it was laid down, amongst other principles,

"that, although in the interests of the public, Government should abstain from direct interference in the matter of rates and fare yet there are certain ruling principles which Government, as the guardian of public interests, must see complied with by the railway administration. There should be no undue preference, in other words, railway administration ought not to be permitted to make preferential bargain with particular persons or companies, such as granting them scales of charges more or less favourable than those granted to the public generally. Again, in cases where the traffic offering is sufficient to justify these arrangements, railway administration must give reasonable facilities for public traffic between any two railway stations, each railway administration being contented to receive for its share of the through rate, less than its ordinary low rate."

It appears from paragraph 279 of the Report that when the Act was passed in 1890, in order to safeguard the interest of the public provision was made in the Act for the appointment of a Railway Commission. The legislative history of the Act, therefore, shows that "interest of the public" was the dominant consideration for a check by the Government on the rating policy of the Companies running non-Government Railways. The Legislature in Chapter V of the Act clearly indicated that "interest of the public", "avoidance of discrimination" and "reasonableness" are the three basic factors which have to be taken into consideration in the matter of check by the Government on the rating policy of the Railways. For all these reasons, I would overrule the first contention which has been raised on behalf of the petitioner Company and hold that sections 29 and 42 of the Act are valid.

20. I now proceed to deal with the second contention of learned Counsel appearing for the petitioner Company. Mr. Sinha urged that the petitioner Company and other Companies, which are running non-Government Railways, have a right to conduct their business according to their choice which includes the right to fix their own rates for rendering service to the people by transporting goods and passengers. Therefore, the power which is vested in Central Government under sections 29 and 42 of the Act is quasi-judicial in nature inasmuch as the exercise of the power affects the right of all such Companies, which run non-Government Railways, and such a power must be exercised in conformity with the principles of natural justice. According to Mr.

Sinha, the Central Government have not followed the principles of natural justice while fixing the rates of freight etc., applicable to the petitioner Company. Learned counsel appearing for the opposite party, on the other hand, submitted that no duty is cast on the Central Government by the provisions of the Act to act judicially and the orders which are passed by the Central Government under Sections 29 and 42 of the Act are purely administrative in nature. The Central Government, therefore, are not required to strictly observe the principles of natural justice while passing the orders. Alternatively, he argued that even if it be held that the power vested in the Central Government is quasi-judicial in nature, there has been no violation of the principles of natural justice because the petitioner Company was given ample opportunity to represent their case for enhancement in the rates of freight and fare before the impugned order was passed by the Central Government.

21. On the rival contentions raised on behalf of the parties, two main points fall for consideration, namely, (1) whether the power vested in the Central Government under sections 29 and 42 of the Act is quasi-judicial in nature or it is purely of administrative character and (2) whether the Central Government have transgressed the principles of natural justice while passing the impugned order (Annexure 13) if the nature of the power vested in the Central Government be held to be quasi-judicial in nature. It will not be necessary to deal with the second point if it is found that the nature of the power that the Central Government have to exercise under sections 29 and 42 of the Act is purely administrative in character. It shall have, however, to be considered whether the Central Government have observed the ordinary rules of fair play while passing the impugned order.

22. Learned counsel appearing for the petitioner Company relying on the case of *R. v. Manchester Legal Aid Company*, (1952) 1 All ER 480, urged that where an authority is under an obligation to pass an order on objective determination of certain facts, either under an express provision of the statute or by implication and the order affects the right of some one, the authority concerned is under a duty to act judicially. According to Mr. Sinha, the very nature of the power vested in the Central Government to regulate the rates of freight etc., implies that the Central Government have to act objectively taking into consideration the relevant facts and any decision of the Central Government in that regard has the direct effect on the

right of the Companies running non-Government Railways. According to learned counsel appearing for the opposite party, the mere fact that a decision has to be taken by an objective test and the decision affects the right of some one, the decision cannot be said to be quasi-judicial in nature. He submitted that the real test is whether by the statute a duty is cast on the authority to act judicially.

23. In the case of *Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam*, AIR 1958 SC 398 at p. 399 it was observed as follows:

"...whether or not an administrative body or authority functions as a purely administrative one or in a quasi-judicial capacity, must be determined in each case, on an examination of the relevant statute and the rules framed thereunder." In the case of *Radeshym Khare v. State of Madhya Pradesh*, AIR 1959 SC 107 the learned Chief Justice made the following observation:

"As stated in paragraph 115 of Halsbury's Laws of England, Volume 11 at page 57, the duty to act judicially may arise in widely differing circumstances which it would be impossible to attempt to define exhaustively. The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute with the assistance of the general principles laid down in the judicial decisions. The principles deducible from the various judicial decisions considered by this Court in *Province of Bombay v. Khusaldas S. Advani*, AIR 1950 SC 222 at p. 260 were thus formulated, namely:

(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

In the instant case there is no *lis* and there is no question of any contest

between the two parties and as such the principle referred to under the first category has no application. It has, therefore, to be considered whether the case comes under the second category, namely, whether the provisions of the Act require the Central Government to act judicially when passing orders under sections 29 and 42 of the Act. No express provisions have been made in the Act regarding the procedure to be adopted by the Central Government in carrying out their duties under sections 29 and 42 of the Act. It is manifest, however, from the nature of the power, which is vested in the Central Government, that they have to take into consideration the various facts before passing orders under sections 29 and 42 of the Act. Undoubtedly an order passed under sections 29 and 42 of the Act in respect of non-Government Railways affects the right of the Companies to run their Railways according to their choice. It is not disputed that the Central Government pass orders under sections 29 and 42 of the Act in respect of non-Government Railways after consideration of the materials placed before them.

Indeed, in paragraph 17 (vi) of the counter-affidavit it has been stated that the Central Government exercise the powers under Section 42 of the Act after considering both the viewpoints of the Railways, their financial position and the effect of fixation of rates and charges on the public. Taking into consideration all the circumstances, I am of the view that though the Act does not expressly cast a duty on the Central Government to act judicially, as the orders of the Central Government have to be passed on the materials placed before them and such orders might seriously affect the rights of the Companies running non-Government Railways, it is implied that a duty is cast on the Central Government to act judicially in the matter of regulation of rates etc., applicable to non-Government Railways. As observed by their Lordships of the Supreme Court in the case of Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta AIR 1962 SC 1110—

"... the statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions of the statute in the first instance in each case and on one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially

will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision of the person affected and other indicia afforded by the statute."

I accordingly hold that the power which is vested in the Central Government under sections 29 and 42 of the Act is quasi-judicial in nature in so far as it affects the rights of the Companies running non-Government Railways and such a power in the case of non-Government Railways has to be exercised in conformity with the principles of natural justice.

24. It is now to be considered whether or not the Central Government have violated the principles of natural justice, while passing orders relating to the fixation of rates of freight etc. applicable to the petitioner Company. Paragraph 21 (iv) and (v) of the application, in which the petitioner Company has taken the specific ground regarding the violation of the principles of natural justice, read thus:

"21 (iv) The petitioner was not given any opportunity to show cause against the proposed order nor was it informed of the reasons why its request could not be acceded to as a result of which the petitioner could not explain the relevant materials and their effect and the consequent relief to which the petitioner is entitled.

(v) The said orders having been passed without due consideration and without giving the petitioner an opportunity to prove its case and thus they offend the rules of natural justice. They are, therefore, illegal and void."

In paragraph 17 of the counter-affidavit filed by the opposite party the allegation that the principles of natural justice have been violated has been denied and it has been asserted that all opportunities were given to the petitioner for justifying their case for the increased rates. It is further stated in that paragraph as follows:

"... The petitioner Light Railway not only made representations on the subject and produced whatever evidence they wished to, they were also asked to supply additional information and clarification and they did so. And it was only after all the material supplied by them or obtained from them had been duly considered that the Ministry of Railways took the decision. These matters were considered by the Ministry of Railways carefully and the Ministry of Railways decided in favour of the petitioner by making applicable to them the increases in freight rates and fares as

detailed in the order dated 2/4-5-1968 of the Ministry of Railways, a copy of which is enclosed to the petition and marked as Annexure 13. It is, therefore, abundantly clear that the petitioner was given all opportunity in the matter and the question of offending the rules of natural justice by the opposite party did not arise."

25. The two impugned sections of the Act do not contemplate recording of oral or documentary evidence in the usual way as in a court of law nor do they contemplate a regular hearing by the Central Government. No rule framed under the Act has been brought to our notice in course of arguments to show that the Central Government have to follow a particular procedure before passing an order either under S. 29 or under section 42 of the Act in respect of Government Railways. As observed in the case of *Bharat Barrel and Drum Mfg. Co. v. L. K. Bose*, AIR 1967 SC 361—

"... It is now well settled that while considering the question of breach of the principles of natural justice the court should not proceed as if there are any inflexible rules of natural justice of universal application. The Court therefore has to consider in each case whether in the light of the facts and circumstances of that case, the nature of the issues involved in the inquiry, the nature of the order passed and the interests affected thereby, a fair and reasonable opportunity of being heard was furnished to the person affected."

In the case of *Union of India v. P. K. Roy*, AIR 1968 SC 850 the same principle has been reiterated in these words:

"... the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

26. It is not disputed that whenever the Government of India revised the freight rates etc. in respect of Government Railways and non-Government Railways, they were informed by the Railway Board and they were asked to furnish full justification for the increase in the freight rates etc., if they desired that the proposed increase should be made applicable to them as well. On being asked by the Railway Board to furnish justification for the increase in the freight rates etc., the petitioner Company had sent written representations from time to time. Along with the let-

ter of representations the petitioner Company had sent various statements to show the increase in the cost of running the Railway and at times they had also sent their annual reports. According to Mr. Lal Narayan Sinha, the petitioner Company ought to have been given an opportunity for personal hearing by the Central Government before rejecting the representation of the petitioner Company and before passing the impugned order (Annexure 13) allowing only a partial increase in the rates of freight etc. Mr. Sinha submitted that the petitioner Company would have been able to show to the satisfaction of the Central Government that regard being had to all the relevant facts including the fact that there is a considerable increase in the cost of running Railway Administration, the petitioner Company is entitled to the same increase in the rates of freight and fare as they are made applicable to the Government Railways and other non-Government Railways if it had been given a personal hearing before the decision of the Central Government. Learned counsel appearing on behalf of the opposite party contended that as the provisions of the Act do not contemplate a personal hearing, the Central Government were not bound to give a personal hearing to the petitioner Company. He, however, conceded that if the petitioner Company had demanded a personal hearing and the same had been denied by the Central Government, the question regarding violation of the principles of natural justice might have arisen.

In support of his contention he relied on the decision in the case of the *State of Assam v. Gauhati Municipal Board*, Gauhati, AIR 1967 SC 1398. In that case a question for consideration was whether the Gauhati Municipal Board was entitled to a personal hearing before the State Government passed the order of supersession under Section 298 of the Assam Municipal Act. The High Court had held that the proceedings culminating in an order under Section 298 of the Assam Municipal Act were quasi-judicial and there was violation of the principles of natural justice in that case. According to the decision of the High Court, the State Government should have given an oral hearing to the Board and should also have given opportunity to produce materials in support of the explanation offered by the Board. While dealing with the question whether the principles of natural justice were violated and the Board had a right of personal hearing, their Lordships of the Supreme Court observed as follows:—

"The High Court has conceded that a personal hearing of the nature indicated above is not always a concomitant of the

principles of natural justice. But it was of the view that in the present case principles of natural justice required that the Board should have been given a personal hearing and an opportunity to produce materials in support of the explanation. We should have thought that when the Board is giving notice as required by Section 298 it would naturally submit its explanation supported by facts and figures and all relevant material in support thereof. However, we are definitely of opinion that the provisions of section 298 being fully complied with it cannot be said that there was violation of principles of natural justice in this case when the Board never demanded what is called a personal hearing, and never intimated to the Government that it would like to produce materials in support of its explanation at some later stage. Therefore, where a provision like section 298 is fully complied with as in this case and the Board does not ask for an opportunity for personal hearing or for production of materials in support of its explanation, principles of natural justice do not require that the State Government should ask the Board to appear for a personal hearing and to produce materials in support of the explanation. In the absence of any demand by the Board of the nature indicated above, we cannot agree with the High Court that merely because the State Government did not call upon the Board to appear for a personal hearing and to produce material in support of its explanation it violated the principles of natural justice."

Two principles are deducible from the observation of their Lordships of the Supreme Court in the above-mentioned case, namely, that a personal hearing is not always a concomitant of the principles of natural justice and that there is no question of the violation of the principles of natural justice when the aggrieved party has not demanded a personal hearing. In the instant case the petitioner Company in their representation (Annexure 7) did not ask for a personal hearing. In the representation (Annexure 9) the petitioner Company simply stated as follows:

"We shall be glad to furnish any other information and depute our representative for personal discussions, if necessary."

In the representation (Annexure 11) no request for personal hearing was made. In the representation (Annexure 12) it was stated as follows:

"We will be pleased to explain the various points and reply to further queries as may be desired and will be prepared to discuss various points per-

sonally at any place in India as and when called for."

As I have already stated, after the receipt of the impugned order (Annexure 13), the petitioner Company sent another representation on the 11th May, 1968 (Annexure 16). In that application the petitioner stated as follows:

"It is further requested that the matter may please be given your immediate attention and if required we may be given an opportunity to explain the various points and reply to further queries if any, as may be desired."

In the telegram (Annexure 17) and in the letter (Annexure 18), which the petitioner Company sent subsequently, it did not make any request for a personal hearing. As I have already stated, by Annexure 'D' dated the 23rd of July, 1968, the Railway Board finally rejected the representation made by the petitioner Company and expressed their inability to accede to any further enhancement in freights and fares. From the various representations, which I have referred to above, it is clear that the petitioner Company did not make a demand for personal hearing. The request made in three of the representations cannot be construed as a demand for personal hearing inasmuch as the petitioner Company left the matter whether they should be given an opportunity to explain the various points to the discretion of the Central Government. For the reasons stated above, I find it difficult to hold that the principles of natural justice have been violated by the Central Government because the petitioner Company was not given a personal hearing.

27. I shall now deal with the third point raised by Mr. Lal Narayan Sinha. Mr. Sinha submitted that in none of the orders, which have been passed by the Central Government and communicated to the petitioner Company, the reasons for disallowing the increase in the rates of freight and fare have been given. It is, therefore, difficult for the petitioner Company to know the grounds on which the representations made by it have been disallowed. According to Mr. Sinha, an authority exercising quasi-judicial power must pass a reasoned order. Learned counsel appearing for the opposite party, on the other hand, contended that an authority exercising quasi-judicial power need not give reasons in support of its decision in every case. It must give reasons when its decision is likely to be challenged in appeal or in revision. According to learned counsel, as an order passed by the Central Government either under section 29 or under section 42 of the Act is final and there is no provision in the Act for appeal or revision against the decision of the Central Gov-

ernment, an order passed under either of the sections cannot be held to be bad in law merely because no reasons have been given in support of the order.

28. Where a statute or any rule framed thereunder in specific terms requires an authority to give reasons for its decision, the authority is bound to give a reasoned decision. An order passed in contravention of such a mandatory provision would render its decision invalid. As the two impugned sections of the Act do not provide for giving reasons, the question of the violation of the statutory provision does not arise in the instant case. It is, however, to be considered whether the absence of reasons in the various orders passed by the Central Government has rendered those decisions invalid on the ground of the failure of the principles of natural justice. In order to decide the point it is necessary to review some of the judicial decisions.

29. In the case of *Express Newspaper Ltd. v. Union of India*, AIR 1958 SC 578 one of the grounds of attack was that the decision of the Wage Board constituted under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, was illegal because no reasons were given by it for its decision. While dealing with that point it was observed as follows:

"It was no doubt not incumbent on the Wage Board to give any reasons for its decision. The Act made no provision in this behalf and the Board was perfectly within its rights if it chose not to give any reasons for its decision. Prudence should, however, have dictated that it gave reasons for the decision which it ultimately reached because if it had done so, we would have been spared the necessity of trying to probe into its mind and find out whether any particular circumstance received due consideration at its hands in arriving at its decision. The fact that no reasons are thus given, however, would not vitiate the decision in any manner and we may at once say that even though no reasons are given in the form of a regular judgment, we have sufficient indication of the Chairman's mind in the note which he made on April 30, 1956, which is a contemporaneous record explaining the reasons for the decision of the majority."

In the case of *Harinagar Sugar Mills v. Shyam Sunder*, AIR 1961 SC 1669 the point for consideration was whether the authority exercising appellate power under section 111 (3) of the Indian Companies Act, 1956, was obliged to set out reasons in support of its decision. While considering that question, it was observed as follows:

"If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of this Court under Article 136 of the Constitution, we fail to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order".

In the case of *Govindrao v. State of M. P.* AIR 1965 SC 1222, while considering the validity of the order passed by the Government under section 5 (3) of the Central Provinces and Berar Revocation of Land Revenue Exemption Act (37 of 1948) it was observed as follows:

"The next question is whether Government was justified in making the order of April 26, 1955? That order gives no reasons at all. The Act lays upon the Government a duty which obviously must be performed in a judicial manner. The appellants do not seem to have been heard at all. The Act bars a suit and there is all the more reason that Government must deal with such cases in a quasi-judicial manner giving an opportunity to the claimants to state their case in the light of the report of the Deputy Commissioner. The appellants were also entitled to know the reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act to be compensated in this manner."

In the case of *M. P. Industries Ltd. v. Union of India* AIR 1966 SC 671 it was held that in exercising the power of revision under rule 55 of the Mineral Concession Rules, 1960, the Central Government acts as a judicial tribunal and as the decision of the Central Government is subject to appeal under Article 136 of the Constitution of India, the giving of reasons for its decision is necessary. In the case of *Bhagat Raja v. Union of India* AIR 1967 SC 1606 the view expressed in the case of AIR 1966 SC 671 was reiterated and it was held that in exercising the powers of revision under rule 55 of the Mineral Concession Rules 1960 the Central Government discharge functions which are quasi-judicial in nature.

While considering the question whether it was incumbent on the Central Government to give any reasons for its decision on review it was observed as follows:

"The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great dis-

advantage if no reasons are given and the revision is dismissed curtly by use of the single word 'rejected' or 'dismissed'. In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court in appeal may have to examine the case *de novo* without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances, what is known as a 'speaking order' is called for."

Learned counsel appearing for the opposite party placed before us an unreported decision of the Supreme Court in the case of *Som Datt Datta v. Union of India*, Writ Petn. No. 118 of 1968 D/-20-9-1968 = (AIR 1969 SC 414). In that case it was contended that the order of the Chief of the Army Staff confirming the proceedings of the Court Martial under section 164 of the Army Act and that of the Central Government dismissing the appeal of the petitioner under section 165 of the Army Act were illegal since no reasons had been given by either of them. The contention was overruled with the following observation:

"In the present case, it is manifest that there is no express obligation imposed by section 164 or by section 163 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial. Mr. Dutta has been unable to point out any other section of the Act or any of the rule made therein from

which necessary indication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication we are unable to accept the contention of Mr. Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision. In English law there is no general rule apart from the statutory requirement that the statutory tribunal should give reasons for its decision in every case.

In *Rex v. Northumberland Compensation Appeal Tribunal*, 1952-1 KB 338 it was decided for the first time by the Court of Appeal that if there was a speaking order a writ of certiorari could be granted to quash the decision of an inferior court or a statutory tribunal on the ground of error on the face of record. In that case, Danning L. J. pointed out that the record must at least contain the document which initiates the proceedings in the pleadings, if any, and the adjudication but not the evidence nor the reasons, unless the tribunal chooses to incorporate them in its decision. It was observed that if the tribunal did state its reasons and these reasons were wrong in law a writ of certiorari might be granted by the High Court for quashing the decision. In that case the statutory tribunal had fortunately given a reasoned decision, in other words, made a speaking order and the High Court could hold that there was an error of law on the face of the record and writ of certiorari may be granted for quashing it. But the decision in this case led to an anomalous result, for it meant that the opportunity for certiorari depended on whether or not the statutory tribunal chose to give reasons for its decision in other words, to make a speaking order. Not all tribunals by any means were prepared to do so and a superior court had no power to compel them to give reasons except when the statute required it. This incongruity (6 & 7 Elizabeth 2 C. 66) which provides that on request a subordinate authority must supply to a party genuinely interested the reasons for its decision. Section 12 of the Act states that when a tribunal mentioned in the first schedule of the Act gives a decision it must give a written or oral statement of the reasons for the decision if requested to do so on or before the giving or notification of the decision. The statement may be refused or the specification of reasons restricted on grounds of national security and the tribunal may refuse to give the statement to a person not principally concerned with the decision if it thinks that to give it would

be against the interests of any person primarily concerned. Tribunals may also be exempted by the Lord Chancellor from the duty to give reasons but the Council of Tribunals must be consulted on any proposal to do so. As already stated, there is no express obligation imposed in the present case either by Section 165 of the Indian Army Act on the confirming authority or on the Central Government to give reasons for its decision. We have also not been shown any other section of the Army Act or any other statutory rule from which the necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. We therefore reject the argument of the petitioner that the order of the Chief of the Army Staff dated May 26, 1967 confirming the finding of the Court Martial under section 165 of the Army Act or the order of the Central Government dismissing the appeal under section 165 of the Army Act are in any way defective in law."

30. From the various decisions of the Supreme Court, referred to above, the following principles can be gathered, namely, that the authority exercising quasi-judicial functions must give reasons for its decision if the statute under which it acts provides that reasons should be given in support of its decision, then reasons in support of its decision should be given by the authority when the decision is subject to an appeal or revision by a higher court or the higher authority even if the statute does not provide specifically that reasons should be given by the authority in support of its decision; that as a rule of prudence the authority should give reasons in support of its decision while exercising quasi-judicial power even if the statute does not require it to give reasons or its decision is not subject to appeal or revision; and that failure of the administrative authority to give reasons in support of its quasi-judicial decision would not per se render its decision invalid on the ground of failure of the principles of natural justice if the statute does not require it to give reasons and its decision is not subject to appeal or revision.

31. In the instant case the various orders of the Central Government cannot be struck down as invalid simply because the Central Government did not give reasons in support of their decision. It must, however, be observed that it would have been proper if the grounds on which the representations of the petitioner Company were rejected would have been disclosed in the various orders of the Central Government so that the petitioner Company might have known the

reasons which led the Central Government to reject their representations.

32. On the point of discrimination relevant statements have been made in paragraph 20 of the writ application which read thus:

"That the freight rates now prevalent in the petitioner's Railway after the above mentioned increases are nearly equal to the freight rates prevailing in the State Railways with effect from 1-7-1962. Statements showing year to year increase in freight rates over State Railways and those in the case of the petitioner's Railway in regard to the major commodities carried by this Railway, namely, limestone (about 87% of the total goods traffic) and cement (about 10% of the total goods traffic), are Annexures 14 and 15 hereto and form part of the petition. It will be seen from Annexure 14 that for limestone, which is 87% of the goods traffic on this railway, the freight rates over the State Railways which were at the same level as in the case of the Petitioners railway in 1968 were 27.5% above those of the petitioner's railway in 1967. After the increase sanctioned by the said letter dated 4-5-1968, the freight rates over the State Railways are still 25% higher than the freight rates of the petitioner's Railway. Your petitioner's Railway was not given the benefit of increase made from time to time between 1963 to 1968. It will be seen that even if in 1968, your petitioner's Railway be allowed to charge the same freight rates and fares as State Railways, the loss incurred by the petitioner's Railway during all the past years as a result of its being compelled to charge lower freights and fares would still remain and never be recouped. Instead of at least doing belated justice to the petitioner by allowing the petitioner to charge the same rates as are now charged by State Railways and other private railways, the Central Government has continued to discriminate against the petitioner by allowing the petitioner only the increase effected over the State Railways as far back as 1962 and denying the petitioner the benefit of increases effected between 1963 and 1968. In paragraph 21 (vii) and (viii) of the writ application the point of discrimination has been raised in these words:

"21 (vii) The said orders of the Government are in contravention of Art. 14 of the Constitution as they discriminate against the petitioner by denying to it the sanction that was accorded to other private railways similarly placed to the petitioner.

(viii) In the matter of increase in freight rates the case of the petitioner cannot be distinguished at all from that of the other private railways nor from

that of the Government Railways and in the absence of any factor that distinguishes the case of the petitioner from that of others the orders are clearly discriminatory and invalid."

Certain facts and figures have been given in paragraphs 22 and 23 of the writ application to show discrimination and they read as follows:

"22. That while proposing further increase in passenger rates and freight rates for coaching and goods traffic in the Railway Budget 1968-69, the Hon'ble Railway Minister made specific mention in Parliament, of the increase in costs and how they are required to be neutralised by saying:

During the past 16 years, from 1951-52 to 1967-68 the price of coal has risen by 115%, of iron and steel by 143 p. c., of cement by 85%, of timber by 72% and of mineral oils by 61 p. c. The per capita cost of staff has risen by 106% during the same period. Taking all these increases into account, the cost of Railway transport has gone up by about 100%. On the other hand, passenger fares have gone up during the period to a substantially lower extent. The average fare realised per passenger per kilometre (non-suburban) increased by 75% for the First Class, by 58.8% for Second Class Mail, by 51.9% for the Second Class Ordinary, by 60% for the Third Class Mail. The fare by Third Class Ordinary train by which 87% of the total non-suburban passenger travelled rose only 36%. Taking all the classes together, the increase during the period 1951-52 to 1967-68 works out to 48.1%".

While proclaiming the above increase in cost of operation to be the basis which warrants the increase in the freight rates passenger fares over the Government Railways, your petitioner has been discriminated against not being allowed the same increase to compensate for the same increased cost of operation which applies to the petitioner's railway as it applies to the Government and other private railways.

33. That in any event after 1962-63 the financial position of the petitioner (which had been deteriorating steadily on account of Government's refusal to sanction any increase in passenger fares and freight rates) declined further and the return on capital at charge went below the return that Indian Government Railways were getting. The deteriorating financial position continued year by year in 1966-67, the return on capital at charge in the case of your petitioner was as low as 1.4% against the figure for Indian Government Railways of 5.4%. In the year 1967-68 the position will deteriorate further and the return on capital at charge is expected to be in vicinity

of 0.5% as against 5.4% on the State Railways. This continuously deteriorating financial position is due to the fact that the working expenses in the case of all the railways in India have been going up steadily on account of increased prices of coal, spares and others as well as increased salary and wages bill. While the increased working cost in the case of the Government and all other private railways were neutralised by the freight increases, the petitioner was not allowed the benefit of increased freight rates till 1968 and even in 1968 the increase sanctioned can at the best be comparable to the freight level prevalent in the Indian Railways in 1962 with the result that the return on capital at charge has gone down from figure above that of the Government Railways to the low figure of 1.4% in 1966-67 and still lower in 1967-68 against the figure for Government Railways of 5.4%, thus causing great loss to the petitioner. Statements explaining the position as stated above were made out and sent to the Opposite parties along with your petitioner's representation dated 16/17-6-1967."

Paragraph 16 of the counter-affidavit filed by the Opposite Party is a reply to paragraph 20 of the writ application and it reads as follows:

"With regard to paragraph 20 of the petition, it is stated that the petitioner railway stands in a class by itself and that the reasons which led to increase over Government Railways from time to time as brought out in paragraphs 10 to 15 above are not applicable to the petitioner Railways. It is further stated that in granting increases in freight rates to other non-Government Railways, their financial position was considered. Shahabad-Saharanpur, Ahmadpur-Katwa, Burdwan-Datwa and Banakura-Damodar River Light Railways had consistently shown a loss each year from 1960-61 to 1966-67. Futwa-Islampur Light Railway had shown a loss in the years 1960-61 and 1962-63. Although the remaining three non-Government Light Railways, namely, Arrah-Sasaram, Howrah-Amta and Howrah-Sheakhala had shown some profits for the years 1960-61 to 1966-67, the dividend paid by these Railways ranged from 3% to 5% as against 10 to 20% paid by the Dehri-Rohtas Light Railway, the petitioner. On the other hand, the petitioner was having a fairly good profit and his financial position was good. Over and above, the reserves accumulated by the petitioner were and are also considerably more than the reserves of the other non-Government Light Railways. A statement showing the financial position of the non-Government light Railways is attached hereto

and marked as Annexure C. It is stated and submitted that there is no substance in the allegation made by the petitioner Railway that it has been discriminated against in the matter of increases in freight rates and fares, the petitioner and the other non-Government Railways not being similarly situated."

In paragraph 17 (vii) and (viii) of the counter-affidavit the point raised in paragraph 21 (vii) and (viii) of the application has been answered in these words:

"17 (vii) It is stated that there has been no discrimination against the petitioner by refusing their prayer as stated, which refusal was based on such proper grounds as have been stated in this counter-affidavit and the question of any contravention of Article 14 of the Constitution does not arise. It is further submitted that the petitioner and the other private Railways are not similarly situated.

(viii). That the Government Railways and other non-Government Railways not being similarly situated and there being distinguishing features in the case of the petitioner as already explained in the previous paragraphs, there is no discrimination as alleged."

The statements made in paragraphs 22 and 23 of the application have been replied in paragraphs 18 and 19 of the counter-affidavit which read thus:

"18. With reference to the statements made in paragraph 22 of the petition, it is stated that the opposite parties crave leave to refer to the speech of the Hon'ble Minister in connection with the increase in the passenger fares and freight rates in the Railway Budget 1968-69 and place their submission, and it may be necessary that the said speech may be submitted before the Hon'ble Court to show the exact position as stated in the speech. The petitioner is also put to strict proof as regards the rise in costs and the factors responsible for it over the petitioner railway. It is further stated that the question of discrimination against the petitioner does not arise. It is, however, submitted that the case of the petitioner was considered in all its aspects and as already stated in this counter-affidavit the financial position of the petitioner was found quite satisfactory and the opposite parties have acted properly and justly in dealing with the case of the petitioner.

19. With regard to the statements made in paragraph 23 of the petition, it is stated that the financial position of the petitioner has not deteriorated. It is submitted that the financial position of the petitioner does not justify the increase as asked for by the petitioner. The reserves accumulated by the petitioner, which increased from 59.37 Lakhs in 1960-61 to

Rs. 74.56 Lakhs in 1966-67, were, and are, also considerably more than the reserves of the other Light Railways. The petitioner transferred Rs. 20 lakhs to the Capital account by issue of Bonus shares of value of Rs. 10 lakhs in the year 1961-62 and another 10 lakhs in the year 1966-67. It may be further stated that the net earnings of the Government Railways for the years 1966-67 and 1967-68, were Rs. minus 18.27 crores and Rs. minus 31.52 crores respectively after paying Rs. 132.39 crores and Rs. 141.52 crores in these two years as contribution to general revenues at 5.50% for the capital invested up to 31-3-1964 and at 6.0% for the capital invested thereafter."

34. Although in the writ application the point of discrimination between the Government Railways and the petitioner Company has been specifically taken, Mr. Lal Narayan Sinha in course of his arguments did not press the point seriously. It is a well settled principle that the Government can be legitimately put in a separate class by itself. (See the cases *Manna Lal v. Collector of Jhalawar*, AIR 1961 SC 828 and *Lachhman Dass v. State of Punjab*, AIR 1963 SC 222.) There can be no two opinions on the question that the profits earned by Government Railways accrue to the benefit of the general public whereas the profits earned by non-Government Railways accrue to the benefit of a particular individual or a set of individuals. It cannot also be doubted that a Government Railway provides better facilities to the travelling public than a non-Government Railway in several respects. The Government Railways, therefore, can legitimately be put as a class by themselves and as such there will be no violation of Article 14 of the Constitution when the Central Government differentiate between the Government Railways and the non-Government Railways in the matter of fixation of rates of freight and fare.

Mr. Sinha seriously contended that the Central Govt. had made a discrimination between the petitioner company and the other non-Government Railways in the matter of fixation of rates of freights etc. without any rational basis. Learned counsel appearing for the opposite party, on the other hand, submitted that the petitioner company stands as a class by itself and as such the Central Government have not made any discrimination between the petitioner Company on one hand and the other non-Government Railways on the other in the matter of fixation of rates of freight and fare. He further contended that the petitioner Company has failed to discharge the onus to prove that the Central Government have made a discrimination between it and the other non-Government Railways.

There is substance in the contention raised on behalf of the opposite party and it cannot be brushed aside.

In the case of *Budhan Choudhary v. State of Bihar*, AIR 1955 SC 191 the true meaning and scope of Article 14 of the Constitution were explained in these words:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

In the case of *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 the principle enunciated above was reiterated and it was further observed as follows:

"The decisions of this Court further establish—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common

report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the fact of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws".

The same principles have to be borne in mind by a Court if a particular order passed by the Government is challenged on the ground of violation of Article 14 of the Constitution.

35. In the application filed by the petitioner company the particulars showing that the petitioner company and the other non-Government railways are similarly situate have not been given. The onus to prove that there has been a discrimination between the petitioner company and the other non-Government Railways being on the petitioner company, which has challenged the orders of the Central Government on the ground of infringement of Article 14 of the Constitution, it was incumbent upon the petitioner company to place sufficient materials before the Court to show that the petitioner company and the other non-Government Railways are similarly situate. In paragraph 16 of the counter-affidavit quoted above it has been asserted by the opposite party that the petitioner company stands as a class by itself. Although in the rejoinder to the counter-affidavit filed by the opposite party the petitioner company has denied the fact that the petitioner company stands as a class by itself, it has not furnished particulars showing that the other non-Government Railways, such as, Shahdara-Sharanpur, Ahmadpur-Katwa, Buddwan-Katwa, Bankura-Damodar and Futwah-Islampur Light Railways, are similarly situate. In the case of *State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.*, AIR 1964 SC 1179 it was observed as follows:

"The petitions filed by the company are singularly deficient in furnishing particulars which would justify the plea of infringement of Article 14 of the Con-

stitution. It cannot be too strongly emphasized that to make out a case of denial of the equal protection of the laws under Article 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that equal protection of the laws has been denied to him must make out that not only he had been so treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis, and such differential treatment is unjustifiably made".

The contention raised on behalf of the petitioner Company that the Central Government have made a discrimination between it and the other non-Government Railways must, therefore, be rejected on the preliminary ground that the petitioner Company has not been placed sufficient materials before the Court to show that the petitioner company and the other non-Government Railways are similarly situate. I may state here that in the writ application the petitioner company has also alleged that the orders passed by the Central Government are mala fide. At the time of argument, however, learned counsel appearing for the petitioner company did not challenge the orders of the Central Government on the ground of mala fide. Indeed no particulars have been given in the writ application to show that the Central Government have made a discrimination against the petitioner company for some ulterior reasons. For the reasons stated above, it is not possible to strike down the orders of the Central Government as invalid on the ground of discrimination between the petitioner company and other non-Government Railways.

36. Now remains to consider the last contention of learned counsel appearing for the petitioner company. Mr. Lal Narayan Sinha contended that the orders of the Central Government are vitiated because they have taken into consideration irrelevant factors and have ignored the relevant factors while fixing the rates of freight etc., applicable to the petitioner company. According to Mr. Sinha, 'freight' and 'fare' are the prices for the service rendered by a Railway. They must relate to the cost actually incurred in rendering service by way of transportation of goods and passengers. Any other factor is not relevant in the matter of fixation of rates of freight etc. He further contended that the Railway Board have taken into consideration wrong facts and irrelevant matters even in judging the financial position of the petitioner company. Before dealing with the aforesaid contentions of Mr. Sinha, I would consider a preliminary point

which was raised by Dr. V. A. Seyid Muhammad appearing for the opposite party. Learned counsel submitted that the petitioner company, although aware of the fact that over-all financial position of the petitioner company was taken into consideration in fixing the rates of freight and fare, has not alleged in the main petition that wrong facts and irrelevant matters were taken into consideration in judging the financial position of the petitioner company. According to learned counsel, on the facts stated in the counter-affidavit, the petitioner company has taken a new point in the rejoinder to the counter-affidavit that wrong facts and irrelevant matters have been taken into consideration in judging the financial position of the petitioner company. In support of his contention that a new point cannot be taken in the rejoinder to the counter-affidavit without amending the main petition, he replied on certain observations made in the cases of Kartick Chandra Dutta v. District Traffic Supdt., Pandu Region, Katihar N. F. Railway, AIR 1957 Pat 676 and Shivdev Singh v. State of Bihar, AIR 1963 Pat 201. In Kartick Chandra Dutta's case AIR 1957 Pat 676 it was observed:

"The authority of the District Traffic Superintendent to remove him from the service was questioned for the first time in his rejoinder to the counter-affidavit on behalf of the opposite party. For this reason alone, this argument must be rejected".

In Shiv Deo Singh's case, AIR 1963 Pat 201 it was observed:

"... It appears to me that after the filing of the counter-affidavit on behalf of the two respondents, no new ground of attack on the whole scheme can be made, by merely mentioning a new fact in a supplementary affidavit without an amendment of the original application". Mr. Lal Narayan Sinha submitted that the facts stated in the counter-affidavit can be taken into consideration in support of the point raised in the main application and relief can be given to the petitioner on the basis of the facts stated in the counter-affidavit. In support of his submission he relied on the cases of Firm Srinivas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, Babu Raja Mohan Manucha v. Babu Manzoor Ahmed Khan, AIR 1943 P.C. 29 and Ranbir Singh Chadha v. Chief Commercial Superintendent (Rates) Head Quarters Office, Delhi, AIR 1961 Punj 268. In Firm Srinivas Ram Kumar's case AIR 1951 SC 177 their Lordships of the Supreme Court observed as follows:

"... when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his

written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings".

In Babu Raja Mohan Manucha's case, AIR 1943 PC 29 the Judicial Committee has observed thus:

"With all due respect to the Chief Court, their Lordships think that their attitude towards the question of pleading was unduly rigid. A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder".

In the Punjab case, which was an application under Article 226 of the Constitution, the following observations were made:

". . . If it is open to the High Court to decide a question of fact which is in dispute on the pleadings or on the evidence produced before it, then there is no reason why the petitioner cannot be allowed to request the High Court to decide the petition on the basis that the respondent's allegation of disputed facts is correct. When the petitioner accepts the respondent's allegations of facts, then insistence on amendments of the petition can serve no useful purpose and can only result in delay in disposal of the petition on merits".

37. Upon a consideration of the various decisions, referred to above, I am of the opinion that ordinarily a new point taken in the rejoinder to the counter-affidavit should not be entertained by the Court unless the petitioner with the permission of the court amends the main application. But facts stated in the counter-affidavit of the other side which support a point taken in the petition can always be relied on. Further where a particular point is taken in the main application and what is stated in reply to it in the counter-affidavit of the other side is not factually correct, statements in the rejoinder to the counter-affidavit pointing out the incorrectness of the allegations in the counter-affidavit should also be taken into consideration. If it is open to the plaintiff to a suit to deny in his deposition the averments in the written statement, there appears no reason why statements in the counter-affidavit not factually correct cannot be denied by filing a rejoinder to it by the petitioner in a writ application. In the in-

stant case in paragraph 21 (ii) of the application the point that the Central Government did not apply their mind to the relevant matters has been specifically taken. The details as to which relevant matters had been ignored and which irrelevant matters had been taken into consideration have not been given. In paragraph 23 of the application, which I have already quoted above, the petitioner company has asserted that after 1962-63 the financial position of the petitioner company had deteriorated. In paragraph 17 (i) of the counter-affidavit the following statements have been made:

"The petitioner having failed to make out a case for increase in railway freight and fares, the request aforesaid was not acceded to. Further, it is stated that in letter No. TCD/1078/64/DRL dated 8-6-1965 from the Ministry of Railways to the petitioner, a copy of which letter is attached and marked as Annexure 'A', it was explained to the petitioner that 'having regard to the over-all financial position of the line, there does not exist adequate justification for sanctioning the increases asked for specially when the upward revision of classification of commodities such as limestone and cement, with effect from 1-4-1965, would further improve the revenues of the company". In paragraphs 18 and 19 of the counter-affidavit, which I have quoted above, the assertion of the petitioner company that its financial position deteriorated since 1962-63 has been denied and a counter assertion to the effect that the financial position of the petitioner company was found satisfactory has been made. The statements made in paragraph 19 of the counter-affidavit show that the reserves accumulated by the petitioner company were also taken into consideration by the authorities in fixing the rates of freight and fare. Annexure 'C' is a chart in which the financial position of the various non-Government Light Railways has been shown. In my opinion, the petitioner company, which has taken a ground that the Central Government did not apply their mind to the relevant matters, in fixing the rates of freight and fare, can legitimately show with reference to the facts stated in the counter-affidavit and the charge (Annexure 'C') that the Central Government have taken into consideration irrelevant facts and have excluded out of consideration the relevant facts in fixing the rates of freight and fare applicable to the petitioner company. I, therefore, do not think that the petitioner company can be disallowed to rely on the statements in the counter-affidavit which support its case.

38. Now I proceed to deal with the main contention. Learned counsel

desired to be reverted to the general side and the Governor had specifically allowed his request in that behalf, an option was subsequently again given to the petitioner and in response to it he had continued to serve on the medical education side. After the termination of his appointment as D.D.R.M.E., he was again asked if he wanted to revert to the general side or continue to work on the college side. On special facilities having been provided to the petitioner, he continued to work on the medical education side and is still so working. The only other defence to the alleged infringement of the petitioner's fundamental right under Article 16 of the Constitution raised by the respondents in one of their pleadings for the first time is that the petitioner is deemed to have withdrawn his application, dated December 20, 1965 (Annexure 'E', which reached the Department on December 22, 1965) by his letter, dated December 21, 1965 (Annexure 'IX') addressed to the Dean of the Medical Department of the Post Graduate Institute wherein he had referred to the oral talk with the Dean and agreed to accept the post of Deputy Medical Superintendent of the Post Graduate Institute on honorary basis along with the post of Professor of Forensic Medicine after the termination of the post of D.D.R.M.E. This letter was written only one day after the application of the petitioner had been sent. The previous application was not even by implication withdrawn by this letter which was clearly intended to make stop-gap arrangement as the petitioner was definitely given to understand that the post of D.D.R.M.E. was being abolished with effect from January 1, 1966, and the post of A.D.H.S. had not yet been created. Petitioner's application was for appointment as A.D.H.S. with effect from the date when the post was created. The petitioner's letter, dated December 21, 1965, related to the arrangement with effect from January 1, 1966. To say the least, this new defence of the State against the charge under Article 16 of the Constitution is wholly disingenuous and a mere afterthought.

(xv) It had been decided by the Health Department that whoever was selected as A.D.H.S., would automatically be promoted as D.H.S. when the latter post would fall vacant. When respondent No. 2 was appointed as D.H.S., the only ground on which he was selected without considering anyone else was that he was already working as A.D.H.S. and had given a good account of himself in that capacity. The appointment of respondent No. 2 as D.H.S. will, therefore, automatically stand or fall with the validity of his appointment as A.D.H.S. It was fairly conceded by the learned Advocate General for the State that whoever would

have been appointed A.D.H.S. in April, 1966, would normally have automatically become the D.H.S. as soon as that post fell vacant.

41. This is the relevant factual aspect of the case. So far as the legal position is concerned, it does not appear to admit of any doubt. Clause (1) of Article 16 of the Constitution which is a mere protection of the guarantee of equal protection contained in Article 14 of the Constitution is couched in the following language:—

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

42. It is the common case of both sides that the petitioner is a citizen of India, and so is respondent No. 2. In the matter of appointment, what Article 16(1) guarantees is an equal opportunity to all citizens to apply for appointment under the State, and to be considered for that appointment. In *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649, and in several other cases thereafter, it has been authoritatively held by their Lordships of the Supreme Court that "appointment" in Article 16 includes promotion to higher posts. In *Banarsidas v. State of Uttar Pradesh*, AIR 1956 SC 520, it was held that selection for appointment in Government service has got to be on a competitive basis and those whose past service is free from blemish can certainly be said to be better qualified for Government service than those whose record was not free from any blemish. It is equally clear that the State can either by appropriate legislation under Article 309 of the Constitution or by statutory rules framed under the proviso to that Article restrict the eligibility of citizens for appointment to any particular post by prescribing the essential qualifications and possible disqualifications etc. So long, however, as neither any qualifications or disqualifications are laid down for a post by any enactment or statutory rules nor (in the absence of any statute or statutory rules) have the same been laid down by the executive order of the appropriate authority, every citizen, who is prima facie qualified for any post or public service is entitled to his fundamental right under Article 16(1) of the Constitution which may in this respect be said to consist of two distinct legal rights, viz.:—

(i) the right to make an application for any post under the Government; and

(ii) the right to be considered on the merits for the post for which an application has been made.

It has been held in the High Court, *Calcutta v. Amal Kumar Roy*, AIR 1962 SC 1704, that "equal opportunity" does

not mean getting the particular post for which a number of persons may have been considered, and so long as the aggrieved person was given consideration along with others, and had been given his chance, it cannot be said that he had not had equal opportunity along with others who may have been selected in preference to him. The fact that the Government may make its choice in a particular way cannot be said to amount to discrimination against the applicant who was duly considered but not appointed. In the same case it was also observed that mere seniority does not confer a right for selection for a higher post. In AIR 1962 SC 602, it was categorically held that "the fundamental right guaranteed by the Constitution is not only to make an application for a post under the Government, but the further right to be considered on merits for the post for which an application has been made. Of course, the right does not extend to being actually appointed to the post for which an application may have been made."

What has happened in the instant case is that the petitioner has exercised half of his fundamental right under Article 16(1) by submitting his application for appointment to the post of A.D.H.S., but the Government has infringed the second part of the petitioner's fundamental right "to be considered on merits for the post for which" he had applied. In AIR 1966 SC 1942, it was observed by their Lordships of the Supreme Court (in paragraph 7 at page 1945 of the AIR report) as follows:—

"Mr. Nambiar in this connection also relied on Articles 15 and 16 of the Constitution. He urged that if the executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309, Articles 15 and 16 would be breached because the appointments in that case would be arbitrary and dependent on the mere whim of the executive. We are unable to hold that Articles 15 and 16 in any way lead us to this conclusion. If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of Article 15 or Article 16 of the Constitution because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State." The analysis of the ratio of the above-quoted passage in the judgment of Supreme Court in B. N. Nagarajan's case, AIR 1966 SC 1942 (supra) appears to be:—

(i) that the executive has the power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309; and by so doing the guarantee

under Articles 15 and 16 would not be breached;

(ii) that if selection and appointment to a post is made in accordance with the rules framed under Article 309, no question of violation of Article 15 or Article 16 would arise;

(iii) that even if no such rules are framed, the guarantee of Article 16 of the Constitution would not be infringed if the Government advertises the post and the conditions of service for appointment thereto and then makes a selection out of all the eligible persons who have submitted their applications for the post. Though no reason was given for not considering the petitioner at the relevant time, the main reason for the State which has been given, i.e., about the petitioner having been far junior to respondent No. 2 in the Medical Service is wholly irrelevant for purposes of Article 16 of the Constitution, particularly when the post of A.D.H.S. was not meant or intended to be filled in exclusively from the medical side and the said post was a new post. It is the admitted case of both sides that the said new post was not intended to be filled in necessarily by promotion. It has been the consistent case of the respondents as disclosed in their written statement that the post in question had to be filled in by selection and that nobody could claim it on the basis of seniority alone. Even if they had not so stated, it is clear, as held by the Supreme Court in AIR 1967 SC 1910, that the question of seniority comes in the matter of selection to a post only if two candidates for the post are otherwise found to be equal. According to the ratio of the judgment of the Supreme Court in Sant Ram Sharma's case, AIR 1967 SC 1910 (supra), seniority cannot be used as a lever for creating inequality between two eligible candidates for a selection post. It is the common case of both sides that the post of Additional Director of Health Services was created as a select post and that nobody could claim a right to be appointed to that post by promotion. In connection with the filling of a similar post in the Police Department, it was held by their Lordships of the Supreme Court in Sant Ram Sharma's case, AIR 1967 SC 1910:—

"The circumstance that these posts are classed as 'Selection Grade Posts' itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the Gradation List but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well established

rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone." Emphasis was then laid by the Supreme Court on the following principle:—

"The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available."

43. The defence of the State based on seniority of respondent No. 2 as compared with that of the petitioner in the P.C.M.S., is, therefore, not a valid defence at all for refusing to consider the application of the petitioner on merits for the select post in dispute. The mere fact that the petitioner was qualified and eligible for the post of A.D.H.S., and he had applied for it entitled him to be considered on merits. Inasmuch as the Government admittedly did not consider his application on merits for the said post, his fundamental right under Article 16(1) has been infringed and breached. To me there appears to be no answer to this charge of the petitioner regarding the violation of his constitutional fundamental right. The Government did not refuse to consider him at that stage on the ground that he was too junior. They just ignored his application. The ground of comparative juniority of the petitioner is the solitary ultimate shield by which this attack of the petitioner against the impugned appointment of respondent No. 2 is now sought to be warded off. As already held by me this defence is defenceless, and devoid of all merit. According to the pronouncement of the Supreme Court in Sant Ram Sharma's case, AIR 1967 SC 1910 the consideration of seniority could enter the field in a case like this if the merits of two candidates were otherwise judged to be equal. Such a stage was admittedly never reached.

44. The fundamental right under Article 16 of the Constitution would become wholly illusory and would be reduced to a mockery if the Government could be permitted to say that in a particular case they had made up their mind to appoint a particular person to a newly created post for any reason whatsoever, and that, therefore, they refused to consider the written application of another duly qualified and eligible person merely because he was at one time junior to the person sought to be appointed though he may be better qualified and may have had a cleaner service record. Article 16, as already stated, does not confer a right on anyone to be appointed to any particular post. The only rights of a citizen are: (i) to apply and (ii) to be considered on merits. The latter part of the petitioner's fundamental right has been clearly in-

fringed in this case. The appointment of respondent No. 2 to the post of A. D. H. S. as a result of the violation of the fundamental right of the petitioner cannot, therefore, be sustained. There was no other ground on which the promotion of respondent No. 2 to the post of the Director of Health Services was justified except that he happened to be the Additional Director of Health Services at the time when higher post fell vacant. Once it is held that the appointment of respondent No. 2 as Additional Director was unconstitutional, his further promotion and appointment as Director of Health Services automatically falls and cannot be sustained.

45. I would, therefore, allow this writ petition with costs and set aside the order of the State Government appointing respondent No. 2 originally as Additional Director Health Services and later on consequently promoting him to the post of Director Health Services.

46. **H. R. SODHI, J.:**— I have had the privilege of going through the judgments of my learned brothers Capoor and Narula, JJ. Both are agreed that none of the orders impugned by the petitioner can be said to have been vitiated on account of any mala fides of the Administrative Department of Punjab Government of which Mrs. Sarla Grewal was the Secretary at the relevant time. I am in respectful agreement with them on this point. To me it appears that the charge of mala fides levelled by a responsible officer like the petitioner was not only misconceived but wholly uncalled for, when we find it proved beyond any doubt that the Administrative Department had actually been going out of the way to help the petitioner, first in his appointment as Officer on Special Duty and then to save him from any monetary loss because of the abolition of the temporary post of Deputy Director, Research and Medical Education, hereinafter described as DD/RME, which post he got on account of the special efforts which Dr. Tulsi Dass, then Director of the Post-graduate Institute of Medical Education and Research, Chandigarh, appears to have made for him.

47. Facts have been stated very succinctly by Capoor, J. and the brief narrative thereof so far as Narula, J. has thought necessary for the purpose of deciding the question if Article 16 of the Constitution of India has been violated is also not in controversy. This narrative, however, seems to suggest that the petitioner being possessed of higher academic qualifications was probably more qualified than respondent No. 2 Kanwar Moti Singh who was the permanent incumbent of the post of the Deputy Director, Health Services, Punjab, and had been promoted as an Additional Director for a shortwhile

and then as a Director. In all services, there are certain basic qualifications which a candidate must possess in order to enter into that service and once he has done so whether on account of these qualifications or higher ones, all members of that service are to be treated equally in the matter of further promotion. Mere possession of higher educational qualifications cannot by itself be taken to be the proof of more merit in a particular officer. It is the general talent of the officer, his basic qualifications, experience; more so in the case of doctors and several other matters, the cumulative effect of which has to be considered in order to determine whether that officer is possessed of higher merit than others and difference in educational qualifications is only one of the factors which might or might not be treated as relevant by the competent authority in the matter of appointment to a selection post.

48. With great respect to my learned brother Narula, J. I do not agree that Article 16 of the Constitution of India has, in any way, been violated in the circumstances of the instant case on account of the appointment of respondent No. 2 as Director, Health Services, Punjab. I need not recapitulate all the facts, but in order to determine if the impugned orders have infringed Article 16 of the Constitution, a few established facts have to be stated in their true perspective.

49. There are in the State of Punjab two classes of Punjab Civil Medical Services, one known as Punjab Civil Medical Service Class I, hereinafter referred to as PCMS I, and Punjab Civil Medical Service Class II, hereinafter referred to as PCMS II, though the departmental head of both these Services has always been the same officer designated as Director of Health Services. The petitioner admittedly joined PCMS II on 15-12-1949 and was confirmed in that Service on 15-2-1951. He was promoted in an officiating capacity to PCMS I only on 25/26-4-1964 and has not yet been confirmed in that post, nor is he due for the selection grade. The petitioner was transferred to the teaching side in a temporary post on 5-9-1960 as an associate Professor of Forensic Medicine in the grade of Rs. 750-50-1400 in the Medical College, Patiala, though he continued to retain his lien in the general cadre, namely, P.C.M.S. II.

50. A Post-graduate Institute of Medical Education and Research had been set up at Chandigarh by the Punjab Government and it was in the year 1955 that for the first time a separate temporary post of a Director of Research and Medical Education was created. Dr. Tulsi Dass who was already in charge of this institute, was appointed its first Director, though administrative control of the

general cadre and Medical Colleges still remained with the Director of Health Services. It was later thought necessary to have a Deputy Director under Dr. Tulsi Dass and a temporary post was accordingly created. Dr. Deepak Bhatia was appointed to this post in the year 1961 with the approval of the Punjab Public Service Commission. The post was not advertised nor any applications invited when Dr. Bhatia was appointed as Deputy Director. The newly created post of the Deputy Director was not included either of the PCMS or teaching cadres. Dr. Jagdish Singh, who was the Director of Health Services, Punjab, at that time, died on 25-12-1962 and Dr. Deepak Bhatia, the senior most in the cadre of the PCMS I, was appointed Director in his place w.e.f. 15-3-1963. On the appointment of Dr. Bhatia as Director, the post of DD/RME fell vacant and it appears from the record that Dr. Tulsi Dass was keen to have the petitioner appointed as Deputy Director. There were several difficulties in his way as the petitioner was very junior in his own cadre for that post. A way out was found presumably by Dr. Tulsi Dass inasmuch as a temporary post of an Officer on Special Duty was created. The petitioner was appointed to that post at the instance of the said Dr. Tulsi Dass and got transferred from Patiala to Chandigarh to work against the vacant post of the Deputy Director in September 1963. It was after this when the ground had been fully prepared for the petitioner that an advertisement, filed as annexure 'A' with the writ petition, was published through the Punjab Public Service Commission in July, 1964, inviting applications for the post of the DD/RME. The advertisement was in the following terms:—

"PUNJAB PUBLIC SERVICE COMMISSION, PATIALA.

Closing date 14-7-1964

28-7-1964 for applicants from abroad.

Recruitment to a permanent post of Deputy Director Research and Medical Education, Punjab, Class I.

INFORMATION FOR CANDIDATES NO. 8(II)

1. Applications must be submitted on the prescribed form attached herewith together with the enclosed sheet of additional questions duly completed. They must reach the Secretary, Punjab Public Service Commission, Patiala, not later than 14-7-1964 (28-7-1964 for applicants from abroad). Applications received after that date will not be entertained.

2. This is a special post in Class I and is temporary sanctioned upto 28-2-1965. It is likely to be retained on permanent basis eventually. It will be pensionable when made permanent. The person appointed will be eligible to subscribe to

the General Provident Fund. The period of probation will be two years.

3. The post is reserved for Scheduled Castes/Tribes and Backward Classes candidates of Punjab but if no suitable person is available it may be filled up by others.

4. The incumbent of the post may be considered for promotion to the post of Director, Research and Medical Education, Punjab, on merits along with others in due course if/when such a post falls vacant.

5. The services of the incumbent can be terminated on one month's notice on either side till the incumbent is confirmed.

6. The selected candidate must be prepared to join duty immediately after selection.

7. Age: (a) Not less than 40 years and not more than 50 years (56 years for members of Scheduled Castes/Tribes and Backward Classes) on 1-4-1964. (b) Candidates serving under the Union/State Governments will not be entitled to any benefits of their past service under their respective Governments.

8. Pay: Rs. 1500-60-1800/75-2100. Higher initial start may be allowed in specially deserving cases on merits.

9. Qualifications: Essential.— (i) M.B. B.S. with distinguished academic career; (ii) must be registered with a State/Central Medical Council; (iii) Post-graduate qualifications e.g. M.D. or M.S. or M.R.C.P. or F.R.C.S. (iv) 10 years administrative/professional/teaching and Research experience; (v) 15 years standing in the profession; (vi) adequate knowledge of Hindi or Punjabi. Preferential: 3-5 years teaching experience.

10. Duties: (a) To assist the Director, Research and Medical Education, Punjab, in the Administration of his office and other Medical Institutions in the Punjab State under his control at Chandigarh.

(b) The incumbent of the post will be required to serve at Chandigarh or anywhere else in the Punjab State according to exigencies of service.

11. No other concessions such as rent-free quarters etc. are admissible.

IMPORTANT.

N.B. According to the revised classification issued by the Punjab Government 'Backward Class' candidates fall under the following two categories:

(a) All the residents of Punjab State, whose family income is less than Rs. 1000/- per annum irrespective of the fact as to which caste, community or class they belong to and what profession they are following.

(b) Persons belonging to classes/communities which have already been/may be declared as 'Backward' by the Punjab Government provided their family income does not exceed Rs. 1800/- per annum.

Candidates claiming concessions admissible to Backward Classes should produce the relevant affidavits filed before a 1st Class Magistrate in the enclosed form (A) or (B)."

There were only three other applicants, two of whom were junior to the petitioner, whereas nothing is known about the record of service of the candidate who was senior to him. The conditions laid down in the advertisement were such that no officer, already in the permanent service of the State or the Union Government feeling secure in his service in the general cadre and fairly high up in seniority with any chances of promotion, was likely to apply for a temporary post and lose the benefit of permanent service.

51. The petitioner was almost 57 steps below respondent No. 2 on the seniority list of PCMS I to which class the former has not yet been confirmed while on the teaching side where the petitioner had been appointed as Associate Professor against a temporary post, there were about 55 professors above him, in the order of seniority, some of them possessing higher qualifications than the petitioner as per annexure R. 2/12 filed by the respondents showing the gradation of the teaching staff as it stood on 1-3-1966. The position of the petitioner, in the final gradation list of the PCMS I and II prepared on 7-12-1963 under the States Reorganisation Act, 1956 (Central Act 37 of 1956) after the merger of the States of erstwhile PEPSU and Punjab as per annexure R. 2/4, was as low as 121. Twenty-five officers on the teaching line, originally junior to the petitioner, had been promoted and made senior to him list whereof is given in annexure R. 2/19. The petitioner with such a position in the general cadre not having been even promoted to PCMS I and being very low in the order of seniority in the teaching staff had everything to gain if he was appointed as DD/RME, though the post was a temporary one and terminable on one month's notice on either side. As a matter of fact the petitioner circumstanced as he was in his own cadre had no chances of early promotion in the ordinary way.

52. He applied for the post of DD/RME, was selected and consequently appointed to this post with effect from 31-8-1964 in a grade of Rs. 1500-2100. Respondent No. 2 who was at that time working as Deputy Director, Health Services lodged a protest against the petitioner being given a job carrying a higher scale of pay. The petitioner was put on probation in terms of his appointment for two years, but before this period could run out, the post itself was abolished with effect from 1-1-1966. On the abolition of the post the administrative department in order to accommodate the petitioner and

protect his pay recommended that the post of Associate Professor of Forensic Medicine in the Medical College at Patiala be upgraded in the scale of Rs. 1000-75-1600 with effect from 1-1-1966 and the petitioner be appointed to that post on the same emoluments which he was enjoying as Deputy Director, Research and Medical Education. He was also given the additional charge of the post of the Deputy Medical Superintendent in the Post-graduate Institute.

53. It may be mentioned here that at this stage the amalgamation of the two wings of the Health Services has had a chequered history. Before the partition of the country in the year 1947 and afterwards upto 8-11-1948, there were two separate departments known as Medical Department and Public Health Department under the Inspector-General of Civil Hospitals and Director, Public Health, respectively. On 26-10-1948, by a notification No. 5907-M-4A/577803 issued by the State Government, these two departments were amalgamated with effect from 8-11-1948 and put under the charge of one officer designated as Director, Health Services. A copy of this notification has been filed by the respondents as annexure R. 2/1. The cadres of PCMS I and II were kept separate as before and there are different rules relating to the appointment, terms and conditions of the two cadres. The professors in Medical Colleges were kept separate as a class from PCMS I in the matter of seniority. In the year 1963 by notification No. 4013-2HB-63/2436, dated 29-3-1963, the teaching cadre of Medical Colleges was separated from the general cadres of the PCMS I and PCMS II and it was directed that the recruitment to all teaching posts at the Colleges would in future be made direct through the Punjab Public Service Commission, though the serving personnel were also eligible. In the year 1965, by order dated 18-12-1965, all these services were again amalgamated and the Director of Health Services was declared as Head of Department for Medical Education and Research except the Post-graduate Institute at Chandigarh. The Director of Health Services, Punjab, was, therefore, from that date onwards, the Head of the Medical Services and the Medical Education and Research in the State of Punjab except in respect of the Post-graduate Institute.

54. A need was consequently felt to have a Joint Director and there was at one time a proposal that the said officer be taken from the teaching side, but ultimately it was decided to have an Additional Director without there being any obligation to have him from amongst the teaching staff. The petitioner seemed to wrongly think that the temporary post of an Additional Director should have

gone to an officer on the teaching side, as he believed that it had been created in lieu of that of the Deputy Director, Research and Medical Education. My learned brother Capoor, J. has elaborately dealt with the matter. There is no material to warrant the assumption that it was a post reserved for the teaching line, whatever might have been the proposals and counter-proposals at one time. An offer of the post of the Additional Director was nonetheless made to senior-most professors in the teaching line, but they declined.

55. Kanwar Moti Singh, respondent No. 2, had been promoted to PCMS I with effect from 5-7-1949 and confirmed in that cadre with effect from 5-7-1950. He got the selection grade in PCMS I with effect from 4-2-1961 and promoted as Deputy Director, Health Services, Punjab, in the scale of Rs. 1300-50-1600 from 24-5-1962. He had also been confirmed as Deputy Director with effect from 14-10-1963. The office of the Director, Health Services, fell vacant twice and he had held the same in an officiating capacity. When the appointment of Dr. Bhatia was made as Director in March, 1963, respondent No. 2 was also considered, though in the matter of seniority he was at that time at serial No. 9 amongst Class I Officers and obviously this consideration implied that he was thought to be possessed of merit making him eligible for selection irrespective of his seniority. It was Dr. Bhatia, of course, who was ultimately selected. In these circumstances, when the temporary post of the Additional Director was to be filled up, respondent No. 2 who was already working as Deputy Director was appointed to that post in the scale of Rs. 1800-100-2000 plus non-practising allowance of Rs. 400 per mensem with effect from 29-4-1966. On 22-8-1966, this respondent was promoted as Director when the post fell vacant on Dr. Deepak Bhatia going to the Government of India.

56. It was in the background of this history of the service of these two contesting officers who belong to different classes, that it was to be seen how far the petitioner had any right to be considered for selection as Additional Director or Director of Health Services. The petitioner belongs to PCMS II though officiating in PCMS I, whereas the respondent holds a confirmed post in the selection grade in PCMS I. These two officers could not, therefore, be said to be members of the same class of service, apart from the seniority of the petitioner which was very low as already stated above, and the question arises whether in such circumstances, can it be said that the petitioner has been accorded any discriminatory treatment by the State Government by not considering him for these posts.

57. Mr. Anand Swarup referred to a demi-official letter in which a reference was made to certain complaints of a personal nature against respondent No. 2 which were denied by the said respondent. It is on record that instead of any action being taken against the respondent, he was rather promoted as a Deputy Director within a few days of the said letter. It was very uncharitable in the absence of any data to establish the allegations regarding the personal character of respondent No. 2, to take notice thereof in determining the respective merits of the petitioner and the respondent, and whether Art. 16 of the Constitution of India has been violated. The argument of Mr. Anand Swarup based on these allegations has no merit and must, therefore, be straightway rejected.

58. The State Government in the exercise of its executive power under Article 162 of the Constitution of India has a right to make appointments to various offices and grant promotions from time to time as it might think proper. A Government servant holds his office during the pleasure of the President or the Governor of the State, as the case may be, and the only limitations laid down on the exercise of that power of the Government are as given in Art. 311 of the Constitution or Art. 16 thereof. No Government servant holding a civil service post under the Union or the State can be dismissed or removed or reduced in rank except by the authority by which he was appointed and that too after an enquiry in which he has been given a reasonable opportunity of being heard in respect of the charges against him and when it is proposed to take some action on the basis of that enquiry he has been given a further opportunity to make a representation against the proposed penalty. Article 16 forms part of the same code of constitutional guarantees as given in Arts. 14 and 15 of the Constitution of India and supplements them. It is only one of the instances of the application of the general rule of equality so far as services under the State or the Union are concerned. This guarantee of equality in the absence of any statutory rules relating to selection to a post by departmental promotion is violated only where the appointing authority brings in arbitrariness in the exercise of its executive power and denies to any individual officer in the same class and similarly situated his right to be considered for that post. It was observed by their Lordships of the Supreme Court in *All India Station Masters' and Assistant Station Masters' Association, Delhi v. General Manager Central Railway*, AIR 1960 S.C. 384, that equality of opportunity in matters of promotion must mean equality as between members

of the same class of employees and not equality between members of separate, independent classes.

59. There is no dispute that Art. 16 (1) of the Constitution guarantees equal opportunity not only in the matter of initial appointment to a service, but also in regard to future promotions to higher posts, but at the same time no civil servant has a claim to ask for a selection post as of right. It is a prerogative of the competent authority to give an officer promotion or refuse the same provided it does not act in the exercise of its executive power in an arbitrary manner. This guarantee of equality under Arts. 14, 15 and 16 of the Constitution, as held by their Lordships of the Supreme Court in *Banarsidas's case*, AIR 1956 SC 520 (*infra*) does not take away the right of the Government to pick and choose proper persons when it is intended to fill up a civil post from out of a number of officers.

60. In order to support his contention that Art. 16 has been violated in the case before us, reliance has been placed by the learned counsel for the petitioner on some observations made by their Lordships of the Supreme Court in AIR 1956 SC 520, where the writ petition filed by *Banarsidas and others* under Article 32 of the Constitution complaining of an infringement of Art. 16 was dismissed. There, some Patwaris who had been working as part-time Government servants in Uttar Pradesh in the Revenue Department, had indulged in acts of indiscipline by trying to paralyse the Revenue Department and coerce the Government to accept their demands. These Patwaris tendered their resignations and the Government accepted the same relieving them of their duties soon after submission of their resignations. On the next day the Government reorganised the cadre by creating a new service of *Lekhpalis*, but the cadre included all those Patwaris whose record of service was free from blemishes and had withdrawn their resignations. The Government rather gave *locus paenitentiae* to those ex-Patwaris who realised their mistake in joining the agitation but did not take into service in the reorganised cadre those Patwaris who had been found guilty of lack of sense of discipline. In these circumstances, some Patwaris who had preferred the writ petition in the Supreme Court contended that the direction of the State Government that only those ex-Patwaris whose resignations had been accepted but had an excellent record of service would be absorbed in the new cadre, denied to them equality of opportunity, and offended against Art. 16. The contention was repelled it being held by their Lordships that the Government like all other employers are entitled to pick and choose from amongst a large number

of candidates offering themselves for employment under Government and no question of any violation of Article 16 arose. It was in this context that an observation was made in the judgment that the Government service has got to be on a competitive basis. The expression 'selection for appointment in Government service has got to be on a competitive basis' cannot be taken out of the context and interpreted to mean that whenever a departmental promotion is to be made, all officers in a particular service get a right to apply for the selection post and whether an application is submitted or not, to be considered for the same, even if they are not equally situated in the relevant cadre. If a competent authority selects an officer to a selection post by a departmental promotion, there is inherent in this selection a competition. It is not understood how the observation referred to above can possibly help the petitioner.

61. Reference was again made to AIR 1962 SC 1704, in support of the contention that mere seniority does not confer a right to be selected to any higher post. It is incorrect to say that respondent No. 2 has been selected solely on the ground of seniority. Seniority-cum-merit are relevant considerations to a selection post and there is nothing to indicate that respondent No. 2 was not possessed of merit and he was selected simply because he happened to be the senior-most. As already stated, merit does not mean merely possessing higher educational qualifications.

62. The petitioner also cannot derive any help from the observations made by their Lordships of the Supreme Court in AIR 1962 S.C. 602. The facts of that case are distinguishable and there is not indeed a ghost of semblance between the facts of that case and the instant one. The services of one Krishan Chander Nayar, who had been employed on a purely temporary basis as a machineman in the Central Tractor Organisation, which was a temporary one under the Ministry of Agriculture, Government of India, New Delhi, were terminated in terms of his employment on the ground that he was no longer required in that Organisation. The Government while terminating his services placed a ban on his being ever taken into Government service, for which there was obviously no justification. The stand taken up by the Government in defence of its action was that the alleged ban was purely a departmental instruction for future guidance not intended, in any way, to prevent the petitioner from applying for any post under the Government. In spite of denial of the Government about the existence of any ban their Lordships came to a conclusion that, as a matter of fact, a ban as

alleged by the petitioner had been imposed and that any application made by the petitioner (Krishan Chander Nayar) seeking employment under the Government would be treated as a waste paper in view of the ban. In these circumstances, their Lordships considered the question of the violation of Article 16 and made an observation that the fundamental right guaranteed by the said Article consisted not only in making an application for a post to the Government, but the further right to be considered on merits for the post for which an application had been made. It was while quashing the ban that their Lordships of the Supreme Court observed that Krishan Chander Nayar had a right to make an application and to be considered for a post. It could not be intended to be laid down by their Lordships that in every case where a person, whether similarly situated or not and whatever his position in any particular service be, has a right to make an application for a departmental promotion when no applications have been invited therefor. The decision in Krishan Chander Nayar's case, AIR 1962 S.C. 602, has to be confined to the facts of that case.

63. The learned counsel for the petitioner laid great emphasis in his submissions on some observations made by their Lordships of the Supreme Court in AIR 1966 S.C. 1942. I do not see how this authority can be pressed into service by the petitioner. The contention was raised on behalf of the petitioners there that Articles 15 and 16 of the Constitution would be violated if the executive were held to have the power to make appointments and lay down conditions of service without making rules in that behalf under proviso to Article 309 of the Constitution. This contention was repelled by their Lordships it being held that it is not obligatory under proviso to Article 309 of the Constitution to make rules of recruitment etc. before the service can be constituted or proposed, or created or filled, and that the State Government has executive powers in relation to all matters with respect to which the legislature of the State has power to make laws and entry No. 41 in List II (State List) empowers the State legislature to make laws with regard to the State public services. In that case, advertisement had been made and applications invited for the recruitment of Assistant Engineers in the executive cadre of the Mysore Public Works Department. The argument of arbitrariness and violation of Articles 15 and 16 was negatived because the applications had been invited giving equal opportunity to all citizens duly qualified to make applications which were considered by the Public Service Commission. It is not seriously contended before us

that their Lordships have in Nagarajan's case, AIR 1966 S.C. 1942 laid down that advertisement for any selection post, where departmental promotion is to be made in the exercise of the executive power of the State, is necessary, and if not made, it would amount to denial of equality guaranteed by Articles 15 and 16 of the Constitution. No such contention can possibly be advanced with reasonableness as inviting of applications by advertisement is only one of the modes of recruitment which would exclude arbitrariness. There may be appointment even without an advertisement and still no arbitrariness is brought in. It will depend on the facts and circumstances of each case as to whether a particular appointment has been so made as to discriminate between two persons similarly situated so that it can be said that a differential treatment has been accorded to one at the cost of the other.

64. It is a mistaken approach to think that in case of every appointment or recruitment to a service or promotion, the State should first invite applications. My brother Narula, J. has also not gone to the extent of holding on the basis of Nagarajan's case, AIR 1966 S.C. 1942 that inviting of applications was necessary but all that has been observed by the learned Judge is that the application made in writing by the petitioner should have been considered. I do not appreciate how it became incumbent on the State Government to consider the so-called application or representation of the petitioner simply because on reading an unofficial news item in the press he submitted the said representation. If there was no obligation on the State Government to invite applications when it sought to make an appointment to a selection post by promotion, there was none to consider one made by an over ambitious officer like the petitioner who, though not equally situated in any manner, thought that he was more qualified simply because of his having higher educational qualifications and on account of his having enjoyed certain temporary advantage at one time as DD/RME. The petitioner is not even confirmed in PCMS I and actually belongs to PCMS II. The two classes of PCMS are quite distinct and separate from each other, though an officer in class II could be promoted to class I. The petitioner might have believed that he had more merit but the State Government considered the claims of all those persons whom it thought were senior on the teaching side and better qualified and it was only when they declined that the post of the Additional Director was offered to respondent No. 2. There is nothing to indicate that any of the senior professors on the teaching side had any grievance against the appoint-

ment of respondent No. 2 as Additional Director. It is the petitioner alone, who though in no way equated with this respondent, chose to make an application for being appointed to the Selection post. The appointment of respondent No. 2 as Director was made in the same manner as was being done hither-to-before and I do not think that any injustice has been caused to the petitioner or that his fundamental right guaranteed under Article 16 has in any way, been violated.

65. For the foregoing reasons the writ petition has no merit and agreeing with my learned brother Capoor, J., I dismiss the same with costs which, therefore being two respondents, I assess at Rs. 300/-.

66. ORDER— In accordance with the decision of the majority of the Bench, the writ petition is dismissed with costs, which, inasmuch as there are two respondents, are assessed at Rs. 300/-.

Petition dismissed.

AIR 1970 PUNJAB AND HARYANA 137 (V 57 C 20)

R. S. NARULA & R. S. SARKARIA, JJ.

Municipal Committee, Jullundur City, Appellant v. Shri Romesh Saggi and others, Respondents.

F. A. O. No. 125 of 1963; D/- 11-12-1968, from order of Gurdev Singh, J., D/- 31-7-1968.

(A) Motor Vehicles Act (1939), Ss. 110 to 110-F — Claim petition under S. 110-C — Judgment of Criminal Court determining guilt or innocence of driver is not binding on Claims Tribunal — Claims Tribunal is "Court" within S. 3, Evidence Act — Tribunal must act judicially and must follow principles of natural justice — AIR 1968 Punj 466, Overruled — (Evidence Act (1872), Ss. 3, 43) — (Punjab Motor Accidents Claims Tribunal Rules (1964), R. 3) — (Land Acquisition Act (1894), S. 18 — District Court acting under S. 18 is a Court).

The judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with a claim petition under S. 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can, however, be relevant only for the purpose and to the extent specified in S. 43 of the Evidence Act. AIR 1968 Punj. 466, Overruled. (Para 35)

CM/EM/B39/69/GDR/D

Per Narula, J.:— The Motor Accidents Claims Tribunal squarely falls within the definition of "Court" contained in S. 3 of the Evidence Act. The mere use of the word "award" in respect of the decisions of the Tribunal does not take the case out of the definition of "Court". What is sought to be excluded from the purview of the Evidence Act by referring to "proceedings before an arbitrator" are proceedings to which the provisions of Arbitration Act, 1940 apply. The mere use of the word "judgment" or the word "award", both of which expressions have been used in connection with the Motor Accidents Claims Tribunal in Ss. 110 to 110-F, does not indicate conclusively as to whether a Tribunal is or is not a "Court" within the meaning of S. 3 of the Evidence Act. Case law discussed.

(Paras 4, 5)

Even assuming that the Motor Accidents Claims Tribunal is not a 'Court' within the meaning of S. 3 of the Evidence Act, but is something akin to an Arbitrator or a domestic Tribunal it cannot be said that the Motor Accidents Claims Tribunal is bound by the findings of fact recorded by a competent Criminal Court on the merits of the controversy relating to the rashness or negligence of the driver in a running down action.

(Paras 14, 17)

Per Sarkaria, J.:— An arbitrator must not disregard the crucial rules of evidence founded on the fundamental concepts of natural justice and public policy. One of such concepts is, that an Arbitrator—indeed for that matter any judicial Tribunal—has to determine the facts in controversy before him by applying his own mind after an independent enquiry and investigation. This is the basic function of any Judicial Tribunal. No Arbitrator or Tribunal, therefore, can be permitted to abdicate this fundamental judicial function and accept a readymade opinion of a Criminal Court. If he fails to make an independent enquiry and contents himself with the role of a rubber-stamp functionary, merely accepting the ipse dixit of the Criminal Court, such self-effacement on his part, will amount to legal misconduct.

(Para 18)

All Judicial Tribunals whether they are or are not Courts within the definition of S. 3 of the Evidence Act, must observe those crucial rules of evidence which are founded on the principles of natural justice. The expression "principles of natural justice" cannot be reduced into any precise, exhaustive and inflexible definition. The question whether or not the principles of natural justice have been observed in a particular case, has to be determined in the light of the constitution of the Tribunal, the nature and scope of its duties and the rules laid

down by the Legislature to regulate its functioning and procedure. In this sense, such principles must vary. (Para 23)

Though the statute is silent on the point, it cannot be disputed that the Tribunal has to determine the claims filed before it in accordance with the general law of torts. Keeping in view the statutory provisions relating to the constitution, scope of powers and duties, and procedure to be followed by the Tribunal, it can safely be said that the fundamental principle underlying S. 43, Evidence Act, is to be deemed a principle of natural justice, which the Tribunal is bound to observe. (Para 24)

In civil actions and criminal prosecutions arising out of the same motor accident involving bodily injury or death, the parties may be different, the issues may not be identical, the nature of the onus may vary and the effect of evidence may not be the same. It will, therefore, be opposed to fundamental canons of justice and public policy to treat the judgments of the Criminal Court binding on a Motor Accidents Claims Tribunal, trying a claim arising out of a motor accident involving injury or death. The judgment of the Criminal Court, can at the most, be used only for the purpose and to the extent indicated in S. 43 of the Evidence Act. Case law discussed.

(Paras 33, 34)

(B) Tort — Negligence — Distinction between civil and criminal negligence — Penal Code (1860), Ss. 304-A, 337 — Evidence Act (1872), Ss. 101 to 104.

Per Sarkaria, J.:— The principles of liability governing civil actions and criminal prosecutions based on negligence differ in two material aspects. Firstly, in a criminal case, such as one under S. 304-A or 337 I.P.C., the negligence which would justify a conviction must be culpable or of gross degree and not the negligence founded on a mere error of judgment or defect of intelligence. The degree of negligence which would justify a conviction must be something to the danger of which, if one drew the accused's attention, the latter might exclaim 'I don't care'. It must be something more than a mere omission or neglect of duty, as for instance, the failure of a Municipal Corporation, or a Trust to repair a road in consequence of which a person using the road got accidentally killed. Thus, a law distinguishes between negligence which originates a civil liability and the one on which a criminal prosecution can be founded. In some cases, the bounds which separate a culpable negligence from a 'civil' negligence are blurred or may even disappear altogether, but in most cases this distinction is clearly discernible. In criminal cases there must be mens rea or guilty mind, i.e., rashness or guilty mind of a degree which can be described

as criminal negligence; mere carelessness is not enough. (Paras 29, 30)

Secondly, the principle of avoidance of liability when there is contributory negligence by the injured person is no defence in criminal law. But contributory negligence may be a good defence to a civil action. (Para 3)

Furthermore, the nature of the onus, the approach to and effect of the evidence in a criminal case is materially different from that in a civil action. In criminal cases, the prosecution must pursue the guilt of the accused beyond the utmost bounds of doubt, to a point of moral certainty. But in civil cases, mere preponderance of probability may be sufficient to fasten the defendant with liability. The reason is not that the Evidence Act prescribes different standards of proof in civil and criminal cases, but because under that Act the burden of proving the guilt of the accused beyond all manner of doubt always rests on the prosecution and never shifts on to the accused. This is not so in civil cases. (Paras 31, 32)

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- (1968) AIR 1968 Goa 78 (V 55)=
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- (1962) AIR 1962 Punj 540 (V 49)=
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Neogy v. Huro Gobind Neogy
K. C. Nayyar, for Appellant; H. L.
Sarin, Senior Advocate, (A. L. Bahl and
H. S. Awasthy with him), for Respondent
No. 1; Des Raj Nanda, for Respondent
No. 3.

NARULA, J.:— In this appeal under Section 110-D of the Motor Vehicles Act (4 of 1939), as subsequently amended by Act 100 of 1956, against an award, dated March 19, 1963, for Rs. 6,750.46 P. and costs, it was argued on behalf of the judgment-debtor appellant before Gurdev Singh, J., that the Motor Accidents Claims Tribunal had no jurisdiction to hold that Raghbir Singh, the driver of the alleged offending vehicle was guilty of any rash or negligent act as Raghbir Singh had already been acquitted by this Court on August 14, 1961 (in Criminal Revision No. 312 of 1961) of the charge of rashness or negligence in respect of the same accident which gave rise to the claim under Section 110-A of the Act. In view of the conflict of authority on the abovesaid point, and the *prima facie* inclination of the learned Judge not to agree with the law laid down by Mahajan, J. in *Sadhu Singh v. Punjab Roadways, Ambala City*, 1968-70 Pun. L. R. 39= (AIR 1968 Punj. 466), and in view of the further fact that this question is likely to arise in a large number of cases, the learned Single Judge has referred the following question for decision by a Division Bench:—

“Whether the judgment of a criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is conclusive and binding upon the Motor Accidents Claims Tribunal dealing with a claim petition under Section 110-C of the Motor Vehicles Act, and if not, for what purposes and to what extent can such a judgment be availed of by the parties concerned.”

2. Sections 110 to 110-F and Section 111-A were added to the principal Act of 1939 by the various provisions contained in the amending Act 100 of 1956. Section 110 authorises the State Government to constitute one or more Motor Accidents Claims Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents in-

volving the death of, or bodily injury to, persons arising out of the use of motor vehicles. Section 110-A states that an application for compensation arising out of an accident of the nature specified above may be made by the person who has sustained the injury or by the legal representatives of the deceased where death has resulted from the accident. Section 110-B provides that the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it to be just. Section 110-C then provides:—

“(1) In holding any inquiry under Section 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.”

Section 110-D gives a statutory right of appeal to a person aggrieved by an award of a Claims Tribunal. Such an appeal lies in cases where the amount in dispute in appeal is not less than Rs. 2,000/-, and is preferable to the High Court. Section 110-E relates to recovery of money from insurers and Sec. 110-F bars the jurisdiction of Civil Courts to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal, and also bars the issue of an injunction in respect of any action taken or to be taken before the Claims Tribunal. Section 111-A authorises the State Government to make rules for the purpose of carrying into effect the provisions of Sections 110 to 110-E, and in particular such rules may provide for, *inter alia*, the procedure to be followed by a Claims Tribunal in holding an inquiry under Chapter VIII, and the powers vested in a Civil Court which may be exercised by a Claims Tribunal.

3. In exercise of the powers conferred by Section 111-A, the Punjab Govern-

ment has framed the Punjab Motor Accidents Claims Tribunal Rules, 1964, which were published in the Home Transport Department of the Punjab Government vide notification No. GSR-4/CA4/39/S. III A/65, dated January 5, 1965. Rule 3 provides that every application for payment of compensation made under Sec. 110-A shall be in the form appended to those rules. There are as many as 24 columns in the prescribed form. But no information regarding any criminal prosecution or a judgment of any criminal Court or the result of a criminal prosecution is required to be given in the prescribed form. Column 22 headed; "any other information that may be necessary or helpful in the disposal of the claim" but this does not by itself indicate that the State Government while prescribing a form envisaged the furnishing of information regarding the result of any criminal prosecution to the Tribunal. Rule 19 states that the Claims Tribunal, in passing orders shall record concisely in a judgment the findings on each of the issues framed and the reasons for such findings and make an award specifying the amount of compensation to be paid by the insurer and also the person or persons to whom compensation shall be paid. Rule 20 states that the provisions of Order 5, Rules 9 to 13 and 15 to 30, Order 9, Order 13, Rules 3 to 10, Order 16, Rules 2 to 21, Order 17 and Order 23, Rules 1 to 3, of the Code of Civil Procedure shall, so far as may be apply to proceedings before the Claims Tribunal. No other rule is relevant for answering the question which has been referred to us. From a survey of the relevant provisions of the Act and the Rules, it is clear that the Act as well as the Rules are absolutely silent on the question of the applicability of any particular rules of evidence.

4. So far as the Evidence Act is concerned, Section 1 provides that the provisions of that Act shall extend to the whole of India (except the State of Jammu and Kashmir), and the Act applies to "all judicial proceedings in or before any Court", but the Act does not apply to the proceedings before an arbitrator. Expression "Court" for the purposes of the Evidence Act is defined in Section 3 to include "all persons, except arbitrators, legally authorized to take evidence"; "Legally authorised to take evidence" would mean the statutory authority to take the statement of a witness on oath or on solemn affirmation. Sub-section (2) of Section 110-C of the Motor Vehicles Act specifically states that "the Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath,". The statutory provisions contained in sub-section (2) of Section 110-C of the Motor Vehicles Act, therefore, expressly authorise the

Tribunal constituted under Section 110 of the Act to take evidence on oath.

Inasmuch as the Presiding Officer of the Tribunal has to be a person, it appears to be clear that the Motor Accidents Claims Tribunal squarely falls within the definition of "Court" contained in Section 3 of the Evidence Act. Once it is held that the Tribunal constituted under Section 110 of the Motor Vehicles Act is a "Court", the major part of the question referred to us is answered as Section 43 of the Evidence Act states that judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of the Evidence Act. It is nobody's case that the judgment of the Criminal Court is or could be relevant under Section 40, 41 or 42 of the Evidence Act in proceedings under Section 110-A of the Motor Vehicles Act. Nor is the existence of the judgment or orders of the Criminal Court in issue, in the claim petition presented under Section 110-A. It is also not claimed that the disputed judgment of the Criminal Court is in any manner relevant under any other provision of the Evidence Act in the claim proceedings.

5. Mr. K. C. Nayyar, the learned counsel for the appellant, conceded that if it is held that the Motor Accidents Claims Tribunal is a "Court" for the purposes of the Evidence Act, the judgment of the Criminal Court will not be relevant and the findings contained in the said judgment cannot be looked at or considered while deciding the claim preferred under Section 110-A of the Motor Vehicles Act. He, however, vehemently argued that the Tribunal in question is not a "Court" within the meaning of Section 3 of the Evidence Act. Two arguments were advanced in support of this contention. It is firstly submitted by Mr. Nayyar that Section 110-C leaves the summary procedure to be followed by the Tribunal to its own discretion by stating that the Tribunal may follow such summary procedure as it thinks fit. He then submits that it is only certain specified chapters or provisions of the Code of Civil Procedure which have been made applicable to the Tribunal and no part of Section 110-C applies the Evidence Act to proceedings before the Tribunal.

The appellant does not appear to be appreciating the difference between the civil procedure by which the claim has to be tried as distinguished from the rules of evidence which may be applied by a Tribunal in disposing of a claim petition. Except to the extent to which the provisions of the Civil Procedure Code have been made applicable, the matter of pro-

cedure has been left to the discretion of the Claims Tribunal subject to the rules that might be framed in that behalf by the State Government under S. 111-A. But the question of applicability of the Evidence Act depends on the Tribunal being a "Court" or not. The reasons for which Mr. Nayyar says that the Motor Accidents Claims Tribunal is not a "Court", are (i) that in referring to the decisions of the Tribunal, the word "award" as distinguished from the expression "judgment or decree" has been used and (ii) that it has been held by this Court that the Tribunal in question is not a regular Civil Court. Learned counsel submits that inasmuch as the Evidence Act has specifically excluded the applicability of its provisions to arbitration proceedings, and inasmuch as the decision of the Motor Accidents Claims Tribunal has been specifically labelled as "Award" which expression has been specifically used in respect of the decisions of arbitrators, it is clear that the Tribunal is not a Court.

In *Fazilka Dabwali Transport Co. (Private) Ltd. v. Madan Lal*, 1968-70 Pun. L. R. 9=(AIR 1968 Punj. 277), it was held by a Division Bench of this Court (S. B. Capoor and Shamsheer Bahadur, JJ.), that neither the Motor Accidents Claims Tribunal nor, consequently the High Court (exercising its appellate jurisdiction under the said Act) is strictly speaking a Court and that the phraseology employed in Section 110-C is itself indicative of that intendment. It was held that the Claims Tribunal in holding an inquiry has been given certain powers of Civil Court for certain specified purposes, but that the Tribunal cannot be regarded as a "Court" strictly speaking and the use of the word "award" gives a complexion of arbitration to its proceedings. What the Division Bench of this Court was considering in the case of *Fazilka Dabwali Transport Co.*, 1968-70 Pun. L. R. 9=(AIR 1968 Punj. 277) (supra) was whether a person aggrieved by the appellate order of this Court under Sec. 110-D of the Motor Vehicles Act has or has not a right of appeal under clause 10 of the Letters Patent. The contention was negatived by the Bench on the ground that an appeal under clause 10 of the Letters Patent lies against a judgment, and that expression is defined in Section 2(9) of the Code of Civil Procedure to mean "the statement given by the Judge, of the grounds of a decree or order." The "Judge" is defined in sub-section (8) of Section 2 to mean a presiding officer of a Civil Court. It was in this context that the learned Judges held that the "Tribunal" is not a Civil Court. The question whether the Motor Accidents Claims Tribunal is or is not a Court as defined in Section 3 of the Evidence Act did not

arise before the Bench and could not possibly have been answered in the case of *Fazilka Dabwali Transport Co.*, 70 Pun. L. R. 9=(AIR 1968 Punj. 277).

The statutory definition of Court contained in Section 3 of the Evidence Act is of a comparatively much wider amplitude than the restricted scope of the expression "Civil Court". Same applies to the decision of the Judicial Commissioner of Goa, Daman and Diu in *British India Genl. Ins. Co. Ltd., Margao v. Chambi Shaikh Abdul Kadar*, 1968 A.C.J. 322=(AIR 1968 Goa 78). The learned Judicial Commissioner held in that case that the Claims Tribunal under the Act cannot be regarded as a Civil Court for the purpose of interference in revision under Section 115(c) of the Code of Civil Procedure and Section 8(2)(b) (i) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963, though the Claims Tribunal could be regarded as a Tribunal for the purposes of supervisory jurisdiction vested in the High Court under Article 227 of the Constitution. As already pointed out, the question of the Tribunal being or not being a "Court" for the purpose of Evidence Act did not arise before the Judicial Commissioner. Mr. Harbans Lal Sarin, the learned senior counsel for respondent No. 1 referred in this connection to certain observations of Dua, J. in *Shri Ram Pertap v. General Manager, Punjab Roadways, Ambala*, 1962-64 Pun. L. R. 448 = (AIR 1962 Punj 540). The learned Judge held in that case that it should be borne in mind that the bunch of Sections 110 to 110-F of the Motor Vehicles Act merely deals with the subject of the substitution of the Motor Accidents Claims Tribunal in place of a Civil Court for purposes of adjudicating claims for compensation in respect of an accident involving the death or bodily injuries to persons arising out of the use of a Motor Vehicle. These observations of a general nature cannot, I think, assist us in coming to a definite finding on the precise question which we are called upon to answer.

The mere use of the word "award" in respect of the decisions of the Tribunal does not in our opinion take the case out of the definition of "Court." There is no doubt that the word "award" is usually used in respect of decisions of arbitrators, but even the decision of a District Court in proceedings under Section 18 of the Land Acquisition Act is called an award, and it cannot be argued that a District Court while deciding a reference under the Land Acquisition Act is not a Court, or that such a decision partakes of the nature of the award of an arbitrator. What is sought to be excluded from the purview of the Evidence Act by referring to "proceedings before an arbitrator" are proceedings to which the provisions

of Arbitration Act 10 of 1940 apply. The object is that the arbitrators cannot be tied down to the strict rules of evidence. If such exclusion had not been specifically provided for, an arbitration Tribunal would also have been covered by the definition of "Court" as an arbitrator is a person who is legally authorised to take evidence.

When the learned Judges of the Division Bench of this Court in Fazilka Dabwali Transport Company's case, 70 Pun LR 9 = (AIR 1968 Punj 277) referred to the use of the expression "award" in relation to the decision of the Tribunal, the object was to distinguish it from a judgment within the meaning of CL 10 of the Letters Patent. Otherwise the word "judgment" itself has been used under R. 19 of the Punjab Motor Accidents Claims Tribunal Rules, 1964, where it is stated that the Claims Tribunal in passing orders shall record concisely "in a judgment" the findings on each of the issues framed and the reasons for such findings. This clearly shows that the mere use of the word "judgment" or the word "award" both of which expressions have been used in connection with the Motor Accidents Claims Tribunal in the abovesaid statutory provisions would not indicate conclusively as to whether a Tribunal is or is not a "Court" within the meaning of Section 3 of the Evidence Act. Mr. Nayyar points out that the 1964 Rules cannot be called into aid in deciding this particular case as the judgment under appeal was given by the Tribunal on March 19, 1963, and the rules in question were framed in 1964. I have referred to the Rules merely as an aid to construction and not for the purpose of finding any fault with the judgment of the Tribunal for non-compliance with any of those Rules.

6. Coming to the decided cases to which reference has been made by the learned counsel for the parties, I may first mention the judgment of a Division Bench of the Chief Court of Punjab, prepared by Rattigan, J., in *Bishen Das v. Ram Labhaya*, 106 Pun Re 1915 = (AIR 1916 Lah 133). The judgment of the Sessions Court at Faridkot convicting the defendant was ruled out of consideration by the District Judge in a claim for compensation. When the correctness of that decision was assailed before the Chief Court, Rattigan, J. observed as follows:—

"We find it unnecessary to deal with the question whether the copy of the judgment was or was not duly certified, as in our opinion the judgment in question should not have been received in evidence for the purpose of proving that defendants caused the death of Ladha Mal, there being ample authority for holding that the judgment of a Criminal Court is inadmissible as a piece of evidence in civil

proceedings (see (1868) 10 Suth WR 56, (1870) 14 Suth WR 339, (1881) ILR 6 Cal 247 and (1896) ILR 23 Cal 610) and that the facts alleged by the plaintiffs in the Civil case must be proved independently of that judgment (see (1882) ILR 4 All 97 and (1866) 5 Suth WR 26 and (1866) 5 Suth WR 27).

The learned Additional Divisional Judge was of opinion that the judgment was relevant under Section 42 as relating to a matter of a public nature inasmuch as a trial for murder is a matter in which the public at large is interested. We cannot agree with this construction of Section 42 or hold that the morbid interest of a section of a public in the details of a murder trial constitutes such trial, 'a matter of a public nature' within the meaning of Section 42."

7. Mr. Sarin then referred to the Division Bench judgment of the Madras High Court in *Pedda Venkatapathi v. G. Balappa* AIR 1933 Mad 429, wherein it was held that under Section 43 of the Evidence Act, the judgment of the Criminal Court can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The Civil Court cannot take into consideration the grounds upon which that acquittal was based. It was further held that it lies upon the Civil Court itself to undertake an entirely independent inquiry before satisfying itself of the absence of reasonable and probable cause, for the alleged malicious prosecution, in a suit for damages on that ground. In re, *Chakka Jagga Rao*, AIR 1935 Mad 563, it was held that in a civil action for assault which is an action in tort, the fact that the defendant has been convicted or acquitted in a criminal Court is relevant only as to the fact of the conviction or acquittal and it is totally irrelevant on the question whether the conviction or acquittal was right, that is to say, whether the assault was or was not in fact committed. The learned Judge held that the judgment of a Criminal Court is a record of the proceeding in that Court, and nothing more, and that a Civil Court should embark upon an inquiry before it on the same facts without being influenced in any way whatever by the conclusion at which the Criminal Court has arrived.

A Division Bench of the Patna High Court held in *Harihar Prasad Singh v. Mt. Janak Dulari*, AIR 1941 Pat 118, that in a civil suit the decisions in criminal cases relating to the subject-matter of the suit cannot be relied upon. A Full Bench of the Lahore High Court while dealing with a converse case where a prayer for stay of the criminal proceedings on account of the subject-matter of the dispute being pendente lite in a civil action was being pressed, held in *B. N. Kashyap v. Emperor*, AIR 1945 Lah 23 (FB) as follows:—

"The fact is that the issues in the two cases although based on the same facts (and strictly speaking even parties in the two proceedings) are not identical and there appears to be no sufficient reason for delaying the proceedings in the criminal Court, which, unhampered by the Civil Court, is fully competent to decide the questions that arise before it for its decision and where in the nature of things there must be a speedy disposal." The question that had been referred to the Full Bench was couched in the following language:—

"When there are concurrent proceedings covering the same ground before a criminal Court and a Civil Court, the parties being substantially the same, would the judgment of the Civil Court, if obtained first, be admissible in evidence before the criminal Court in proof or disproof of the fact on which the prosecution is based?"

The above question was answered by the Full Bench in the negative with the observations which have already been quoted.

8. In *Ramadhar Chaudhary v. Janki Chaudhary*, AIR 1956 Pat 49, a Division Bench of that Court held that a judgment of a Criminal Court is admissible to prove only as to who were the parties to the dispute and what order had been passed in the criminal proceedings, but that the facts stated therein or statements of the evidence of the witnesses examined in the criminal case, or the findings given by the Criminal Court are not admissible in the civil proceedings. The learned Judges held that technically the judgments of Criminal Courts are inadmissible as not being between the same parties, the parties in the criminal proceedings being the State on the one hand, and the prisoner on the other, and in the civil suit the prisoner and some third party; and substantially because, the issues in a civil and criminal proceeding are not the same, and the burden of proof rests in each on different shoulders. *Modi, J.* held in *Onkarmal v. Banwarilal*, AIR 1962 Raj 127, that a judgment of acquittal in a Criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of facts on which the conviction is based. The learned Judge held that the Civil Court must independently of the decision of the Criminal Court investigate facts and come to its own finding on the relevant point.

9. Mr. Sarin then referred to the judgment of the Court of Appeal in *Hollington v. F. Hewthorn & Co. Ltd.*, 1943 (2) All ER 35. In that case the plaintiff's car which was being driven by the son of the plaintiff was involved in an accident with

the car owned by the defendant. The plaintiff's claim for damages to his car and for personal injuries sustained by his son was allowed. At the trial stage a certificate to the effect that the defendant's driver had been convicted for driving without due care and attention on the same day on which the accident occurred was ruled out of consideration. In the Appeal Court it was contended that the said exclusion of the evidence consisting of the certificate was contrary to law. It was held by the Court below that the certificate of conviction could not be tendered in evidence in civil proceedings, and that the certificate had been rightly rejected by the trial Court. It was held that in a subsequent civil trial, the Court should come to a decision on the facts before it without regard to the proceedings before a criminal Tribunal. The Court of Appeal held:—

"The contention that a conviction or other judgment ought to be admitted as prima facie evidence is usually supported on the ground that the facts have been investigated, and the result of the previous investigation is, therefore, at least some evidence of the facts that have been established thereby. To take the present case, it could be said that the conviction shows that the magistrates were satisfied, on the facts before them, that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the Criminal Court was not satisfied of his guilt; though the discussion by text-book writers and in the cases all turn on the admissibility of convictions, not of acquittals. If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal and this only goes to show that the Court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that was cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected."

10. In the authoritative pronouncement of their Lordships of the Supreme Court in *Anil Behari Ghosh v. Smt. Latika Bala Dassi*, AIR 1955 SC 566, it was clearly held in the following passage that the High Court could not have assumed on the basis of the judgment of conviction in the sessions trial that Charu was the murderer, and that the question whether Charu was or was not a murderer had to be decided on the evidence produced in the civil case:—

"The learned counsel for the contesting respondent suggested that it had not been found by the lower Appellate Court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate

of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The Courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu, if he was the murderer of the testator. On this question the Courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence."

11. The precise question relating to the jurisdiction of a Motor Accidents Claims Tribunal to take into consideration the finding of a Criminal Court recorded in its judgment against the accused driver, came up for consideration before a Division Bench of the Madras High Court in the Indian Mutual General Insurance Society Ltd., Madras v. M. Kothandian Naidu, 1966 ACJ 62 (Mad). The Bench held that though the driver who had been acquitted of the charge under Sec. 304-A of the Indian Penal Code on having been given the benefit of doubt, the fact of his acquittal by the Criminal Court was not relevant and the judgment of acquittal had no direct bearing on the merits of the civil action which ought to be decided exclusively on the facts brought on the record of the Motor Accidents Claims Tribunal.

11-A. Mr. K. C. Nayyar relied on the judgment of a Division Bench of the Mysore High Court in P. Channappa v. Mysore Revenue Appellate Tribunal, Bangalore, AIR 1966 Mys 68, for the proposition that the Tribunal was bound by the findings of the Criminal Court. In P. Channappa's case the question for decision in the writ petition in which the judgment was given was whether after the decision of the City Magistrate in the prosecution case to the effect that Channappa's stage carriage was not overloaded on the relevant day, the Regional Transport Authority could or could not suspend the stage carriage permit of the writ petitioner on the ground that in fact his stage carriage was overloaded on the relevant day. In other words the question was whether it was open to the State Transport Authority constituted under the Motor Vehicles Act to go into the question of the truth or otherwise of the charge of overloading for a second time in order to reach an independent conclusion on the same question of fact contrary to the one

reached by the Criminal Court. While allowing the writ petition, the Division Bench of the Mysore High Court held that when a particular charge had been enquired into and found against by a competent criminal Court, the Regional Transport Authority, a Tribunal constituted under the Motor Vehicles Act, could not again enquire into the same charge so long as the acquittal before the Criminal Court was not based on any technical ground, but on merits.

The situation with which the Mysore High Court was dealing in Channappa's case, AIR 1966 Mys 68 was entirely different from the one with which we are faced. It was the jurisdiction of the Regional Transport Authority and not of the Motor Accidents Claims Tribunal which was under consideration. Moreover, even as matter of public policy, it appears to be consistent with the rule of law to hold that once a competent Municipal Court, be it a Civil Court or a Criminal Court, has come to a definite finding of fact on a question on which penalty can be imposed by a statutory Tribunal, it should not be open to the latter to come to an independent finding on the same point, which may be inconsistent with the finding of the competent Court. That principle does not, however, hold good in case of a civil action for compensation or damages on account of a fatal or bodily injury. As pointed out by the Patna High Court in AIR 1956 Pat 49, the parties in a criminal action as distinguished from the third party claim in a running down action, are different, and the burden of proof may lie on the different parties, and the standard of proof on the central question of negligence or rashness may itself differ. Whereas in a Criminal Court the burden of proof never shifts from the prosecution, the application of the doctrine of *res ipsa loquitur* in a running down action is well-known. In fact when the question of the jurisdiction of the Motor Accidents Claims Tribunal to take into consideration the judgment of a Criminal Court came up before a Division Bench of the Mysore High Court itself after the decision in Channappa's case, AIR 1966 Mys 68 in Seethamma v. Benedict D'Sa, 1966 ACJ 178 = (AIR 1967 Mys 11), it was unequivocally held by the Division Bench of the Mysore High Court as follows:—

"At one stage of the argument Mr. Sundaraswamy asked us to say that since respondent 1 was acquitted by the Magistrate in the prosecution launched against him for rash and negligent driving, that acquittal to some extent negatives the negligence imputed to him. It is obvious that the order of acquittal upon which Mr. Sundaraswamy depends cannot be used in that way. We have to found

our conclusion as to negligence upon the material before us and the purpose for which the order of acquittal can be used is only to prove that there was an order of acquittal and nothing more."

In the face of the subsequent judgment of the Mysore High Court in Seethamma's case, 1966 ACJ 178 = (AIR 1967 Mys 11) (Supra), no reliance can in our opinion be placed on the earlier judgment of that very Court in P. Channappa's case, AIR 1966 Mys 68 for the proposition which is now being canvassed before us by Mr. K. C. Nayyar. Even otherwise, the distinction between the two cases is apparent as has already been pointed out.

12. Mr. Nayyar then referred to a Division Bench judgment of the Madras High Court in Jerome D'Silva v. Regional Transport Authority, South Kanara, AIR 1952 Mad 853. That again was a case where the allegation against the writ petitioner was that his motor vehicle was being used for smuggling rice, and on the driver of the vehicle having been charged by the police under Section 186 of the Indian Penal Code, had been discharged on the finding that the accusation against him was groundless and in spite of the discharge of the driver by the order of the Criminal Court, dated January 6, 1951, the Regional Transport Officer suspended the permit of the petitioner by order, dated March 3, 1951, on ignoring the finding of the Criminal Court and coming to an independent finding that the smuggled rice was being transported in the vehicle.

The writ petition was filed to have quashed the abovesaid order of the Regional Transport Officer as well as the order of the Regional Transport Authority upholding the same order in appeal on March 31, 1951. Subba Rao, J. (as he then was), before whom the case came up for hearing in the first instance, referred it to a larger Bench. It was in the above circumstances that the Division Bench of the Madras High Court held that if there is a conviction by a competent Criminal Court, that would furnish conclusive ground for any penal action by the Transport Authorities, and similarly if the criminal prosecution ends in a discharge or acquittal of the accused and such order of the Criminal Court is passed before the order of any Road Transport Tribunal decides the matter, then the Tribunal has no power to go behind the order of the competent Criminal Court. The considerations which weighed with the Madras High Court in Jerome D'Silva's case, AIR 1952 Mad 853 and with the Mysore Court in P. Channappa's case, AIR 1966 Mys 68 do not appear to be relevant for deciding the question which has been referred to us.

13. The solitary judgment of a learned Single Judge of this Court in 1968-70 Pun

LR 39 = (AIR 1968 Punj 466) which no doubt supports the contention which is being advanced by Mr. K. C. Nayyar is based on the judgment of the Madras High Court in Jerome D'Silva's case, AIR 1952 Mad 853 and that of the Mysore High Court in P. Channappa's case, AIR 1966 Mys 68. The learned Judge has not given any additional reason for holding that the Motor Accidents Claims Tribunal is bound by the decision of the Criminal Court on merits as to the question of rashness or negligence of the driver of the offending vehicle. The judgment of the learned Single Judge in Sadhu Singh's case, 70 Pun LR 39 = (AIR 1968 Punj 466) does not appear to be consistent with the trend of judicial authority on the subject to which detailed reference has already been made, and does not appear to lay down good law in the face of the pronouncement of their Lordships of the Supreme Court in Anil Behari Ghosh v. Smt. Latika Bala Dass, AIR 1955 SC 566.

14. Mr. Nayyar's further argument was that it would not be consistent with the general juridical principles to allow a Tribunal like the Motor Accidents Claims Tribunal to sit in judgment over the decision on merits of a competent Criminal Court. This line of argument is obviously based on the assumption that the Claims Tribunal is not a "Court" within the meaning of Section 3 of the Evidence Act. Even if we were to assume for the sake of argument, though we have held to the contrary, that the Claims Tribunal established under Section 110 of the Motor Vehicles Act is not a "Court" within the meaning of Section 3 of the Evidence Act, we would be inclined to hold that nevertheless the Tribunal is not bound by the findings of fact recorded by a competent Criminal Court on the merits of the controversy relating to the rashness or negligence of the driver in a running down action.

15. Strength was sought to be derived by Mr. Nayyar from the observations of the Members of the Judicial Committee in Sambasivam v. Public Prosecutor, Federation of Malaya, (1950) AC 458, to the following effect:—

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings."

It is noteworthy that their Lordships of the Privy Council emphasised in the above-quoted passage that the verdict of the Criminal Court is binding in all sub-

sequent proceedings "between the parties to the adjudication", and never stated that it is binding on those who were not parties to the first adjudication. It is nobody's case that Romesh Saggi was a party to the criminal case in which Raghbir Singh is stated to have been acquitted. The parties to the case of criminal prosecution of Raghbir Singh were the State on the one hand and Raghbir Singh on the other. For the same reason, the observations of their Lordships of the Supreme Court in *Pritam Singh v. State of Punjab*, AIR 1956 SC 415, approving of the abovesaid ratio of the judgment of the Privy Council in a similar case, can be of little assistance to Mr. Nayyar's client.

16. From whatever angle the matter is viewed, we are, therefore, of the opinion that the law laid down in *Sadhu Singh's* case 70 Pun LR 39 = (AIR 1968 Punj 466) is not correct, and that the view (on the question referred to us) expressed by the Division Bench of the Mysore High Court in 1966 ACJ 178 = (AIR 1967 Mys 11) and by the Division Bench of the Madras High Court in the 1966 ACJ 62 = (AIR 1967 Mad 54) is the correct one. We would, therefore, return the following answer to the question referred to us:—

"The judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunal, dealing with a claim petition under Section 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can, however, be relevant only for the purpose and to the extent specified in Section 43 of the Evidence Act."

16-A. With the abovesaid answer, we send back this case to the learned Single Judge for disposal on merits in accordance with law. The costs of this reference shall be costs in the appeal.

17. **SARKARIA, J.** :— I entirely agree with my learned brother that the answer to the question referred to us should be in the negative, as proposed. I, however, wish to emphasise and elaborate a little, the alternative aspect of the matter founded on the assumption — though not our finding—that the Motor Accidents Claims Tribunal is not a 'Court' within the meaning of Section 3 of the Evidence Act, but is something akin to an Arbitrator or a domestic Tribunal.

18. In this connection, it may be noted that even an arbitrator must not disregard the crucial rules of evidence founded on the fundamental concepts of natural justice and public policy. One of such con-

cepts is, that an Arbitrator—indeed for that matter any Judicial Tribunal—has to determine the facts in controversy before him by applying his own mind after an independent enquiry and investigation. This is the basic function of any Judicial Tribunal. No Arbitrator or Tribunal, therefore, can be permitted to abdicate this fundamental judicial function and accept a ready-made opinion of a criminal Court. If he fails to make an independent enquiry and contents himself with the role of a rubber-stamp functionary, merely accepting the ipse dixit of the Criminal Court, such self-effacement on his part, in my opinion, will amount to legal misconduct.

19. There is authority for the proposition that where the Arbitrator improperly admits evidence, which is the crucial evidence in the case, his award must be set aside as vitiated. In *Kelantan Government v. Duff Development Co.*, (1923) AC 395, it was held that where it appears that the Arbitrator has decided on evidence which in law was not admissible and which is incorporated in the award, there is an error of law on the face of the award. This principle was adopted in *Dutton Massey and Co. v. Jammadas Harparsad*, AIR 1924 Sind 51. Another Sind case which is cited in *Dutton Massey and Company's* case, AIR 1924 Sind 51 is *Gunnies v. Tulsidas*, (Misc. No. 563 of 1921) (Sind) wherein the award was attacked on the ground of misconduct on the part of the Arbitrators in admitting improper evidence and acting on such evidence in arriving at their conclusion.

20. In that case, it was urged that only one question as to the construction of a particular clause in the contract between the parties had been referred to the Arbitrators for their decision, and though the Arbitrators were of the opinion that the objector was entitled to a decision in his favour the Arbitrators had, notwithstanding the protest of the objector, admitted evidence of an alleged custom to vary the express terms of the contract and had acted on such custom. The award was set aside, *inter alia*, on the ground that there was an error apparent on the face of the record. Again, in *G. P. Gunnies & Co. Ltd. v. Amanlal Tulsidas*, AIR 1924 Sind 75, a Full Bench of that Court laid down that where the Arbitrators had admitted improper evidence and were misled by it, they had committed an error of law patent on the face of the award and this could amount to legal misconduct.

21. To the same effect is the ratio of *S. Venkatasubbiah v. Kumara Ramiah*, AIR 1935 Mad 184, and *Walford, Baker & Co. v. Macfic and Sons*, (1915) 113 LT 180.

22. In *Aboobaker Latif v. Reception Committee of the 48th Indian National Congress*, AIR 1937 Bom 410, Wadia, J. of the Bombay High Court held that though

the Evidence Act does not apply to arbitration, yet the Arbitrator must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy.

23. The law is well settled that all Judicial Tribunals whether they are or are not Courts within the definition of Section 3 of the Evidence Act,—must observe those crucial rules of evidence which are founded on the principles of natural justice. Well then, what are the "principles of natural justice" which a domestic Tribunal is bound to observe? In particular, is the principle underlying Sec. 43 of the Evidence Act one of "natural justice?" The expression "principles of natural justice" cannot be reduced into any precise, exhaustive and inflexible definition. The question whether or not the principles of natural justice have been observed in a particular case, has to be determined in the light of the constitution of the Tribunal, the nature and scope of its duties and the rules laid down by the Legislature to regulate its functioning and procedure. In this sense, such principles must vary. (In this connection, see the observations of the Supreme Court in *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.*, AIR 1957 SC 232 = 1957 SCR 98).

24. In the instant case, Section 110-C (2) of the Motor Vehicles Act expressly clothes the Motor Accidents Tribunal with all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses, etc., and Rule 20 enjoins on it to follow many of the material provisions of the Code of Civil Procedure. Though the statute is silent on the point, it cannot be disputed that the Tribunal has to determine the claims filed before it in accordance with the general law of torts. Keeping in view the statutory provisions relating to the constitution, scope of powers and duties, and procedure to be followed by the Tribunal, it can safely be said that the fundamental principle underlying Section 43, Evidence Act, is to be deemed a principle of natural justice, which the Tribunal is bound to observe.

25. In the view I take, I am fortified by a decision of the House of Lords in *General Medical Council v. Spackman*, 1943 (2) All ER 337. In that case, a registered medical practitioner, who was co-respondent in a divorce suit, was found by the Divorce Court to have committed adultery with the respondent therein to whom he stood in professional relationship, and a decree nisi was pronounced, which was afterwards made absolute. The General Medical Council gave him notice that a meeting of the Council would be held to decide whether his name should be re-

moved from the medical register for "infamous conduct in a professional respect." At the hearing, he desired to call fresh evidence on the issue of adultery. The Council declined to hear the fresh evidence, but accepted the decree nisi as prima facie proof of adultery, and directed that the practitioner's name should be erased from the register. The Court of first instance, by a majority, consisting of Viscount Caldecote, C. J. and Humphreys, J. held that the Council had made 'due inquiry' and in consequence, dismissed the application of the medical practitioner for a writ of certiorari. Singleton, J. was of a different opinion, and considered that even when a doctor was adjudged to have been guilty of adultery under a decree of the Divorce Court, the Council, if that finding were disputed, ought to hear evidence tendered by or on behalf of the doctor in an endeavour to establish the contrary. In the Court of Appeal, Mackinnon, Goddard and Clauson L. JJ., were unanimous in adopting the view which had been expressed by Singleton J. Mackinnon L. J. held that 'due enquiry' involved 'a full and fair consideration of any evidence that the accused desires to offer, and, if he tenders them, hearing his witnesses.' With this, the other two Lord Justices agreed, and the writ of certiorari was granted accordingly.

26. The General Medical Council appealed to the House of Lords, which dismissed the appeal and affirmed the judgment of the Appeal Court. On behalf of the Council, it was urged before the House of Lords that no injustice had been done, and that a lay body like the Council could not take a better test of truth or falsity on an issue of adultery than the decision of a Judge specially delegated by the legislature to try that kind of question. It was emphasised that the finding of adultery was recorded by a civil court and it was not the decision of a petty sessional Magistrate in a criminal matter. It was added that the Council did not accept without question the verdict of the Court in a civil case, but looked at the reasons behind the Judge's order, and that it was entitled to accept the conclusion of the Court as final. It was, therefore well justified in applying the principle that no opportunity ought to be given to produce evidence which was reasonably available at the time of the trial in the civil Court. In short, the Council's case was that it was entitled to treat the conclusion of the Court as to adultery as final, unless the new evidence was not so available or unless there was fraud. It was further argued that the Court should not usurp the functions of the domestic Tribunal or dictate its procedure. Repelling these arguments, Viscount Simon L. C. made this illuminating speech:—

"Parliament has conferred on the General Medical Council responsibility for the register, and has constituted the council a domestic forum to determine whether a case is made out for striking off the list a particular name. The gravity to the doctor concerned of an adverse decision by the council needs no emphasis, but the responsibilities of the General Medical Council cannot be measured only by the effect of its decision on an individual . . . (After referring to the terms of Section 29 of the Medical Act, 1958, which gave the Council power to erase the name of a medical practitioner after "due inquiry" if he had been found guilty of infamous conduct in any professional respect, his Lordship proceeded):—

".....It is not disputed that the general Medical Council, in exercising this jurisdiction, is not a judicial body in the ordinary sense. It is master of its own procedure and is not bound by strict rules of evidence. It is not subject to correction by the Courts as long as it complies with Section 29 of the Act of 1858. That section draws a significant distinction between a case in which the impeached practitioner has been convicted of felony or misdemeanour and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case, the decision of the council is properly based on the fact of the convictionIn the latter case, the decision of the council, if adverse to the practitioner, must be arrived at "after due inquiry" and this of course means after due inquiry by the council. The question, therefore, is whether the council in this case can be regarded as having reached its adverse decision 'after due inquiry' when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged and that the finding of Divorce Court against him as co-respondent is wrong.

"It is worth observing that this problem does not arise only in connexion with conclusions reached in the Divorce Court.The previous decision is not between the same parties. There is no question of estoppel or of res judicata. In such cases the decision of the Courts may provide the council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the Council should hear the challenge and give such weight to it as the Council thinks fit. The same view must, I think, be taken if the practitioner challenges the correctness of a finding of adultery by the Divorce Court.....So much follows from the structure of Section 29 and from the necessity, if there is to be "due inquiry", of giving the accused party a fair opportunity of meeting the accusation. Unless Parliament otherwise enacts, the

duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—e.g. whether by hearing evidence viva voce or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation In that case, Lord Atkin observed as under:

".....It is not disputed that where there has been a trial, at least before a High Court Judge, the notes of the evidence at such trial and the judgment of the judge may afford prima facie evidence in support of the charge, for the council are not obliged to hear evidence on oath. But the very conception of prima facie evidence involves the opportunity of controverting it, and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the prima facie case made from the previous trial. If this is inconvenient it cannot be held. It is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. Convenience and justice are often not on speaking terms. Nor do I accept the view put forward on behalf of the council that they are ill-qualified to form an opinion on such a charge as the present compared with a High Court Judge. I can imagine no tribunal better qualified to draw deductions from the proved conduct between a doctor and his female patient than the very experienced body of men for instance who sat on the present inquiry.

Some analogy exists, no doubt, between the various procedures of this and other not strictly judicial bodies, but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man. I would, therefore, demur to any suggestion that the words of Lord Loreburn L. C. in *Board of Education v. Rice*, 1911 AC 179, afford a complete guide to the General Medical Council in the exercise of their duties. As I have said, it is not correct that 'they need not examine witnesses.' They must examine witnesses if tendered, and their own rules rightly provide for this. Further it appears to me very doubtful whether it is true that "they have no power to administer an oath"

.....The question, however, does not turn on the judge's absence of doubt, but on whether the members of the coun-

cil are themselves convinced of their fellow-practitioner's guilt. I agree with the judgment of Singleton J. and those of the Lord Justices, and am of opinion that the appeal should be dismissed."

27. Lord Wright, who agreed with Viscount Simon L.C., observed:—

"..... The question of a failure of 'natural justice' is what is to be considered in this appeal, but, before considering the meaning of these words, I must first observe that they can in this case be properly taken as a description of what the council has to do, namely, to make "due inquiry", which under the statute is the governing criterion, that is 'an independent inquiry by the council as the body responsible for its own decision'.

'Natural justice' seems to be used in contrast with any formal or technical rule of law of procedure....."

(Quoting with approval the words of Selborne L.C. in *Spackman v. Plustead District Board of Works*, (1885) 10 A.C. 229, that in the proceedings of the authority, 'there must be no malversation of any kind, and there would be no decision within the meaning of the statute if there were anything of that sort done contrary to the 'essence of justice', Lord Wright continued:—

I have italicized (here in ') the two phrases which the Earl of Selborne seems to me to use as meaning what is generally meant by 'natural justice'. He adds, that 'this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him.....

(In 1911 AC 179) Lord Loreburn L. C. had just expressly observed that the board can obtain information in any way they think best, always giving fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their 'view'. The words fair and relevant are to be noted. If this statement is applicable to an 'administrative tribunal', it must, in my opinion, be applicable to the proceedings of the council which may not inaptly be described as a professional tribunal like so many other similar professional bodies which are invested by statute for grave reasons of public policy with disciplinary powers over members of the profession. (After discussing some other cases, the speech proceeded:—

In *Rex v. Local Government Board*; *Ex parte Arlidge*, (1914) 1 K. B. 160, Hamilton L. J. described the phrase 'contrary to natural justice' as an expres-

sion 'sadly lacking in precision'. So it may be, and, perhaps it is not desirable to attempt to force it into any procrustean bed, but the statements which I have quoted may, at least, be taken to emphasise the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard. These are conditions of the validity of any decision enunciated by the council If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.

..... The legislature has not made a decree of the Divorce Court conclusive on the question of adulterous conduct in the same way as it has made a conviction of felony or misdemeanour conclusive so that in such a case all that the council has to decide on proof of the decree and the identity of the party is whether the adultery amounts to infamous conduct in a professional respect. Parliament, when it thinks fit, can clearly and effectively put on the same footing for the purpose of disqualifying the offender as a conviction of treason and felony a decree of adultery of the Divorce Court The proceedings in the Divorce Court were an entirely separate proceeding. The proceedings before the Council are fresh proceedings, before a different body who are bound to hold a due inquiry on their own responsibility and make their own decision on the evidence before them."

28. It is to be noted that notwithstanding the fact that the medical practitioner in that case had been guilty of adultery by the Divorce Court, i.e., the High Court exercising matrimonial jurisdiction, and not merely by a Criminal Court, it was held that failure by the Medical Council to make a due inquiry and arrive at a decision on their own responsibility, independently of the decision of the Divorce Court, was vitiated on the ground that it amounted to a breach of the principles of natural justice. If I may say so with respect, the observations quoted above from General Medical Council's case, 1943-2 All. E. R. 337, apply with greater force to the case of a Motor Accidents Claims Tribunal. Whereas the Medical Council was required under Section 29 of the Medical Act, 1858, only to make a 'due inquiry' and thus proceed in a quasi-judicial manner, the provisions of Sections 110 to 110-F of the Motor Vehicles Act and the statutory rules framed under Section 111-A of that Act contemplate that the proceedings of the Tribunal shall be wholly judicial in character. While

making an inquiry, it shall, inter alia, have the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses, and it is also enjoined (Rule 20) not only to follow many of the provisions of the Code of Civil Procedure, but also to record concisely in a judgment a finding on each of the issues framed and the reasons for such finding (Rule 19).

29. It is important to note in this connection that the principles of liability governing civil actions and criminal prosecutions based on negligence differ in two material aspects. Firstly, in a criminal case, such as one under Section 304-A or 337, Indian Penal Code, the negligence which would justify a conviction must be culpable or of gross degree and not the negligence founded on a mere error of judgment or defect of intelligence.

30. "The principle to be observed", said Lord Atkin in *Andrews v. Director of Public Prosecution*, (1937) 2 All. E. R. 552, "is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case." The degree of negligence which would justify a conviction must be something to the danger of which, if one drew the accused's attention, the latter might exclaim 'I don't care'. It must be something more than a mere omission or neglect of duty, as for instance, the failure of a Municipal Corporation or a Trust to repair a road in consequence of which a person using the road got accidentally killed. Thus, a law distinguishes between negligence which originates a civil liability and the one on which a criminal prosecution can be founded. In some cases, the bounds which separate a culpable negligence from a 'civil' negligence are blurred or may even disappear altogether, but in most cases this distinction is clearly discernible. In short, in criminal cases there must be *mens rea* or guilty mind, i.e., rashness or guilty mind of a degree which can be described as criminal negligence; mere carelessness is not enough.

31. Secondly, the principle of avoidance of liability when there is contributory negligence by the injured person is no defence in criminal law. (See *Tika Ram's case*, AIR 1950 All 300). But in the absence of a statute analogous to the English statute, namely, the Law Reform (Contributory Negligence) Act, 1945, in India, contributory negligence may be a good defence to a civil action.

32. Furthermore, the nature of the onus, the approach to and effect of the evidence in a criminal case is materially different from that in a civil action. In criminal cases, the prosecution must pursue the guilt of the accused beyond the utmost bounds of doubt, to a point of moral certainty. But in civil cases, mere preponderance of probability may be sufficient to fasten the defendant with liability. The reason is not that the Evidence Act prescribes different standards of proof in civil and criminal cases, but because under that Act the burden of proving the guilt of the accused beyond all manner of doubt always rests on the prosecution and never shifts on to the accused. This is not so in civil cases.

33. To sum up, in civil actions and criminal prosecutions arising out of the same motor accident involving bodily injury or death, the parties may be different, the issues may not be identical, the nature of the onus may vary and the effect of evidence may not be the same. It will, therefore, be contrary to all fundamental concepts of natural justice to treat the findings of the Criminal Court as binding on the Motor Accidents Claims Tribunal, assuming — but not holding — that such a Tribunal is not a Court as defined in Section 3 of the Evidence Act, but partakes the character of an Arbitrator, with most of the trappings of a Court.

34. It will, therefore, be opposed to fundamental canons of justice and public policy to treat the judgments of the criminal Court binding on a Motor Accidents Claims Tribunal, trying a claim arising out of a motor accident involving injury or death. The judgment of the Criminal Court, can at the most, be used only for the purpose and to the extent indicated in Section 43 of the Evidence Act.

35. For the reasons recorded in our separate judgments, we answer the question referred to us in the following manner, and direct that this appeal will now go back to the learned Single Judge for disposal on merits in accordance with law:—

"The judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with a claim petition under Section 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can, however, be relevant only for the purpose and to the extent specified in Section 43 of the Evidence Act."

Costs of this reference shall be costs in the appeal.

Order accordingly.

**AIR 1970 PUNJAB & HARYANA 152
(V 57 C 21)**

S. B. CAPOOR AND R. S. NARULA, JJ.

Manohar Lal Ganeshi Lal and another, Plaintiffs-Appellants v. Ganeshi Ram Pohla Ram and others, Defendants-Respondents.

First Appeal No. 456 of 1958, D/- 16-9-1968, from decree of Sub-J., 1st Class, Rohtak, D/- 25-8-1958.

Civil P. C. (1908), Ss. 11, 2(2), O. 23, R. 1 — Scope — Mortgagor and mortgagee — Usurious Loans Act (1918), S. 3(1) Proviso (ii) (as amended by Punjab Act, 7 of 1934) — Question of amount due from mortgagor in subsequent suit for redemption—Question already decided in previous suit inter partes—Mortgaged land not redeemed, nor mortgage foreclosed — Question cannot be reopened under S. 3 — Expression “any decree of a Court” in proviso (ii) to S. 3(1) applies to consent decree — (Transfer of Property Act (1882), S. 60) — (Debt Laws — Usurious Loans Act (1918), S. 3(1) Proviso (ii) (as amended by Punjab Act 7 of 1934)).

It is only an adjudication of a res that operates as a bar on the principles of res judicata whether statutory or constructive. When it is found that there has in fact been no adjudication by a Court, the provisions of Section 11 of the Code of Civil Procedure do not bar the trial of the relevant issue. (Para 5)

In a subsequent suit for redemption of mortgaged property the question of the amount due from the plaintiff-mortgagor to the defendant-mortgagee on the mortgage in suit, which question has already been decided by a consent decree in a previous redemption suit inter partes, but the mortgaged land has not been redeemed nor the mortgage foreclosed, cannot be reopened under Section 3 of the Usurious Loans Act as amended by the Punjab Relief of Indebtedness Act (7 of 1934). The jurisdiction of the Court to reopen or scale down the debt is expressly barred by S. 3 of Usurious Loans Act. AIR 1967 SC 591, Distinguished, AIR 1934 PC 205 Explained. Case law discussed.

(Paras 5, 7)

The expression “any decree of a Court” in proviso (ii) to sub-section (1) of Section 3 of the Usurious Loans Act applies as much to a consent decree as to a decree passed in a contested action. This is in contradistinction to the provisions or principles of Section 11 of the Code of Civil Procedure, which bar the trial of

only such an issue which was directly or substantially in issue in the previous litigation and on which the adjudication of a competent Court has been superimposed. (Para 5)

The invoking of the relief under the purview of sub-section (1) of Section 3 of the Usurious Loans Act is subject to the second proviso to that sub-section and the word “decree” in that proviso applies as much to a consent decree as to a decree based on appraisal of evidence by the Court itself. A decree based on a compromise is in a way passed on the admission of the parties on the points in issue and has for all practical purposes the same force as a decree obtained after contest. Any relief granted to the plaintiffs in a subsequent suit in respect of the mortgage money which was payable on the date of the previous consent decree, cannot but affect the previous decree. (Para 7)

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| 1964-2 SCR 310, P. Venkata Subba Rao v. V. Jagannadha Rao | 4, 5 |
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| 60 Pun. W. R. 1917, Phula Singh v. Bur Chand | 6 |

Dalip Chand Gupta and J. V. Gupta, for Appellants; G. P. Jain with Sarvshri Satya Prakash Jain and G. C. Garg, for Respondent (No. 1 only).

R. S. NARULA, J.:— The sole question which calls for decision in this plaintiffs' Regular First Appeal against the judgment of the Court of Shri Mohan Lal Jain, Subordinate Judge, 1st Class, Rohtak, dated August 25, 1958, granting the plaintiff-appellants a decree for possession of the land in dispute conditional on their depositing in the Court a sum of Rs. 6,000/- within six months of the date of the decree for redemption of the mortgaged land is — whether in a subsequent suit for redemption of mortgaged property the question of the amount due from the plaintiff-mortgagor to the defendant-mortgagee on the mortgage in suit, which question has already been

decided in a previous suit inter partes, on the basis of which the mortgaged land has not been redeemed nor the mortgage foreclosed, can be reopened under Section 3 of the Usurious Loans Act as amended by the Punjab Relief of Indebtedness Act (7 of 1934). This question has arisen in the case in hand in the following circumstances:—

The land in suit was mortgaged with possession by one Ganeshi Lal with the predecessor-in-interest of defendants Nos. 2 to 11 for Rs. 4,000/- in the year 1921. The usufruct of the land was to be adjusted against the interest amounting to Rs. 200/- which amount of interest fell due on half of the mortgage money, i.e., on Rs. 2,000/-. The remaining mortgage-money of Rs. 2,000/- was to carry interest at Re. 0/7/9 per cent per mensem. After the death of the original mortgagee, his heirs sold their mortgage rights in favour of Ghasi Ram, defendant No. 1, for a sum of Rs. 3,000/-. The plaintiff-appellants (to whom reference will be made in this judgment by their title in the trial Court as also to the other parties to this litigation) who are the heirs of Ganeshi Lal, the original mortgagor, obtained on May 9, 1955, a decree for redemption of the land in dispute on payment of Rs. 6,000/- to be deposited by them within six months of the date of that decree. The decree of the competent Civil Court, dated May 9, 1955, further provided that if the plaintiffs fail to deposit the amount within the aforesaid period of six months "the mortgage shall continue as before." It is the admitted case of both sides that the mortgage amount determined by the consent decree of the Civil Court in the previous suit was not paid by the plaintiffs within the prescribed period or indeed at any time thereafter. It is also not in dispute that the defendants took no steps to foreclose the mortgage.

It was in the abovesaid circumstances that the suit from which the present appeal has arisen was filed by the plaintiffs on August 5, 1957, claiming a decree for possession by redemption of the land in dispute without payment of any mortgage money or on payment of the mortgage money which may be fixed according to law after taking account of profits accruing from the land. The suit was resisted by Ghasi Ram defendant No. 1 alone. Proceedings against other defendants were ex parte. Defendant No. 1 admitted the mortgage as well as its terms. He, however, pleaded that the claim of the plaintiffs was barred on principles of res judicata on account of the previous adjudication by a competent Civil Court, and on account of the plaintiffs not having redeemed the land on making the requisite payment within the time allowed by the said previous decree.

Defendant pleaded that this had resulted in automatic foreclosure of the mortgage. In the alternative it was pleaded that in any case the plaintiffs could not challenge the quantum of the mortgage money which they were liable to pay, i.e., Rs. 6,000/- which had been found by the Court in the previous suit, and that, therefore, the plaintiffs could not call for accounts from the defendant. On the pleadings of the parties, the trial Court framed as many as seven issues out of which we are concerned in this appeal with issues Nos. 2 and 3 only, which were:—

"2. Whether the suit is barred by res judicata?

3. Whether the plaintiffs can challenge the amount of Rs. 6,000/- as agreed upon between the parties in the previous suit?"

2. By its judgment and decree under appeal, the trial Court found issue No. 2 against the contesting defendant and held that the suit for redemption was not barred by res judicata, but decided issue No. 3 against the plaintiffs and held that the plaintiffs could not ask for the decision of the competent Court in the previous suit though based on a compromise being reopened, as to the amount of mortgage money which the plaintiffs were liable to pay for redemption of the land in dispute. Not satisfied with the finding of the trial Court on issue No. 3, the otherwise successful plaintiffs have preferred this appeal to this Court. While admitting the appeal on December 1, 1958, Dua, J. directed on the application of the plaintiff-appellants that the sum of Rs. 6,000/- in question may be deposited by them in Court and the mortgagee-respondents may be allowed to withdraw the amount on furnishing adequate security to the satisfaction of the executing Court for restitution of the amount in question. We were informed by the learned counsel for the contesting parties that in pursuance of the abovesaid order, the plaintiffs did deposit the requisite amount in the trial Court and have in consequence thereof already obtained actual possession of the mortgaged land in full satisfaction of the decree under appeal subject to the decision of this Court.

3. Mr. Ganga Parshad Jain, the learned counsel for the contesting defendant-respondent, did not question the correctness of the finding of the trial Court on issue No. 2 and indeed frankly conceded that the subsequent suit of the plaintiffs for redemption was not barred. Parties, therefore, contested before us only about the correctness or otherwise of the finding of the trial Court on issue No. 3. Mr. Dalip Chand Gupta, the learned counsel for the plaintiff-appellants submitted that the decree in the previous suit for redemption having been passed on a com-

promise between the parties, the Court below was bound to ignore the same for purposes of the subsequent suit in which the whole matter must be held to be again open. What the plaintiffs actually claim is that the Court is bound to scale down the mortgage debt under Section 3 of the Usurious Loans Act and the previous decree is no bar to this being done. He further contended that determination of the quantum of the mortgage money was not a *res* which had been adjudicated upon by the Court itself in the previous suit, and that what had in fact happened was that the trial Court had merely superimposed its seal on a mere agreement between the parties as to the quantum of the mortgage money. In addition, counsel contended that the whole decree in the previous suit must be treated as one indivisible unit and the moment the plaintiffs had not redeemed the mortgage within the time allowed by the said decree, the whole of the previous decree should be deemed to have been washed out, and that the present suit should have been tried as if no decree at all had been passed in the previous suit.

Counsel firstly referred to the judgment of the Privy Council in *Raghunath Singh v. Mt. Hansraj Kunwar*, AIR 1934 P.C. 205. It was held in that case that unless it could be said that a decree involved a decision to the effect that the mortgagor's right to redeem was extinguished, it cannot operate by way of *res judicata* so as to prevent the Courts, under Section 11 of the Code of Civil Procedure, from trying a second redemption suit. There is no quarrel with the proposition of law laid down by the Privy Council in *Raghunath Singh's* case, AIR 1934 P.C. 205 (supra), and as already observed, learned counsel for the contesting defendant did not for a moment assail the proposition of law laid down by the Judicial Committee of the Privy Council. No question as to the reopening of the determination of the Court in the previous suit as to the quantum of mortgage money arose in the case of *Raghunath Singh*, AIR 1934 P.C. 205. Reference was then made to the judgment of a learned Single Judge of the Madras High Court in *K. Santamma v. K. R. Venkatarama Reddi*, AIR 1935 Mad. 909, wherein it was held that with respect to the application of Order 23, Rule 1 of the Code of Civil Procedure, a suit for partition should be treated differently, and a subsequent suit for partition of the same property involved in the previous suit is not barred under Order 23, Rule 1 by the dismissal of the previous suit even though no permission to institute a fresh suit was obtained when the previous suit was dismissed on the ground of compromise, the reason being that the right to bring a suit for partition unlike other suits is a

continuing right, and as soon as the defendant failed to carry out the compromise, "the parties are relegated to their rights as they existed prior to the compromise."

Though the main question decided by *Madhavan Nair, J.* in *Keesari Santamma's* case, AIR 1935 Mad. 909 (supra) is not in dispute in the appeal before us, Mr. Dalip Chand Gupta has laid great stress on the observation of the learned Judge to the effect that in case of non-carrying out of the compromise what happens is that "the parties are relegated to their rights as they existed prior to the compromise". From the abovesaid expression used by the Madras High Court in its judgment in the case of *Keesari Santamma*, AIR 1935 Mad. 909, counsel wants to spell out that the result of not redeeming the land in dispute by the plaintiffs in execution of or in pursuance of the decree in the previous suit is that the parties before us are also relegated to their rights as they existed prior to the compromise which would mean that the compromise as well as the decree passed thereon have to be completely ignored and that this would result in the determination of the mortgage money in the previous suit being deemed to be non-existent. We do not find any force in this contention of the learned counsel. The only aspect of the case with which the Madras High Court was concerned was as to the maintainability of the subsequent suit for partition. No question of detail such as the one involved in issue No. 3 before us was mooted before the Madras High Court.

The observation to which reference has been made by Mr. Dalip Chand Gupta was made only for the purpose of emphasising that the second suit would not be barred by the partition suit having been dismissed on the allegation that it had been adjusted. The Madras High Court held that the parties had been relegated to their rights which existed prior to the compromise and that giving effect to the said principle would result in the finding that the subsequent suit was maintainable. All that was held was that the dismissal of the previous suit in the case before the Madras Court could not operate as a bar to the plaintiffs' suit. The ratio of the judgment in *Keesari Santamma's* case, AIR 1935 Mad. 909, does not appear to advance the contention of Mr. Dalip Chand Gupta at all.

4. Reliance was lastly placed by Mr. Gupta on the authoritative pronouncement of their Lordships of the Supreme Court in *P. Venkata Subba Rao v. V. Jagannadha Rao*, (1964) 2 S.C.R. 310 = (AIR 1967 S.C. 591). The fate of the case before the Supreme Court depended upon the scope and true construction of

Section 19 of the Madras Agriculturists Relief Act (4 of 1938) as amended by Section 16(ii) of the Madras Agriculturists Relief (Amendment) Act (23 of 1948). Sub-section (1) of Section 19 of the 1938 Madras Act, *inter alia*, provided that where a Court has passed a decree before the coming into force of that Act for the repayment of a debt against an agriculturist, the Court shall, on an application of the judgment-debtor, apply the provisions of that Act to such decree and notwithstanding anything contained in the Code of Civil Procedure, amend the decree accordingly or enter satisfaction thereof as the case may be. Sub-section (2) of Section 19 makes the provisions of sub-section (1) applicable even to those cases where the decree has been passed by a Court in respect of a debt payable on the date of commencement of the Act after such commencement. Section 16 of the Amending Act of 1948 states that the amendments made by the said 1948 Act shall apply to the following sets of proceedings, namely:—

(i) all suits and proceedings instituted after the commencement of this Act;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement;

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act.

The relevant substantive provisions of the Madras Act entitle the judgment-debtors against whom decrees covered by Section 16 have been passed to apply for their being scaled down. One of the questions which arose for decision before the Supreme Court under the above provisions was whether a compromise decree passed in a suit instituted before the commencement of the Act falls within clause (ii) or clause (iii) of Section 16 of the Amending Act. The Supreme Court held:—

"There, being no distinction between decrees passed after contest and decrees passed on compromise, the words 'in which the decree or order passed has not become final' in clause (ii) of Section 16, cannot be held to refer to a compromise decree but to decrees which are final such as final decrees for foreclosure, etc., in suits on mortgages."

Their Lordships held on the facts of the case before them that it was governed by clause (iii) of Section 16 read with sub-section (2) of Section 19 of the principal Act and the judgment-debtors were, therefore, entitled to broach the question of the scaling down of the decree once again. In the portion of the judgment on

which Mr. Gupta has relied, it was observed by the Supreme Court that though the conduct of the judgment-debtor in omitting to press the claim for reduction of the amount of the claim on the first occasion was significant, it did not constitute *res judicata* either statutory or constructive. It was in that context that the Supreme Court observed that the compromise decree was not a decision by the Court, but was the acceptance by the Court of something to which the parties had agreed, and that a compromise decree merely sets the seal of the Court on the agreement of the parties. On that basis it was held that the Court while passing the compromise decree at the earlier stage had not decided anything, and that it was only a decision by the Court which could be *res judicata*, whether statutory under Section 11 of the Code of Civil Procedure or constructive as a matter of public policy.

Their Lordships of the Supreme Court refused to look into the evidence to show that the judgment-debtor had actually paid two sums under the consent decree because no plea of estoppel by conduct had been raised or tried in that case. The contention of Mr. Gupta was that a judgment-debtor is doubtlessly not entitled to invoke the provisions of Section 3 of the Usurious Loans Act (10 of 1918) as amended by Section 5 of the Punjab Relief of Indebtedness Act (7 of 1934), in a case where the grant of relief under that provision would affect any decree of a Court, but that the earlier consent decree cannot in the light of the observations made in the judgment of the Supreme Court in *Pulavarthi Venkata Subba Rao's case*, 1964-2 SCR 310=(AIR 1967 SC 591) (supra), be called a decree of a Court. In order to appreciate this argument of the learned counsel, it is necessary to take notice at this stage of the relevant part of Section 3 of the Usurious Loans Act as amended by Punjab Act 7 of 1934. The relevant extract from the section is quoted below:—

"(1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe,—

(a) that the interest is excessive; and

(b) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers, namely, may,—

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in res-

pect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii)	x	x	x
	x	x	x
	x	x	x

Provided that, in the exercise of these powers, the Court shall not—

(i)	x	x	x
	x	x	x
(ii) Do anything which affects any decree of a Court.			
	x	x	x
	x	x	x
	x	x	x

5. A mere perusal of the above quoted provision makes it plain that the ratio of the judgment of the Supreme Court in Pulavarthi Venkata Subba Rao's case, 1964-2 SCR 310=(AIR 1967 SC 591), has no application to the matter before us. It is only an adjudication of a res that operates as a bar on the principles of res judicata whether statutory or constructive. When it is found that there has in fact been no adjudication by a Court, the provisions of Section 11 of the Code of Civil Procedure do not bar the trial of the relevant issue. In the present case, however, the appellants must fail, not because of the ordinary principles of res judicata, but because of the fact that the jurisdiction of the Court to reopen or scale down the debt is expressly barred by the very provision which the appellants seek to invoke for getting the relevant relief. What the relevant part of Section 3 of the Usurious Loans Act says is that the Court shall not reopen any transaction or grant any relief under sub-section (1) of Section 3 where by doing so "any decree of a Court" is affected.

The expression "any decree of a Court" in proviso (ii) to sub-section (1) of Section 3 of the Usurious Loans Act applies, in my opinion, as much to a consent decree as to a decree passed in a contested action. This is in contradistinction to the provisions or principles of Section 11 of the Code of Civil Procedure, which bar the trial of only such an issue which was directly or substantially in issue in the previous litigation and on which the adjudication of a competent Court has been superimposed. The answer to the question whether the appellants in the present case can escape the bar of the second proviso to sub-section (1) of Section 3 depends upon the answer to the simple question — "whether the grant of any relief resulting in the reduction of the sum of Rs. 6,000/- payable under the previous decree would or would not affect the previous decree." To ask that question is to answer it. An answer to the above question in the negative appears to me to be an impossibility. In the

Supreme Court case the relevant provisions of the Madras Act clearly provided for the scaling down of decretal debts. There is no jurisdiction in the Civil Courts in Punjab to scale down any debt under Section 3 of the Usurious Loans Act as amended by the 1934 Punjab Act, except in the circumstances mentioned in Section 3 itself.

No reference is being made by me in this connection to the various sections contained in Part IV of the 1934 Punjab Act as subsequently amended relating to proceedings before Debt Conciliation Boards as the same are not relevant for purposes of deciding this appeal. The relief available in the Civil Courts of Punjab under Section 3 of the Usurious Loans Act is subject to proviso (i) and proviso (ii) to sub-section (1) of that section. This case falls squarely within proviso (ii). Nor do we find any force in the contention of Mr. Gupta to the effect that the non-payment of the mortgage money by the plaintiffs within six months of the previous decree made the decree non-existent for purposes of the second proviso to sub-section (1) of Section 3 of the Usurious Loans Act. The relevant proviso does not say that it is only an executable decree the effecting of which would bar the availability of relief under the purview of sub-section (1) of that section. The effecting of any decree of a Court is prohibited by the proviso.

6. Mr. Ganga Parshad Jain, the learned counsel for the contesting defendant, referred us to a Division Bench judgment of the Oudh Chief Court in Darshan Lal v. Munnu Singh, AIR 1940 Oudh 273, wherein it has been held that the former decree operates as res judicata on the question of amount due on the mortgage and that the purchaser of the equity of redemption is entitled to redeem on payment of the amount determined by the former decree. The question whether the former decree was a consent decree or one obtained after contest did not arise in Darshan Lal's case, AIR 1940 Oudh 273 (supra). Reliance was then placed on behalf of the defendant on the judgment of a Division Bench of the Lahore High Court in Phula Singh v. Bur Chand, AIR 1917 Lah. 446. This case was really followed by the Oudh Court.

In the Lahore case it was held that the question of the amount due on the mortgage in question was res judicata by reason of the decree in the previous suit. A Full Bench of the Bombay High Court held in Ramji Bapuji v. Pandharinath Ravji, ILR 43 Bom. 334=(AIR 1918 Bom. 1) (FB), (per Scott, C. J.) that "a second redemption suit must recognise the binding effect of the previous redemption decree nisi in so far as it settles the accounts up to the date of that decree, and the

duty of the Court in the second suit would be limited to the ascertainment of the amount due at the date of the second suit or decree and to give such consequential relief as the law permits." In *Mt. Maina Bibi v. Chaudhri Vakil Ahmad*, AIR 1925 P.C. 63 (at page 68), it was held that the question of the amount of the dower debt and that of the rate of interest which had been decided in the earlier suit could not be reopened in the second suit, and that it was only the amount subsequent to the date of the previous decree which could be gone into at the later stage. It was observed by the Privy Council that the non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right of the plaintiffs to the inheritance of, or, their rights to recover possession of the lands at some future time.

7. Mr. Ganga Parshad Jain lastly referred to the Division Bench judgment of Harries and Ganga Nath, JJ., in *Ibney Hasan v. Gulkandi Lal*, AIR 1936 All. 611. In that case it was held that where it is not possible for the High Court to reduce the interest without affecting a decree previously passed by a Court of competent jurisdiction, it cannot exercise the powers given by Section 3 of the Usurious Loans Act. It was decided by the Allahabad High Court that the Court in exercising its powers under Section 3 of the Usurious Loans Act must not do anything which affects any decree whether such decree be inter partes or not. Once the distinction pointed out by the Allahabad High Court is recognised, it becomes clear that the law laid down by the Supreme Court in connection with the application of the principles of *res judicata* is not at all relevant for determining the question of application of the second proviso to sub-section (1) of Section 3 of the Usurious Loans Act. Relief under the purview of sub-section (1) of Section 3 cannot be granted even in a case where some decree not inter partes is likely to be affected. A consent decree which is inter partes cannot certainly be placed at any lower pedestal than a decree which is not even inter partes. As already stated it is not necessarily an adjudication of the Court itself in a contested action which creates the bar under the second proviso. It is the possibility of affecting any decree of any competent Court which creates the relevant bar.

We are, therefore, unable to find any fault with the ultimate decision of the trial Court on issue No. 3. It is unnecessary to deal with the reasoning on which the trial Court based its finding on that issue. We would, therefore, hold that the invoking of the relief under the purview of sub-section (1) of Section 3 of the Usurious Loans Act is subject to the second proviso to that sub-section and

that the word "decree" in that proviso applies as much to a consent decree as to a decree based on appraisal of evidence by the Court itself. A decree based on a compromise is in a way passed on the admission of the parties on the points in issue and has for all practical purposes the same force as a decree obtained after contest. In the circumstances of this case any relief granted to the appellants in respect of the mortgage money which was payable on the date of the previous consent decree, cannot but affect the said previous decree.

8. No other point having been argued before us in this case, the appeal of the plaintiffs fails and is accordingly dismissed with costs.

9. S. B. CAPOOR, J: I agree.
Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 157 (V 57 C 22)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA, JJ.

Kanianwali Co-operative Farming Society at Kanianwali through its Secretary Kanwal Krishan and others, Petitioners v. State of Punjab through the Secy. to the Punjab Govt. in the Rev. Dept. Civil Secretariat, Chandigarh and others, Respondents.

Civil Writ No. 621 of 1968, D/- 30-4-1969.

(A) Punjab Security of Land Tenures Act (10 of 1953) as amended by Punjab Security of Land Tenures (Amendment and Validation) Act (14 of 1962), S. 19-B — Section has retrospective effect and operates from the date it was enacted — 1967 Lah. LT 155 and 1969 Pun LJ 1, Overruled.

Per Majority (Mahajan J. contra). The retrospective amendment of S. 19-B with effect from July 10, 1958, makes the provisions of that section subject to S. 10-A of the Act right from the first day when S. 19-B was enacted;

At no time was Section 19-B independent of and not subject to the provisions of Section 10-A;

The expression "this Act" in S. 19-B (unamended as well as amended) has reference to the principal Act of 1953, and not to any subsequent amending legislation. (Para 44)

The controversy about the decision of 1962-64 Pun. L. R. 331 being correct or not is wholly irrelevant in the changed legislative field because of the unamended Section 19-B being deemed to have never existed and the amended S. 19-B

FM/FM/C439/69/RGD/P

being treated as the only section which came into force and continues to apply to the category of acquisitions mentioned therein. (Para 44)

The law laid down in Bhagat Gobind Singh's case, AIR 1963 Punj. 319, as well as in the State of Punjab v. Shamsher Singh, 1966-68 Pun. L. R. 41 and also in the Letters Patent judgment in the State of Punjab v. Bhalle Ram, 1963 Pun. L. J. 65, is correct and unexceptionable.

(Para 44)

The observations in the judgment of the Single Judge in Gurcharan Singh v. State of Punjab, 1967 Lah. L. T. 155, which go contrary to the decision of the earlier Division Bench in the case of the State of Punjab v. Bhalle Ram, 1963 Pun. L. J. 65, were not quite correct. For the same reason decision in Smt. Atma Devi v. State of Punjab, 1969 Pun LJ 1 on the point now in issue (which was based on the earlier Single Bench judgment in case of Gurcharan Singh, 1967 Lah LT 155) was also not correct.

(Para 44)

Any land which is once included in the surplus area of a big land-owner never ceases to be surplus and is never taken out of the pale of the area which is liable to be utilised under Section 10-A (a) except in the cases of acquisition by the State or acquisition by inheritance referred to in the Act.

(Para 44)

The purpose of enacting Section 19-B was to take over the surplus area of those who became big land-owners after April 15, 1953, by acquiring more lands from other land-owners (otherwise than by inheritance subject to Section 10-B) and not to reduce the surplus area of those who were big land-owners on April 15, 1953.

(Para 44)

Bhalle Ram's case, 1962-64 Pun. L. R. 331 is overruled not only by subsequent amendment of the Act but also by 1963 Pun. L. J. 65.

(Para 32)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Harmonious construction.

Per Shamsher Bahadur, J.:— Words in a statute have to be given their plain meaning and every effort has to be made by Courts to give a harmonious construction to the various provisions even if some seeming contradiction is involved. If a workable construction could be evolved by retaining each word in the relevant provision, such a construction has to be preferred to the one which would involve the deletion of some of its clauses or the re-writing of its provisions. Any construction of a statute which defeats its object is neither permissible nor legitimate.

(Paras 29, 31)

Cases Referred: Chronological Paras

(1969) 1969 Cur LJ 1 = 1969 Pun LJ 11 (SC), Arjan Singh v. State of Punjab 15, 37

(1969) 1969 Pun LJ 1, Smt. Atma Devi v. State of Punjab 5, 30, 44

(1967) 1967 Lah LT 155 = 1967 Pun LJ 193, Gurcharan Singh v. State of Punjab 5, 30, 44

(1967) 1967 Cur LJ 804 = 1967 Pun LJ 307, Hans Raj v. State of Punjab 3, 27, 31, 42, 44

(1966) AIR 1966 SC 1869 (V 53) = 1966-68 Pun LR 300, Bhagwan Das v. State of Punjab 27

(1966) 1966-68 Pun LR 41 = 1965 Cur LJ 891, State of Punjab v. Shamsher Singh 3, 31, 42, 44

(1963) AIR 1963 Punj 319 (V 50) = 1963-65 Pun LR 105 = 1963 Cur LJ 22, Bhagat Gobind Singh v. Punjab State 3, 5, 26, 31, 42, 44

(1963) 1963 Pun LJ 65, State of Punjab v. Bhalle Ram 3, 25, 42, 44

(1962) 1962-64 Pun LR 331 = 1963 Cur LJ 89, Bhalla Ram v. State of Punjab 2, 3, 5, 7, 10, 14, 15, 19, 21, 25, 26, 27, 33, 36, 40, 41, 42, 43, 44

(1961) Civil Writ No. 486 of 1961 = ILR (1962) 1 Punj 585, Surja v. Financial Commr. Punjab 33

(1961) Civil Writ No. 1051 of 1960 = ILR (1962) 1 Punj 811, Jagan Nath v. State of Punjab 33

(1960) AIR 1960 SC 1080 (V 47) = (1960) 3 SCR 887, Kavalappara Kottarathil Kochuni v. State of Madras and Kerala 33

(1953) AIR, 1953 SC 244 (V 40) = 1953 Cri LJ 1094, State of Bombay v. Pandurang Vinayak 41

(1952) 1952 AC 109 = 1951-2 All ER 587, East End Dwellings Co. Ltd. v. Finsbury Borough Council 41

D. S. Nehra with Mr. B. S. Bajwa, for Petitioners; A. S. Sarhadi, Senior Advocate with N. S. Bhatia, for Advocate General, Punjab, for Respondents.

MAHAJAN J.:— This Full Bench has been constituted in order to resolve the conflict that has arisen in this Court, as to whether the provisions of the Punjab Security of Land Tenures (Amendment and Validation) Act, 1962 (Act No. 14 of 1962) are retrospective or prospective? One set of decisions has given retrospectivity to all the provisions of this Act including Section 19-B; whereas the other set of decisions has merely given Section 19-B, as amended by this Act, a prospective effect.

2. In Bhalle Ram v. State of Punjab, 1962-64 Pun LR 331, it was decided by me that transfers made before the 30th of July, 1958, of the surplus area by a land-owner cannot be ignored vis-à-vis the transferee; and such transfer has to be taken into consideration, so far as the transferee is concerned, to find out whether the land with the transferee is in

excess of the permissible area after taking into consideration the land already held by him. In other words, after adding the land obtained by the transfer to the land already held by the transferee, it has to be determined under Section 19-B, whether there is any surplus land in the hands of the transferee.

3. In the wake of Bhalle Ram's decision, 1962-64 Pun LR 331 the Legislature stepped in and enacted the Punjab Security of Land Tenures (Amendment and Validation) Act, 1962 (Act No. 14 of 1962). The Letters Patent Bench reversed Bhalle Ram's decision 1962-64 Pun LR 331 in view of the amendment. The decision of the Letters Patent Bench is reported as State of Punjab v. Bhalle Ram 1963 P. L. J. 65. This decision of the Letters Patent Bench did not take into consideration the provisions of Sec. 1(2) of Act No. 14 of 1962, according to which Section 19-B, as amended, was to take effect from the 30th of July, 1958. It was also not urged before the Letters Patent Bench that Bhalle Ram's decision 1962-64 Pun LR 331 could not be reversed because Sec. 19-B was not retrospective. In short, the question of retrospectivity of S. 19-B was not considered by the Letters Patent Bench. The decisions, which are in line with the decision of the Letters Patent Bench in Bhalle Ram's case, 1963 Pun LJ 65 are:—

(1) Bhagat Gobind Singh v. Punjab State, 1963-65 PLR 105 = 1963 Cur LJ 22 = (AIR 1963 Punj 319);

(2) State of Punjab v. Shamsheer Singh, 1966-68 Pun LR 41;

(3) Hans Raj v. State of Punjab, 1967 Cur LJ 804 (P & H).

4. None of these decisions notices Section 1 (2) of Act 14 of 1962, which brought into operation Section 19-B, as amended, with effect from the 30th of July, 1958.

5. The matter again cropped up in Gurcharan Singh v. State of Punjab, 1967 Lah LT 155; and in that case, I came to the conclusion that the position, as prevailed when Bhalle Ram's case, 1962-64 Pun LR 331 was decided, continued to prevail up to the 30th of July, 1958, as was clear from Section 1 (2) of Act No. 14 of 1962, read with Section 6 of that Act. This view found favour with Narula, J. in Smt. Atma Devi v. State of Punjab, 1969 Pun LJ 1. The Letters Patent Bench decision as well as the decision in Bhagat Gobind Singh's case, 1963-65 Pun LR 105 = (AIR 1963 Punj 319) were brought to the notice of the learned Judge; and the learned Judge was of the view that in spite of the Letters Patent Bench decision and Bhagat Gobind Singh's decision, 1963-65 Pun LR 105 = (AIR 1963 Punj 319) the rule in Bhalle Ram's case, 1962-64 Pun LR 331 still held the field, as held by me in Gurcharan Singh's case, 1967 Lah LT 155.

6. Therefore, it is clear from what has been stated above that the short controversy that we are called upon to resolve is, whether the amendment of Sec. 19-B by Act No. 14 of 1962, operates from the 30th of July, 1958, or it has retrospective effect and would operate from the commencement of the parent Act, that is, Punjab Security of Land Tenures Act, 1953 (Act No. 10 of 1953)?

7. The previous history of the legislation along with its relevant amendments was noticed by me in detail in Bhalle Ram's case, 1962-64 Pun LR 331; and for facility of reference, I merely reproduce the relevant part of that decision:—

".....In order to appreciate the contention of the learned counsel for the parties, it is essential to go through from the very start into the relevant provisions of the various Acts that have held the field from time to time. The first Act that was enacted in this behalf is the Punjab Tenants (Security of Tenures) Act, 1950 (Act No. 22 of 1950) which came into force on the 6th November, 1950. The permissible area in this Act was kept at 100 standard acres and the provisions as to transfers are dealt with in Sections 10, 11 and 12 and are in these terms:—

'10. Effect of Transfer:— Subject to the provisions of Sections 11 and 12, and save in the case of lands acquired under any law for the time being in force, every transfer or other disposition of land, whether by act of parties or by operation of law or by or in execution of a decree, unless duly completed or deemed to have been completed before the 1st May, 1950, shall be void and unenforceable in so far as it tends to reduce or has the effect of reducing the minimum period of tenancy hereinafter specified.

11. Saving of Bona fide sale:— Nothing contained in Section 10 shall apply to a sale made, or intended to be made, in good faith and any tenant of the land which is the subject matter of such sale shall, unless the unexpired period of his tenancy fixed by or under the provisions of this Act is accepted by the vendee, be liable to ejectment under the provisions of the Punjab Tenancy Act, 1887 (16 of 1887), as if he were a tenant from year to year:

Provided that, where the tenant is not accepted by the vendee, the tenant shall, subject to the rights of other pre-emptors as provided in the Punjab Pre-emption Act, 1913, be entitled to pre-empt the sale in the manner prescribed therein, and Section 15 of the said Act shall be deemed to be amended accordingly.

This Act was amended by the Punjab Tenants (Security of Tenures) Amendment Act, 1951 (President's Act 5 of 1951). So far as the present controversy is concerned, no change was made in the 1950 Act

by this amendment. The 1950 Act was repealed by the Act and the Act came into force on the 15th April, 1953. S. 2 is the definition section and it is only necessary to notice the definitions of the phrases 'land-owners', 'permissible area', 'reserved area', 'surplus area'; and these definitions are as under:—

'2. In this Act, unless the context otherwise require (1) 'land-owner' means a person defined as such in the Punjab Land Revenue Act, 1887 (Act 17 of 1887), and shall include an 'allottee' and 'lessee' as defined in Cls. (b) and (c) respectively, of Section 2 of the East Punjab Displaced Persons (Land Resettlement) Act, 1949 (Act 36 of 1949), hereinafter referred to as the Resettlement Act.'

Explanation:— In respect of land mortgaged with possession, the mortgagee shall be deemed to be the land-owner.

(The definition of the 'land-owner' in the Punjab Land Revenue Act is in these terms:—

'land-owner' does not include a tenant or an assignee of land revenue, but does include a person to whom a holding has been transferred, or an estate or holding has been let in farm, under this Act for the recovery of an arrear of land-revenue or of a sum recoverable as such an arrear and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate.)

(2) * * * * *

(3) 'Permissible area' in relation to a land-owner or a tenant means thirty standard acres and where such thirty standard acres on being converted into ordinary acres exceed sixty acres, such sixty acres;

Provided that—

(i) no area under an orchard at the commencement of this Act, shall be taken into account in computing the permissible area;

(ii) * * * * *

(4) 'Reserved area' means the area lawfully reserved under the Punjab Tenants (Security of Tenures) Act, 1950 (Act 22 of 1950), as amended by President's Act of 1951 hereinafter referred to as the '1950 Act' or under this Act.

(5) * * * * *

(5-a) 'Surplus area', means the area other than the reserved area, and, where, no area has been reserved, the area in excess of the permissible area selected as prescribed; but it will not include a tenant's permissible area:

Provided that it will include the reserve area, or part thereof, where such area or part has not been brought under self-cultivation within six months of reserving the same or getting possession thereof after ejecting a tenant from it, whichever

is later, or if the land-owner admits a new tenant, within three years of the expiry of the said six months.'

The other provisions which require notice in connection with the present controversy are Sections 6, 10-A and 16 and are in these terms:—

'6. For the purposes of determining under this Act the area owned by a land-owner, all transfers of land except bona fide sales or mortgages with possession, or transfers resulting from inheritance made after the 15th August, 1947 and before the commencement of this Act, shall be ignored.

10-A(a) The State Government or any officer empowered by it in this behalf, shall be competent to utilize any surplus area for the resettlement of tenants ejected, or to be ejected, under Cl. (i) of sub-section (1) of S. 9.

(b) Notwithstanding anything contained in any other law for the time being in force, no transfer or other disposition of land which is comprised in a surplus area at the commencement of this Act, shall affect the utilization thereof in Cl. (a).

Explanation:— Such utilization of any surplus area will not affect the right of the land-owner to receive rent from the tenant so settled.

16.— Save in the case of land acquired by the State Government under any law for the time being in force, or by an heir by inheritance, no transfer or other disposition of land effected after the 1st February, 1955 shall affect the rights of the tenant thereon under this Act.'

The Act was again amended by the Punjab Security of Tenures (Amendment) Act 57 of 1953, but so far as the provisions concerning the present controversy are concerned no change was made. The next amendment of the Act was made by the Punjab Security of Land Tenures (Amendment) Act, 1955 (Act No. 11 of 1955). Sub-section (3) of S. 2 was replaced by the following sub-section:—

'(3) 'Permissible area' in relation to a land-owner or a tenant, means thirty standard acres and where such thirty standard acres on being converted into ordinary acres exceed sixty acres, such sixty acres:

Provided that:—

(i) no area under an orchard at the commencement of this Act, shall be taken into account in computing the permissible area;

(ii) for a displaced person—

(a) who has been allotted land in excess of fifty standard acres, the permissible area shall be fifty standard acres or one hundred ordinary acres, as the case may be,

(b) who has been allotted land in excess of thirty standard acres but less than fifty standard acres, the permissible area shall be equal to his allotted area,

(c) who has been allotted land less than thirty standard acres, the permissible area shall be thirty standard acres, including any other land or part thereof, if any, that he owns in addition, and so also sub-section 5 (a) of S. 2 as under:—

'(5-a) 'Surplus Area' means the area other than the reserved area, and, where no area has been reserved, the area in excess of the permissible area selected as prescribed; but it will not include a tenant's permissible area:

Provided that it will include the reserved area, or part thereof, where such area or part has not been brought under self-cultivation within six months of reserving the same or getting possession thereof after ejecting a tenant from it, whichever, is later, or if the land-owner admits a new tenant, within three years of the expiry of the said six months.'

Section 16 was also substituted by the following section:—

"16.—Save in the case of land acquired by the State Government under any law for the time being in force, or by an heir by inheritance, no transfer or other disposition of land effected 'after the 1st February, 1955, shall affect the rights of the tenant thereon under this Act'."

8. The next amendment of the Act came into force in the year 1957 by the Punjab Security of Land Tenures (Amendment) Act, 1957, (Punjab Act No. 46 of 1957). Certain changes were made in Section 2 (5-a) by section of the amending Act with the result that Section 2 (5-a) after the amendment stands thus:—

'2 (5-a) 'Surplus area' means the area other than the reserved area, and, where no area has been reserved, the area in excess of the permissible area selected under Section 5-B or the area which is deemed to be surplus area under sub-section (1) of S. 5-C, but it will not include a tenant's permissible area:

Provided that it will include the reserved area, or part thereof, where such area or part has not been brought under self-cultivation within six months of reserving the same or getting possession thereof after ejecting a tenant from it, whichever is later, or if the land-owner admits a new tenant, within three years of the expiry of the said six months.'

9. The last amendment is by the Punjab Security of Land Tenures (Amendment) Act, 1959 (Punjab Act No. 4 of 1959). Section 10-A was amended by Section 2 of the amending Act and new Sections 19-A and 19-B were inserted. The amended Section 10-A and Ss. 19-A and 19-B are in these terms:—

'10-A. (a) The State Government or any officer empowered by it in this behalf, shall be competent to utilise any surplus area for the resettlement of tenants ej-

ected, or to be ejected under Cl. (i) of sub-section (1) of S. 9.

(b) Notwithstanding anything contained in any other law for the time being in force, and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance no transfer or other disposition of land which is comprised in a surplus area at the commencement of this Act, shall affect the utilization thereof in Cl. (a).

Explanation:— Such utilization of any surplus area will not affect the right of the land owner to receive rent from the tenant so settled.

19-A.(1) Notwithstanding anything to the contrary in any law, custom, usage, contract or agreement from and after the commencement of the Punjab Security of Land Tenures (Amendment) Ordinance, 1958, no person whether, as land-owner, or tenant, shall acquire or possess by transfer, exchange, lease, agreement or settlement any land, which with or without the land already owned or held by him, shall in the aggregate exceed the permissible area:

Provided that nothing in this section shall apply to lands belonging to registered co-operative societies formed for purposes of co-operative farming, if the land owned by an individual member of the society does not exceed the permissible area.

(2) Any transfer, exchange, lease, agreement or settlement made in contravention of the provisions of sub-section (1) shall be null and void.

'19-B(1) If, after the commencement of this Act, any person whether as land-owner or tenant, acquires by inheritance or bequest or gift from a person to whom he is an heir any land or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain and if the land of such person is situated in more than one patwar circle, he shall also furnish a declaration required by Section 5-A.

(2) If he fails to furnish the return and select his land within the prescribed period, then the Collector may, in respect of him, obtain the information required to be shown in the return through such agency as he may deem fit.

(3) If such person fails to furnish the declaration, the provisions of Section 5-C shall apply.

(4) The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under Cl. (a) of Section 10-A or for such other purposes as the State Government may by notification direct.'

It may be mentioned that this Act was enacted in pursuance of the Punjab Security of Land Tenures (Amendment) Ordinance, 1958 (Punjab Ordinance No. 6 of 1958) which was repealed by the Amending Act No. 4 of 1959.

It is in the light of these provisions relating to sales that the respective arguments of the parties have to be examined

10. As already said, in the wake of Bhalle Ram's decision, 1962-64 Pun LR

331, the Legislature stepped in and enacted the Punjab Security of Land Tenures (Amendment and Validation) Act (No. 14 of 1962). Section 1 (2) is as follows:—

"1(2):— Clause (a) of S. 2, S. 4, S. 5, S. 7 and S. 10 shall be deemed to have come into force on the 15th day of April, 1953, Cl. (b) of Section 2 and S. 6 shall be deemed to have come into force on the 30th day of July, 1958, and the remaining provisions of this Act shall come into force at once."

Sections 2 (5-a), 10-A and 19-B were amended and some other new sections were added. The amended sections along with the relevant new provisions are set out below:—

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2(5-a)— 'Surplus Area' means the area other than the reserved area, and, where no area has been reserved, the area in excess of the permissible area selected under Section 5-B or the area which is deemed to be surplus area under sub-section (1) of S. 5-C, but it will not include a tenant's permissible area:

Provided that it will include the reserved area, or part thereof where such area or part has not been brought under self-cultivation within six months of reserving the same or getting possession thereof after ejecting a tenant from it, whichever is later, or if the land-owner admits a new tenant, within three years of the expiry of the said six months.

* * * *

10-A.(a) The State Government or any officer empowered by it in this behalf, shall be competent to utilize any surplus area for the resettlement of tenants ejected, or to be ejected under Cl. (i) of sub-section (1) of S. 9.

(b) Notwithstanding anything contained in any other law for the time being in force, and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance no transfer or other disposition of land which is comprised in a surplus area at the commencement of this Act, shall affect the utilization thereof in Cl. (a).

Explanation:— Such utilization of any surplus area will not affect the right of the land owner

2(5-a) 'Surplus Area' means the area other than the reserved area, and where, no area has been reserved, the area in excess of the permissible area selected under Section 5-B or the area which is deemed to be surplus area under sub-section (1) of S. 5-C and includes the area in excess of the permissible area selected under Section 19-B; but it will not include a tenant's permissible area: Provided that it will include the reserved area, or part thereof, where such area or part has not been brought under self-cultivation within six months of reserving the same or getting possession thereof after ejecting a tenant from it, whichever is later, or if the land-owner admits a new tenant, within three years of the expiry of the said six months.,

* * * *

10-A(a) The State Government or any officer empowered by it in this behalf, shall be competent to utilize any surplus area for the resettlement of tenants ejected, or to be ejected, under Cl. (i) of sub-section (1) of S. 9.

(b) Notwithstanding anything contained in any other law for the time being in force and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance, no transfer or other disposition of land which is comprised in surplus area at the commencement of this Act, shall affect the utilization thereof in Cl. (a).

Explanation:— Such utilization of any surplus area will not affect the right of the land-owner to

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to receive rent from the tenant so settled.

* * * * *

19-B (1) If, after the commencement of this Act, any person whether as land-owner or tenant, acquires by inheritance or bequest or gift from a person to whom he is an heir any land or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, which, with or without the land already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain and if the land of such person is situated in more than one patwar circle, he shall also furnish a declaration required by Section 5-A.

(2) If he fails to furnish the return and select his land within the prescribed period, then the Collector may, in respect of him, obtain the information required to be shown in the return through such agency as he may deem fit.

(3) If such person fails to furnish the declaration, the provisions of S. 5-C shall apply.

(4) The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under Cl. (a) of Section 10-A or for such other purposes as the State Government may by notification direct.

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receive rent from the tenant so settled.

(c) For the purpose of determining the surplus area of any person under this section, any judgment, decree or order of a Court or other authority obtained after the commencement of this Act and having the effect of diminishing the area of such person which could have been declared as surplus area shall be ignored.

19-B—Subject to the provisions of Section 10-A, if after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir any land, or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, or if, after such commencement any person acquires in any other manner any land, which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain, and if the land of such person is situated in more than one patwar circle, he shall also furnish a declaration required by Section 5-A.

(2) If he fails to furnish the return and select his land within the prescribed period, then the Collector may in respect of him obtain the information required to be shown in the return through such agency as he may deem fit and select the land for him in the manner specified in sub-sec. (2) of Section 5-B.

(3) If such person fails to furnish the declaration, the provisions of Section 5-C shall apply.

(4) The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under Cl. (a) of Section 10-A or for such other purposes as the State Government may by notification direct.

(a) that the State Government or any officer empowered in this behalf shall be competent and shall be deemed always to have been competent, to determine in the prescribed manner the surplus area referred to in Section 10-A of a land-owner out of the lands owned by such land-owner immediately before the commencement of this Act; and

(b) that for evaluating the land of any person at any time under this Act, the land owned by him immediately before the commencement of this Act, or the land acquired by him after such commencement by inheritance or by bequest or gift from a person to whom he is an heir, shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such commencement, and that the land acquired by him after such commencement in any other manner shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such acquisition."

Section 10 of Act No. XIV of 1962 provided that "Section 10-A of the Principal Act, as amended by this Act, and Clause (5-a) of Section 2 of the Principal Act shall always be deemed to have been inserted in the Principal Act on the 15th day of April, 1953."

12. Thus the position, that emerges after the amendment of the Parent Act (Act No. X of 1953) by the Amending and Validation Act (Act No. XIV of 1962) along with the amendments, that have been made from time to time between the dates of the passing of these two Acts, is as follows:

13. Whatever area is over and above the reserved area or the permissible area of a land owner, as on 15th of April, 1953, will be the surplus area, provided on that area, there are no tenants within their permissible area. In other words if on the surplus land, there are tenants and their holdings do not exceed the tenant's permissible area, as defined in Section 2 (3) of the Parent Act, the so-called surplus area will not be surplus. It will only be surplus if, on the relevant date, it is in excess of the reserved or permissible area of the owner and there are no tenants on the same up to the extent of the permissible area of the tenants. According to Section 10-A, the State Government or any officer empowered by it in this behalf could utilize the surplus area for the resettlement of ejected tenants or tenants that might be ejected under Section 9 (1) (i) of the Act.

Sub-section (b) of Section 10-A provides as follows:—

"10-A (b) — Notwithstanding anything contained in any other law for the time being in force and save in the case of land acquired by the State Government under any law for the time being in force

or by an heir by inheritance no transfer or other disposition of land which is comprised in surplus area at the commencement of this Act, shall affect the utilization thereof in clause (a).

EXPLANATION:— Such utilization of any surplus area will not affect the right of the land-owner to receive rent from the tenant so settled."

All transfers and dispositions of land comprised in the surplus area, as on 15th of April, 1953, will not affect its utilization for resettlement of tenants ejected under Section 9(1)(i). If the matter stood here, there would be no difficulty.

But the amended Section 19-B provides that—

"Subject to the provisions of Section 10-A if after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir, any land, or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, or if, after such commencement, any person acquires in any other manner any land, which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form x x x x giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain x x x"

Sub-section (4) provides that—

"The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under clause (a) of Section 10-A x x x x".

14. It is common ground that after the coming into force of Section 19-B, that is, with effect from the 30th of July, 1958, a transferee of a surplus area cannot change its character merely because he was holding land far below his reserved area or permissible area. It is also not disputed that the transfer of surplus area is not void unless the area obtained by transfer coupled with the area already held in the hands of the transferee exceeds the reserved area or the permissible area. The only question, which has been debated and which requires to be settled is, what is the position qua the surplus land transferred between the 15th of April, 1953, and the 30th of July, 1958, in the hands of a transferee when the land transferred and the land already held by the transferee do not exceed the reserved area or the permissible area in the hands of the transferee. According to Bhalle Ram's decision, 1962-64 Pun. L. R.

331, the surplus land, after transfer in the hands of transferee, will cease to be surplus unless it is in excess of the reserved area or permissible area in the hands of the transferee. It is also plain that the Amending and Validation Act No. XIV of 1962 was enacted to do away with the import of that decision. The only question is, whether the Legislature did away with the same with effect from the 15th of April, 1953 or the 30th of July, 1958. The very fact, that the amended Section 19-B was made operative from the 30th of July, 1958, shows that the Legislature never intended to make this provision retrospective. It was specifically held in Bhalle Ram's case, 1962-64 Pun. L. R. 331, that Section 19-B overrides Section 10-A because both the provisions could not stand together. What was surplus under Section 10-A could cease to be surplus under Section 19-B by reason of transfer of land, the validity of which was not impaired by law. The transfers were not to affect the utilization of the surplus. But by reason of Section 19-B, that surplus, on transfer, would become the reserved or permissible area of the transferee and would thus cease to be the surplus area because, otherwise, a curious result will follow, namely, that the same land, though the surplus area of the transferor, would not be the surplus area of the transferee after a transfer, inasmuch as, the same is not rendered void by any provisions of the Act. What I have said above finds further support from the definition of the surplus area. Only that area is surplus, which is in excess of the reserved or permissible area and vis-a-vis the transferee, the surplus of the transferor may cease to be surplus at all. If the intention of the Legislature was to take away the benefit conferred on the transferees by Bhalle Ram's case, 1962-64 Pun. L. R. 331, retrospectively, Section 19-B would have been given effect like Sections 10-A and 2(5-a) with effect from the 15th of April, 1953. But that was not done and, in my opinion, advisedly. The Legislature did not want to unsettle the settled transactions.

15. Mr. A. S. Sarhiadi, learned counsel for the State, drew our attention to the objects and reasons leading to the enactment of Act XIV of 1962. No reference can be made to the Objects and Reasons of the enactment because the rule of construction is that the intention of the Legislature has to be gathered from the plain and express language of the statute. It is only, where the language is not plain or express that aid may be derived from the Objects and Reasons for its interpretation. The decision in Bhalle Ram's case, 1962-64 Pun. L. R. 331, was before the Legislature when it enacted Act No. XIV of 1962, and advisedly made Sec-

tion 19-B operative from the 30th of July, 1958, thus indicating that they did not want to take away the effect of that decision prior to the 30th of July, 1958. There seems to be no escape from this conclusion. Reference may also be made to the observations of the Supreme Court in Arjan Singh v. State of Punjab, 1969 Cur. L. J. 1 (SC). Hegde, J., who spoke for the Court, observed:—

“* * It is a well settled rule of law that no provision in a statute should be given retrospective effect unless the legislature by express terms or by necessary implication has made it retrospective and that where a provision is made retrospective, care should be taken not to extend its retrospective effect beyond what was intended.”

16. No explanation has been offered by the learned counsel for the State, why the Legislature made the amended Section 19-B operative with effect from the 30th of July, 1958.

17. After giving the matter my careful consideration, it appears to me that transfers of land, which is surplus in the hands of an owner, are not only valid; but the surplus area will cease to be surplus in the hands of the transferee if in the aggregate the area already held by the transferee and the area acquired by him on transfer does not exceed his permissible or reserved area and whatever is in excess of his permissible and reserved area will be the surplus area. This will only hold good vis-a-vis transfers effected up to the 30th of July, 1958. All transfers thereafter would not have this result because the transfer being subject to Section 10-A will not be taken into account under Section 19-B. This section after amendment opens with the phrase—

“Subject to the provisions of Section 10-A * * *”

18. I now proceed to state the facts of the present petition: Hakam Singh, respondent No. 5, owned 348 Acres 7 Kanals, 10 Marlas of land. This land was under the cultivation of petitioners Nos. 2 to 7, Kartar Singh and others. On the 14th of May, 1955, Hakam Singh gifted the land in dispute to petitioners Nos. 2 to 7. Thereafter, mutations were entered and sanctioned. As Hakam Singh had not reserved his area, proceedings were taken for declaration of the surplus area. On the 5th of April, 1966, the Revenue Assistant, as Collector, declared 288 Acres 7 Kanals 10 Marlas as surplus leaving an area of 60 acres as the permissible area under Section 5-B. Against this decision, an appeal was taken to the Commissioner and it was contended that petitioners Nos. 2 to 7 were the tenants prior to the 15th of April, 1953; and as such, any land which is over and above the reserved or permissible area and on which tenants are

settled would not be surplus area in view of the definition of 'surplus area' in Section 2(5-a). It was also urged that the transfer being prior to the 30th of July, 1958, and the area in the hands of the transferee including the lands held by them not being in excess of their reserved or permissible area, the area in dispute could not be declared as 'surplus area'. On the 6th of March, 1967, the Commissioner rejected the appeal. The Commissioner held that the donees petitioners Nos. 2 to 7 were not tenants though they were in cultivating possession as the sons of the donor. The contention, that the area ceased to be reserved area by reason of the transfers, was also negatived. The case was remanded for the decision of certain matters which had not been decided. A revision was preferred against this order to the Financial Commissioner; but with no effect. This led to the present petition under Article 226 of the Constitution of India; and the only contention that has been urged before us, is that the transfers being to persons not holding land in excess of the reserved or permissible area, the surplus land in their hands would cease to be surplus because in their hands it is within the reserved or the permissible area.

19. In view of my decision, that Section 19-B is not retrospective and Bhalle Ram's decision, 1962-64 Pun. L. R. 331, holds the field with regard to the transfers effected prior to the 30th of July, 1958, this petition must succeed. The petition is accordingly allowed; and the order of the Financial Commissioner, the Commissioner and the Collector declaring the land in dispute to be surplus area is quashed. But in the circumstances of the case, there will be no order as to costs.

20. SHAMSHER BAHADUR, J.:—The provisions of the Punjab Security of Land Tenures Act, 1953, as it stood amended by the Punjab Security of Land Tenures (Amendment & Validation) Act, 1962, which have been set out in the judgment of my learned brother, Mahajan J., are designed, as stated in the preamble itself "to provide for the security of land tenure and other incidental matters." Besides providing for security of land tenure, the scheme of the legislation makes it clear that tenants from reserved or permissible areas are liable to ejection. The small landowner thus is as much a subject of protection as a tenant of a landowner whose holdings exceed the permissible area. The concept of 'permissible area' is applicable both to landlords and tenants. Tenants, who are liable to be evicted or have in fact been ejected under Section 9, are to be resettled and indeed, it is provided in Section 9-A that even a tenant who is liable to be ejected under clause (i) of sub-section (1) of Sec-

tion 9 shall not be dispossessed of his tenancy unless he is accommodated on a surplus area. The concept of 'surplus area' is the kernel of the legislation, and the Legislature obviously intended the creation of such areas for the purpose of resettlement of tenants who are liable to be ejected or in fact have been ejected.

21. It is in furtherance of this central idea of resettlement of tenants that Section 10-A has been enacted. I need not advert again to clauses (a), (b) and (c) of this section, the last one of which was inserted by the Punjab Security of Land Tenures (Amendment and Validation) Act, Punjab Act 14 of 1962 (also referred to as the Amending Act 14 of 1962). Clause (c) of Section 10-A says that any judgment, decree or order of a court or other authority, obtained by a person and having the effect of diminishing the holding of the area of such person which could have been declared surplus, shall be ignored. The various provisions introduced by Amending Act 14 of 1962 were given retroactive operation by the Act and as it has been contended strenuously that the judgments which have either reversed the decision in Bhalle Ram's case, 1962-64 Pun. L. R. 331, or have not followed it, have omitted to take account of this provision, it is well to set it out again. Sub-section (2) of Section 1 of the Amending Act says that—

"Clause (a) of Section 2, Section 4, Section 5, Section 7 and Section 10 shall be deemed to have come into force on the 15th day of April, 1953,..... and Section 6 shall be deemed to have come into force on 30th day of July, 1958,.....".

We are not concerned with clause (a) of Section 2, which relates to the explanation added in regard to lands allotted to displaced persons. Section 4 of the Amending Act is now clause (c) of Section 10-A, to which reference has been made. Section 5 of the Amending Act contains the newly inserted Section 10-B, which says that in case where succession has opened after the surplus area or any part thereof has been utilised under clause (a) of Section 10-A, the saving provision in favour of an heir by inheritance under clause (b) of Section 10-A shall have no effect in respect of the area which has actually been utilised; and lastly, Section 10 which is to take effect from 15th April, 1953, is the overall deeming provision which is in these terms:—

"Section 10-A of the principal Act, as amended by this Act, and clause (5-a) of Section 2 of the principal Act, shall always be deemed to have been inserted in the principal Act on the 15th day of April, 1953."

22. Could there be a clearer intention of the Legislature that the provision for utilisation introduced in clause (c) of Section 10-A was positively to take effect

from the 15th day of April, 1953? In other words, any judgment, decree or order of a Court or other authority tending to scale down the possible surplus area of a landowner shall be ignored right back from 15th of April, 1953. It is well to emphasise again that sub-section (5-a) of Section 2 inserted by Punjab Act No. 11 of 1955, defining the 'surplus area', was also deemed to have taken effect from 15th April, 1953. Now, the closing words inserted by Punjab Act 14 of 1962 in this sub-section (5-a) which defines 'surplus area' are to this effect:—

".....and includes the area in excess of the permissible area selected under Section 19-B,....."

The area selected as permissible area under Section 19-B, inserted by Punjab Act 4 of 1959 and amended by Act 14 of 1962, has not been made sacrosanct and is made expressly subject to the provisions of Section 10-A, which includes clause (c).

23. The matter does not end here. Even sub-section (4) of Section 19-B (Section 6 of the Amending Act 14 of 1962) which no doubt under sub-section (2) of Section 1 of the Amending Act 14 of 1962, has to take effect from 30th July, 1958, says that:—

"The excess land of such person shall be at the disposal of the State Government for utilisation as surplus area under clause (a) of Section 10-A or for such other purpose as the State Government may by notification direct."

24. This brings us to the consideration whether Section 19-B can operate as an integral piece of legislation independently of Section 10-A. Sub-section (2) of Section 1 of the Amending Act 14 of 1962 says that Section 6 "shall be deemed to have come into force on the 30th day of July, 1958". As amended by Act 14 of 1962, Section 19-B says that:—

"..... if after the commencement of this Act, any person, whether as landowner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir any land, or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land.....which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall,..... furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain"

25. It is sought to be argued that transfers effected before 30th July, 1958, even though having the effect of diminishing the surplus area shall be taken into reckoning and not ignored. The section is

preceded by the non obstante clause "subject to the provisions of Sec. 10-A" whose plain meaning is that the overriding authority of the State Government to utilise the land as surplus will remain unaffected. What is saved by Sec. 19-B read with sub-section (2) of Section 1 of the Amending Act 14 of 1962 is the actual transfer. Words in a statute have to be given their plain meaning and every effort has to be made by Courts to give a harmonious construction to the various provisions even if some seeming contradiction is involved. If a workable construction could be evolved by retaining each word in the relevant provision, such a construction has to be preferred to the one which would involve the deletion of some of its clauses or the re-writing of its provisions. The matter seems to me to be obvious as the Amending legislation (Act 14 of 1962) which gives retroactive operation to Section 10-A was enacted to meet the situation which had been created by Bhalle Ram's case, 1962-64 Pun. L. R. 331. The Letters Patent Bench of Dulat and Grover JJ. in 1963 Pun. L. J. 65, while overruling the decision of Mahajan J., made this observation towards the end:—

"It is clear now from the amendments that the surplus area in connection with any landowner is to be determined on the basis of that landowner's holding as it existed on the 15th April, 1953, and the land, which is in fact surplus at that time, will remain surplus irrespective of any transfer made by the landowner subsequently."

What warrant is there to say that the Letters Patent Bench had not considered the effect of sub-section (2) of Section 1 of the Amending Act 14 of 1962 which said that while the amended Sec. 10-A would come into force from 15th April, 1953, the amended Section 19-B would come into force on 30th July, 1958? It seems to me that the compulsive obligation behind Sections 4 and 10 of the Act 14 of 1962 being made operative with effect from 15th April, 1953, renders the position taken on behalf of the petitioners utterly untenable. The amended Section 10-A is expressly stated to be deemed "to have been inserted in the principal Act on the 15th day of April, 1953".

26. In 1963-65 Pun. L. R. 105=(AIR 1963 Punj. 319), which is a judgment of Mehar Singh, J. (as the Hon'ble the Chief Justice then was) and myself, it is stated at page 124 that:—

"In Section 19-B, before its amendment by Punjab Act 14 of 1962, provision was made for furnishing of declaration under Section 5-A by a person acquiring land so as to determine his surplus area and in (1962) 64 Pun. L. R. 331, Mahajan J. held that according to Section 19-B the area acquired by the transferees including the

area held by them is to be taken into account for the purpose of finding the surplus area in their hands... In the wake of this decision Section 19-B has been amended by Punjab Act 14 of 1962 by adding in the beginning of sub-section (1) of it these words — 'subject to the provisions of Section 10-A' which means that the position has now been clarified that land in the hands of a transferee does not cease to be available for utilisation under Section 10-A."

Section 19-B having been specifically made subject to the provisions of Section 10-A, cannot protect a Court decree or order which has been obtained after the 15th April, 1953, although it had been passed before the 30th of July, 1958 in so far as the utilisation of the land as surplus area is concerned. Any construction of a statute which defeats its object is neither permissible nor legitimate.

27. In another Bench decision in *Hans Raj v. State of Punjab*, 1967 Cur. L. J. (P. & H.) 804, I said, and Narula J. concurred with me that a judgment, decree or order of a court obtained after 15th April, 1953, would not affect the declaration of the surplus area which has to be determined according to the holding of a person on the date of the commencement of the Act, i.e., 15th April, 1953. Reference was made to the Supreme Court decision in *Bhagwan Das v. State of Punjab*, 1966-68 Pun. L. R. 300=(AIR 1966 S.C. 1869), where it was observed that "the scheme of the Punjab Security of Land Tenures Act appears to be that the entire land held by the landowner in the State of Punjab on the date of the commencement of the Act must be evaluated on that date and the status of the landowner and his surplus area, if any, must be then ascertained." Their Lordships of the Supreme Court had given consideration to all the provisions of the Act and it is impossible to spell out the contention which is now brought in the limelight that the earlier Bench decisions of this Court failed to take account of the provisions of sub-section (2) of Section 1 of the Amending Act 14 of 1962. In my view, the situation has not changed to require any reconsideration. I am, therefore, unable to agree with Mahajan J. that the decision in *Bhalla Ram's case*, 1962-64 Pun. L. R. 331, still holds the field. On the contrary *Bhalla Ram's case*, 1962-64 Pun. L. R. 331, was overruled not only by statute in express terms but also by Division Bench judgments of this Court.

28. In my view, the petition ought to be dismissed and the order of the Financial Commissioner upholding the orders of the Commissioner and the Collector maintained.

29. R. S. NARULA, J.:— Having had the advantage of perusing the learned

judgments prepared by my Lords Mahajan and Shamsher Bahadur JJ., I would prefer to record my decision in this case as well as the reasons which have impelled me to reach that conclusion in my own words.

30. Out of his total holding of 348 Acres, 7 Kanals and 10 Marlas of land (valued at 160 Standard Acres and 13½ Units) in village Kanianwali, tahsil Muktsar, district Ferozepore, Hakam Singh respondent No. 5 (without reserving any area for self-cultivation) gifted the land in dispute in May, 1955, to his sons petitioners Nos. 2 and 3, their respective wives, petitioners Nos. 4 and 5, and to the respective daughters of his two sons who are petitioners 6 and 7. Mutation in respect of the said gifts was duly entered and sanctioned on May 14, 1955. By his order, dated April 5, 1966, the Collector (Agrarian), Ferozepore, ignored those transfers in exercise of the power conferred on him under Section 10-A (b) of the Punjab Security of Land Tenures Act, 1953, as subsequently amended, and declared 288 Acres, 7 Kanals and 10 Marlas of Hakam Singh's original holding (including the land in dispute) as his surplus area. The Collector's order to ignore the transfers having been upheld right up to the Financial Commissioner, the transferees have, in this petition under Articles 226 and 227 of the Constitution sought, *inter alia*, a decision to the effect that the said transfer could not be ignored as Sections 10-A (b) and (c) did not apply to transfers effected between April 15, 1953, and July 30, 1958, as held in 1967 Lah. L. T. 155, and 1969 Pun. L. J. 1.

31. On the other hand, the learned counsel, for the respondents have pressed for the abovesaid contention of the petitioners being repelled on the authority of the Division Bench judgments of this Court in:—

(i) 1963-65 Pun. L. R. 105=(AIR 1963 Punj. 319);

(ii) 1966-68 Pun. L. R. 41, and

(iii) 1967 Cur. L. J. 804 (P. & H.).

As the two sets of decisions on the question of the applicability of Section 10-A to transfers effected between April 15, 1953 and July 30, 1958, were not reconcilable this petition at the time of its admission on February 16, 1968, was directed by the Motion Bench to be placed before my Lord, the Chief Justice for its being heard by a Full Bench.

32. Though all the relevant provisions of law have been set out by my learned brother Mahajan, J., I will briefly indicate the chronological order in which those provisions were enacted and then refer to the resultant situation. The Punjab Tenants (Security of Tenure) Act (22 of 1950), as amended by the Punjab Tenants (Security of Tenure) Amendment

Act, 1951 (President's Act 5 of 1951) was repealed and replaced by the Punjab Security of Land Tenures Act (10 of 1953) (hereinafter called the principal Act), on and with effect from April 15, 1953. The Prevention of Ejectment (Temporary Powers) Ordinance, 1952, had by then already expired by efflux of time. The concept of "surplus area" was introduced for the first time into the principal Act by the Punjab Security of Land Tenures (Amendment) Act (11 of 1955) (hereinafter referred to as the 1955 Act), which came into force on May 26, 1955. One of the specified objects of enacting the 1955 Act was "to introduce the new concept of 'surplus area' and its utilisation by the State Government for the resettlement of ejected tenants". Another objective of the said enactment was "to prevent sales and other dispositions of land adversely affecting the continuance of tenancies and the extent of available surplus area." The amendment made in the definition of "permissible area" by Section 3 of the 1955 Act is not material for our purposes. Area other than the reserved area and where no area had been reserved, the area in excess of the permissible area selected as prescribed (excluding a tenant's permissible area) was defined as the "surplus area" in clause (5-a) added to Section 2 of the principal Act by Section 3 of the 1955 Act. Sections 10-A (a) and (b) were inserted into the principal Act by Section 8 of the 1955 Act, in the following terms:—

"10-A. (a) The State Government, or any officer empowered by it in this behalf, shall be competent to utilize any surplus area for the resettlement of tenants ejected, or to be ejected, under clause (i) of sub-section (1) of Section 9.

(b) Notwithstanding anything contained in any other law for the time being in force, no transfer or other disposition of land which is comprised in a surplus area at the commencement of this Act, shall affect the utilization thereof in clause (a). Explanation.— Such utilization of any surplus area will not affect the right of the landowner to receive rent from the tenant so settled."

Sections 5-A to 5-C were then introduced into the principal Act by Section 3 of the Punjab Security of Land Tenures (Amendment) Act (46 of 1957), requiring every land-owner or tenant, who owns or holds land in excess of the permissible area to furnish a declaration supported by affidavit in respect of the land owned or held by him, and permitting the landowner who might not have exercised his right of reservation to select his permissible area and to intimate the selection to the prescribed authority; and further providing for the consequences and penalties of non-compliance with the furnishing of the declaration and making the selection.

The definition of "surplus area" as contained in Section 2(5-a) of the principal Act was amended so as to substitute the expression "as prescribed" by the words "under Section 5-B or the area which is deemed to be surplus area under sub-section (1) of Section 5-C". Next came, the Punjab Security of Land Tenures (Amendment) Ordinance No. 6 of 1958, promulgated by the Governor of Punjab on July 30, 1958. The date of promulgation of this Ordinance has to be borne in mind as it has a special significance for the purpose of dealing with the somewhat vexed question on which my learned brothers have not been able to agree. The Ordinance amended clause (b) of Section 10-A of the principal Act so as to save from its operation land acquired by the State Government under any law for the time being in force and land acquired by an heir by inheritance. Paragraph 4 of the Ordinance introduced into the principal Act Sections 19-A to 19-D. Section 19-B(1) as enacted under the Ordinance reads as follows:—

"If, after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or bequest or gift from a person to whom he is an heir any land which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain, and if the land of such person is situated in more than one Patwar circle, he shall also furnish a declaration required by Section 5-A."

Sub-section (4) of Section 19-B was in the following terms:—

"The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under clause (a) of Section 10-A or for such other purposes as the State Government may by notification direct."

The circumstances which led the Governor to promulgate the Ordinance can be gathered from the objects and reasons of the Punjab Security of Land Tenures (Amendment) Act (4 of 1959), which replaced the Ordinance on January 19, 1959. One of the said objects was "to prohibit further acquisition of land in excess of the permissible area by inheritance, transfer, exchange, lease, agreement, or settlement". The relevant provisions of the 1959 Act were practically the same as those of the 1958 Ordinance. Section 19-B (1) as originally introduced into the principal Act by the Ordinance was slightly amended by the 1959 Act and then read as follows:—

"If, after the commencement of this Act, any person, whether as landowner or tenant, acquires by inheritance or bequest or gift from a person to whom he is an heir any land or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, which, with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain, and if the land of such person is situated in more than one Patwar circle, he shall also furnish a declaration required by Section 5-A."

Section 5 of the 1959 Act by which the Ordinance was repealed provided that notwithstanding such repeal, anything done or any action taken under the Ordinance shall be deemed to have been done or taken under the 1959 Act as if the Act had commenced on the 30th day of July, 1958.

33. At the time when Bhalle Ram's case, 1962-64 Pun. L. R. 331, was decided on December 5, 1961, Section 19-B(1) and Section 19-B(4) were in the same form as have been quoted above and as had been introduced into the principal Act by the 1959 Act. The basis of the judgment of my learned Brother Mahajan, J. in Bhalle Ram's case, 1962-64 Pun. L. R. 331, was that Section 19-B had impliedly repealed Section 10-A in so far as acquisitions covered by Section 19-B were concerned. After preferring an appeal against the Single Bench judgment in Bhalle Ram's case, 1962-64 Pun. L. R. 331, and before the decision of the Letters Patent Appeal, the State Legislature passed the Punjab Security of Land Tenures (Amendment and Validation) Act, 1962 (Act 14 of 1962) (hereinafter called the 1962 Act). It has been authoritatively held by their Lordships of the Supreme Court in Kavalappara Kottarathil Kochuni v. States of Madras & Kerala, AIR 1960 SC 1080, that Statement of Objects and Reasons for passing a law may be referred to for the purpose of ascertaining the conditions prevailing at the time the Bill was introduced and the purpose for which the amendment introduced by the Bill in the previous Act was made. The purpose for which the Bill leading to the passing of the 1962 Act was introduced into the Legislature can be gathered from the objects of the same. The relevant extracts from the "Objects" are given below:—

"Some of the recent judicial pronouncements have the effect of defeating the objectives with which the Punjab

Security of Land Tenures Act, 1953, was enacted and amended from time to time.

In another Civil Writ No. 1342 of 1960 re: Bhalle Ram v. State of Punjab, 1962-64 Pun. L. R. 331, the High Court has interpreted Section 19-B as if it impliedly repealed Section 10-A(b) in respect of the transfers from the surplus area made between 15th April, 1953, and 30th July, 1958, and as if such transfers could not be ignored under Section 10-A(b) for the purpose of computing the surplus area. The view taken by the High Court would considerably diminish the surplus area of a land-owner as available on 15th April, 1953. Section 19-B was never enacted with that object. The purpose of enacting Section 19-B was to take over the surplus area of those who became big landowners after 15th April, 1953, by acquiring more lands and not to reduce the surplus area of those who were big land-owners on 15th April, 1953."

Accordingly clauses 3, 6 and 7 of the Bill seek to neutralise the effect of the aforesaid decisions. Clause 11 provides for the validation of certain orders made under the parent Act notwithstanding the decision first mentioned."

Clauses 3, 6 and 7 of the Bill ultimately became Sections 3, 6 and 7 of the 1962 Act. Whereas Section 3 was intended to neutralise the effect of a Division Bench judgment of this Court in Jagan Nath v. State of Punjab, Civil Writ No. 1051 of 1960 (Punj.), and Section 7 was intended to neutralise the effect of the judgment of this Court in Surja v. Financial Commissioner, Punjab and others, Civil Writ No. 486 of 1961 (Punj.), Section 6 was expressly enacted "to neutralise the effect" of the judgment of this Court in Balle Ram's case, 1962-64 Pun. L. R. 331. The object of introducing clause (c) into Section 10-A by clause (4) of the Bill which led to the passing of the 1962 Act was to provide that the decrees which had been obtained by interested persons being relations etc. for the diminishing of the surplus area should be ignored in computing the surplus area. Different dates of coming into force of different provisions were prescribed by sub-section (2) of Section 1. As explained in a later part of this judgment, the fixing of different dates was not a matter of whim, but had to be done on a scientific basis in order to achieve the objectives of the amendments which were sought to be made by this Act. Clause (c) which was introduced into Section 10-A of the principal Act in the following words by Section 4 of the 1962 Act was given retrospective effect from the 15th day of April, 1953:

"For the purposes of determining the surplus area of any person under this

section, any judgment, decree or order of a Court or other authority, obtained after the commencement of this Act and having the effect of diminishing the area of such person which could have been declared as his surplus area shall be ignored."

Clause (a) of Section 2 whereby an explanation was added to clause (3) of Section 2 of the principal Act defining "permissible area" was likewise deemed to have come into force on April 15, 1953. Sections 5 and 7 of the 1962 Act by which Sections 10-B, and 19-E and 19-F were introduced into the principal Act were likewise given retrospective effect from April 15, 1953. On the other hand the only two provisions of the 1962 Act which were deemed to have come into force on the 30th day of July, 1958, were Sections 2(b) and 6. Under Section 2(b), the following words and figures were added to the definition of "surplus area" as contained in clause (5-a) of Section 2 of the principal Act, as amended by the 1955 Act:—

"and includes the area in excess of the permissible area selected under Section 19-B."

Section 6 of the 1962 Act is the crucial section which amended Section 19-B in the following manner:—

"In Section 19-B of the principal Act,— (1) in sub-section (1), for the words 'if, after the commencement of this Act, any person whether as land-owner or tenant acquires by inheritance or bequest or gift from a person to whom he is an heir any land or if after the commencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land', the following words shall be substituted, namely:—

'Subject to the provisions of S. 10-A, if after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir any land, or, if after the commencement of this Act, and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement any land, or if, after such commencement, any person acquires in any other manner land,' and

(2) in sub-section (2), the words 'and select the land for him in the manner specified in sub-section (2) of Sec. 5-B' shall be added at the end."

34. Section 19-B(1) as amended by the above-quoted provisions of Section 6 of the 1962 Act is in the following terms:—

"Subject to the provisions of Sec. 10-A, if after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir any land, or if after the com-

mencement of this Act and before the 30th July, 1958, any person has acquired by transfer, exchange, lease, agreement or settlement, any person acquires in any other manner any land, which with or without the lands already owned or held by him, exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain, and if the land of such person is situated in more than one Patwar circle, he shall also furnish a declaration required by Section 5-A".

35. The material points of difference between the unamended Section 19-B(1) as introduced by the 1959 Act on the one hand, and the said provision as amended by the 1962 Act on the other, are these:—

(i) In the unamended Section it was not stated that it was subject to Section 10-A. It was so stated in the amended section;

(ii) In the unamended section only three categories of acquisition by transfer were mentioned, viz:—

(a) acquisition by inheritance after the commencement of the Act;

(b) acquisition after the commencement of the Act by bequest or gift from a person to whom the person acquiring is an heir; and

(c) acquisition "after the commencement of this Act" and before the 30th of July, 1958, by transfer, exchange, lease, agreement or settlement.

In the amended section four kinds of acquisition of land are referred to. In addition to the three kinds of acquisition under the unamended section, the following fourth category was added:—

(d) acquisition "after such commencement" (i.e. after the commencement of the Act) by any person in any other manner.

Since the counsel for both sides laid so much emphasis on the effect of amending Section 19-B with effect from July 30, 1958, in contradistinction to the retrospective effect given to the addition made in Section 10-A from April 15, 1953, by the specific provisions of Section 1(2) of the 1962 Act, it appears to be appropriate to deal with that argument at this very stage straightway. The submission of the learned counsel for the petitioners to the effect that if the acquisitions during the period April 15, 1953, to July 30, 1958, referred to in Section 19-B were also required to be made subject to Section 10-A, the Legislature would have given effect to the amendment of Section 19-B from April 15, 1953, appears to me to be wholly fallacious. It would be remembered that Section 19-B saw the

light of the day for the first time on July 30, 1958, when the Governor's Ordinance was promulgated. To imagine that an amendment to Section 19-B could be made effective from a date prior to the one on which the principal section itself came into force is, in my opinion, illogical. If Section 19-B had been amended with effect from April 15, 1953, the amendment contained in the words of Section 6 of the 1962 Act would have hung in the air as the principal provision into which the amendment had to be introduced was not in existence at any time before July 30, 1958. In these circumstances there appears to me to be no answer to the proposition that the maximum possible retrospective effect that could have been given by the Legislature to the amendment of Section 19-B was from the date of the introduction of the principal provision and that was July 30, 1958; and this is what the Legislature did. The effect of amending Section 19-B in 1962 with effect from July 30, 1958, is that for all legal and practical purposes all concerned must forget that the un-amended Section 19-B was ever introduced by the 1958 Ordinance and was ever on the statute book or in existence. On the contrary the deeming provisions of Section 1(2) of the 1962 Act read with Section 5(2) of the 1959 Act result in Section 19-B as amended in 1962 being deemed to have been on the statute book as we now find it right from July 30, 1958. In other words, we have to assume in the circumstances described above that the 1958 Ordinance introduced into the principal Act Section 19-B as we find it after its amendment in 1962. In this connection it is significant to notice (as already pointed out) that retrospective effect from July 30, 1958, has been given only to those amendments effected by the 1962 Act which seek to amend the provisions which had been inserted into the principal Act only on July 30, 1958, for the first time by the Governor's Ordinance.

36. The inference at which I have arrived by the above process of reasoning leads to the corollary that we must forget once for all the decision given by this Court in Bhalle Ram's case, 1962-64 Pun. L.R. 331, as the provision of law on which the said decision was given is now deemed to have never existed. I say that the original provision never existed because that is the effect of a deeming provision which has replaced an old one from the date of inception of the original section. The necessary consequence is that we cannot think of Section 19-B having ever existed without the clause "subject to the provisions of Section 10-A", and we are compelled to assume by legal fiction that Section 19-B(1) has always been subject to and never independent of Sec. 10-A.

This conclusion appears to me to be absolutely inescapable.

37. The next important question which needs consideration in this respect is as to what is the meaning of the expression "after the commencement of this Act" used in Section 19-B. In other words, the question is, which is the enactment to which reference is made by the expression "this Act" in Section 19-B(1). Learned counsel for the petitioner placed reliance on certain observations of Hegde J. in the judgment of their Lordships of the Supreme Court in 1969 Cur. L. J. 1 (SC), for contending that the expression "after the commencement of this Act" in Section 19-B(1) means "after the commencement of the 1959 Act", i.e., during the period commencing January 19, 1959. This, in my opinion, is the second fallacy in the way of thinking of the petitioners. In the case of Arjan Singh, 1969 Cur. L. J. 1 (SC), the Supreme Court was dealing with the question of the date of the coming into force of Section 32-KK of the Pepsu Tenancy and Agricultural Lands Act, 1955. In that connection it was observed that on a reading of the various provisions of the Pepsu Tenancy and Agricultural Lands (Amendment and Validation) Act, 1962, it appeared to the Supreme Court, that the Legislature intended that Section 7 of that Act which introduced into the principal Act Section 32-KK should be deemed to have come into force on 30th October, 1956. Hegde, J. observed:—

"Evidently the draftsman when he drafted Section 7 of the Act had in his mind the Amendment Act and not the principal Act. The words 'this Act' in Section 7 of the Amendment Act (Section 32-KK of the principal Act) in our opinion were intended to refer to the Amendment Act and not to the principal Act."

His Lordship made it clear beyond any doubt that it is true that ordinarily when a section is incorporated into the principal Act by means of an amendment reference in that section to "this Act" means the principal Act, and that it was only in view of the particular significance of subsection (2) of Section 1 of the Amendment Act of 1962 in the Pepsu Act that the construction placed on the particular expression in Arjan Singh's case, 1969 Cur. L. J. 1 (SC) had become permissible. The learned Judge further observed that every statute had to be construed as a whole and the construction given should be a harmonious one. After carefully considering the matter, I am firmly of the opinion that the meaning to be assigned to the expression "this Act" in Sec. 19-B (1) of the 1953 Act is the one which, according to the ratio of the judgment of the Supreme Court, has to be ordinarily

resorted to, and that this is not an exceptional case where "this Act" can possibly mean any of the amending Acts. There are reasons, more than one, for taking this view. The first and foremost thing that has prevailed with me in this connection is that whereas it was permissible in the case of the Pepsu Act to construe "this Act" as the 1956 amending Act, it is not possible to do so in the present case for the simple reason that Section 19-B was for the first time introduced into the principal Act by the Governor's Ordinance of 1958, and even at that time the expression used in Section 19-B was "this Act". The use of the said expression in the section as introduced by the Ordinance is wholly inconsistent with the possibility of construing "this Act" in Section 19-B as having relation to the Governor's Ordinance by which it was introduced. If the expression in Section 19-B (1) as introduced by the Ordinance had been "this Ordinance", the thing would have been equally clear on the other side. The judgment of the Supreme Court in the case of Arjan Singh, 1967 Cur. L. J. 1 (SC), is, therefore, of no avail to the petitioners.

38. The only choice which is left to us to construe the expression "this Act" occurring in Section 19-B (1) is either to relate it to the 1953 Act or the 1959 Act, or the 1962 Act. The question of relating it to any of the amending Acts which came into existence after the Ordinance does not arise as the very same expression existed in the provision referred to in paragraph 4 of the Ordinance itself. The expression "this Act", must, therefore, in my opinion, relate to the principal Act of 1953, and cannot possibly be related to any other enactment.

39. What follows from the above conclusions is that Section 10-A applies to all acquisitions by transfer after April 15, 1953, and not only to those which were effected after July 30, 1958. Once it is held, as I have held above, that Section 19-B(1) is deemed to have been subject to Section 10-A from the very first day the provision came into existence, and at no time independent of Sec. 10-A, and further that the acquisitions after the coming into force of the Act have reference to acquisitions after April 15, 1953, the petitioners cannot possibly succeed on the argument with which I am dealing at the moment.

40. The validity of the four arguments of the learned counsel for the petitioners which appear to have appealed to my Lord Mahajan, J. may now be tested. The first refers to the importance of the date July 30, 1958, being specified in sub-section (2) of Section 1 of the 1962 Act as the date from which Section 19-B was deemed to have been in existence in its

amended form. This argument was noticed in all the three forms in which it was pressed by Mr. Nehra in the judgment of my learned brother Mahajan, J. in the following words:—

(i) "The very fact, that the amended Section 19-B was made operative from the 30th of July, 1958, shows that the Legislature never intended to make this provision retrospective."

(ii) "If the intention of the Legislature was to take away the benefit conferred on the transferees by Bhalle Ram's case 1962-64 Pun LR 331 retrospectively, Section 19-B would have been given effect like Sections 10-A and 2 (5-a) with effect from the 15th of April, 1953. But that was not done and, in my opinion, advisedly. The Legislature did not want to unsettle the settled transactions."

(iii) "No explanation has been offered by the learned counsel for the State, why the Legislature made the amended Section 19-B operative with effect from the 30th of July, 1958."

41. It is indeed true and equally unfortunate that the learned counsel for the State could not offer any explanation as to why the Legislature had made amended Section 19-B operative with effect from the 30th of July, 1958, and not from April 15, 1953. But I have already given elaborate reasons for the Legislature having done so. So far as the intention of the Legislature to take away the benefit conferred on the transferees by Bhalle Ram's case, 1962-64 Pun LR 331 retrospectively is concerned, it appears to me that the specified objects of enacting Section 6 of the 1962 Act as contained in the relevant extracts from the "Objects and Reasons" of the Bill which led to the passing of that Act (quoted verbatim in an earlier part of this judgment) furnish complete answer to the said argument of Mr. Nehra. The express object of enacting Section 6 of the 1962 Act whereby Section 19-B of the principal Act was made subject to Section 10-A was to neutralise completely the effect of the judgment of this Court in Bhalle Ram's case, 1962-64 Pun LR 331 and no exception appears to have been made in leaving any category of cases which could be governed by the judgment in Bhalle Ram's case, 1962-64 Pun LR 331 unaffected. Moreover, as already observed by me, the judgment of this Court in Bhalle Ram's case, 1962-64 Pun LR 331 can no more be looked into for determining the controversy before us as the unamended Section 19-B in respect of which the judgment was given is deemed to have never been in existence. The following observations of Lord Asquith of Bishopstone in the judgment of the House of Lords in East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 (at page 132) are apt in this connection:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

The above mentioned dictum of the House of Lords was approved by their Lordships of the Supreme Court in *State of Bombay v. Pandurang Vinayak*, AIR 1953 SC 244. *Mehar Chand Mahajan, J.*, who wrote the judgment of the Supreme Court held in that case as below:—

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusions."

Therefore, extending the deeming provision contained in the 1962 Amending Act to its logical conclusion and giving full effect thereto, we have to decide this case on the assumption that the unamended Section 19-B had never seen the light of the day and that Section 19-B had from its very inception been subject to the provisions of Section 10-A. In my opinion, the intention of the Legislature to unsettle the settled transactions like the one in *Bhalle Ram's case*, 1962-64 Pun LR 331 is manifest from the scheme of the amending Act.

42. While allowing the appeal of the State against the decision of my Lord

As in the Act

"After the commencement of this Act and before the 30th July, 1958."

This exposes the fallacy in this argument of learned counsel. I am, therefore, of the opinion that each of the three arguments of Mr. Nehra on which my Lord Mahajan, J. has based his judgment is not free from one or the other infirmity.

43. There are certain additional considerations for holding that if *Bhalle Ram's case*, 1962-64 Pun LR 331 were to be decided today, that is at any time after the original Section 19-B had been wiped out and replaced by the amended Section 19-B, the correct decision would have been the one which was arrived at by the Letters Patent Bench on May 7, 1963. Firstly, the amendment made by Section 2 (b) of the 1962 Act in Section 2 (5-a) of the principal Act contains a reference to Section 19-B and the said amendment has been enforced from July 30, 1958, by sub-section (2) of S. 1 of the 1962 Act. Though Sec. 6 and Section 2 (b) stand on the same footing, so far as retrospective effect given to them by Section 1 (2) is concerned, a clear

Mahajan, J. in *Bhalle Ram's case*, 1962-64 Pun LR 331, it was observed in 1963 Pun LJ 65, by *Dulat, J.* (who prepared the judgment of the Division Bench and with whom *Grover, J.* concurred):—

"It is clear now from the amendments that the surplus area in connection with any land-owner is to be determined on the basis of that land-owner's holding as it existed on the 15th April, 1953, and the land, which is in fact surplus at that time, will remain surplus irrespective of any transfer made by the land-owner subsequently. In these circumstances and in view of the express amendments of the Punjab Security of Land Tenures Act, the decision arrived at by the learned Single Judge in this case cannot stand."

So far as the interpretation of the expression "this Act" in Section 19-B (1) is concerned, what appears to have appealed to Letters Patent Bench in *Bhalle Ram's case*, 1963 Pun LJ 65 was that the expression referred to the principal Act of 1953. It is in the same sense that this expression appears to have been impliedly construed in the cases of (1) *Bhagat Gobind Singh*, 1963-65 Pun LR 105 = (AIR 1963 Punj 319) (supra), (2) *Shamsher Singh*, 1966-68 Pun LR 41 (supra), and (3) *Hans Raj*, 1967 Cur. L. J. 304 (Supra). The meaning which counsel for the petitioner wants to assign to the expression "commencement of this Act" in Section 19-B (1) is July 30, 1958, that is, the date of the Ordinance. If this interpretation were to be correct, the relevant part of Section 19-B (1) would read as follows:—

As sought to be interpreted
by counsel

"After July 30, 1958, and before
the 30th July, 1958."

distinction about the date from which the relevant amendment introduced by those sections become effective has been brought about by Sec. 10-A of the 1962 which is in the following terms:—

"Section 10-A of the Principal Act, as amended by this Act, and CL (5-a) of Section 2 of the principal Act, shall always be deemed to have been inserted in the principal Act on the 15th day of April, 1953."

The language of the abovequoted provision leaves no doubt in my mind that the Legislature expressly made Section 10-A of the principal Act, as amended by the 1962 Act, effective from April 15, 1953, as it is stated in the said provision that the amended Section 10-A shall always be deemed to have been inserted in the principal Act on the date of its inception. Secondly sub-section (4) of S. 19-B which provides that excess land of the persons referred to in sub-section (1) shall be at the disposal of the State Government for utilisation as surplus area under CL (a)

of Section 10-A, necessarily refers to all the categories of persons acquiring land to whom reference is made in sub-sec. (1) of Section 19-B, including persons who had acquired land after April 15, 1953, but before July 30, 1958. Thirdly, Cl. (b) of Section 19-F which provides, *inter alia*, that the land acquired by inheritance etc. after the coming into force of the Act shall be evaluated for converting into Standard Acres as if the evaluation was being made on the date of such commencement (April 15, 1953), would be meaningless if Section 19-B (1) were not to be subject to Section 10-A right from 15-4-1953. It is also significant that Sec. 19-F starts with the phrase, "for the removal of doubts it is hereby declared." Fourthly and lastly, I think that construing Section 19-B (1) in the manner in which Mr. Nehra wants us to construe it would be cutting at the very texture of the whole Act and interfering with the scheme of this branch of legislation. According to my reading of Section 19-B, it was never intended to impinge on the scope of Section 10-A, but was merely intended to enlarge the scope of the scheme and intention behind Section 10-A. Lands which had become the surplus area of any land-owner, would never cease to be surplus area except in the two contingencies specifically mentioned in the Act, i.e., in the case of acquisition by the State Government or in the case of acquisition by inheritance (subject to Section 10-B). The language of Section 19-B shows that the purpose of enacting it was to take over the surplus area of those who become big land-owners after April 15, 1953, by acquiring additional lands and not to reduce the surplus area of those who were big land-owners on April 15, 1953. Once Section 19-B is read in that light, it appears to become simpler to resolve the controversy which has been raging about its meaning for quite some time. It is apparent that a transferee of a surplus area after the enactment of Section 19-B, that is after July 30, 1958, cannot transform the same into his permissible area merely because his original holding, if any, plus the acquired area, would not exceed the permissible area. It is noteworthy that sub-sections (1) and (2) of Section 19-A make the acquisition of any area exceeding one's permissible area after the coming into force of the 1953 Act, void, and of no effect. There is, therefore, no justification for taking out of the purview of Section 10-A, the acquisitions made between April 15, 1953, and July 30, 1958.

44. I would, therefore, hold:—

(i) that the retrospective amendment of Section 19-B with effect from July 30, 1958, makes the provisions of that section subject to Section 10-A of the Act right from the first day when Section 19-B was enacted;

(ii) that at no time was Section 19-B independent of and not subject to the provisions of Section 10-A;

(iii) that the expression "this Act" in Section 19-B (unamended as well as amended) has reference to the principal Act of 1953, and not to any subsequent amending legislation;

(iv) that the controversy about the decision of this Court in Bhalke Ram's case, 1962-64 Pun LR 331 being correct or not is wholly irrelevant in the changed legislative field because of the unamended Section 19-B being deemed to have never existed and the amended Section 19-B being treated as the only section which came into force and continues to apply to the category of acquisitions mentioned therein;

(v) that the law laid down by this Court in Bhagat Gobind Singh's case, 1963-65 Pun LR 105=(AIR 1963 Punj 319) (Supra) as well as in 1966-68 Pun LR 41 (Supra), and in the judgment of 1967 Cur LJ 804 (P & H) (Supra) and also in the Letters Patent judgment in 1963 Pun LJ 65 (Supra), is correct and unexceptionable;

(vi) that, with the greatest respect to my Lord Mahajan, J., the observations in the judgment of the learned Single Judge in 1967 Lah LT 155 (Supra) which go contrary to the decision of the earlier Division Bench in the case of 1963 Pun LJ 65 (Supra), were not quite correct. For the same reason my decision in 1969 Pun LJ 1 (Supra) on the point now in issue (which was based on the earlier Single Bench judgment in the case of 1967 Lah. L. T. 155 with which I was bound) was also not correct;

(vii) that the making of the amendment to Section 19-B retrospective with effect from July 30, 1958, only, has no effect on the material question, and that any land which is once included in the surplus area of a big land-owner never ceases to be surplus and is never taken out of the pale of the area which is liable to be utilised under Section 10-A (a) except in the cases of acquisition by the State or acquisition by inheritance referred to in the Act; and

(viii) that the purpose of enacting Section 19-B was to take over the surplus area of those who became big land-owners after April 15, 1953, by acquiring more lands from other land-owners (otherwise than by inheritance subject to Sec. 10-B) and not to reduce the surplus area of those who were big land-owners on April 15, 1953.

The only other point which was argued at some length by Mr. D. S. Nehra related to petitioner No. 1. His contention was that petitioner No. 1 being a co-operative society was exempt from the operation of the principal Act, and inasmuch as the disputed surplus area of respondent No. 5 was in the cultivation of petitioner No. 1 co-operative society, no part of it could

be made available for utilisation under Section 10-A (a). This argument was, however, dropped by Mr. Nehra in the middle when he was faced with the amendment of the principal Act relating to the original exemption in favour of co-operative societies.

For the foregoing reasons, I agree with my Lord Shamsher Bahadur, J., that the petitioners cannot succeed. I would accordingly dismiss this writ petition with costs.

ORDER OF THE COURT

45. In accordance with the opinion of the majority this writ petition fails and is dismissed with costs.

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 176 (V 57 C 23)

P. C. PANDIT AND H. R. SODHI, JJ.

Kewal Krishan, Appellant v. Shiv Kumar and others, Respondents.

Civil Misc. No. 317-C of 1968, in First Appeal No. 296 of 1967, D/-25-3-1969.

Civil P. C. (1908), Ss. 96 (3), 151, 152, O. 47, R. 1 — Consent decree — Setting aside of, on ground that consent is obtained by coercion — Proper remedy is to file separate suit — Appeal, application for review or application under S. 151 or S. 152 is not sustainable. AIR 1952 All 29 & AIR 1929 Oudh 385 (FB) & (1884) ILR 10 Cal 612 & AIR 1926 Cal 512 & (1903) ILR 30 Cal 613 & (1912) ILR 36 Bom 77 & AIR 1933 Bom 205, Dissented from.

In order to set aside a consent decree on the ground that the consent was obtained by coercion, the proper remedy is to file a separate suit and not an appeal or an application for review against that decree or an application under Section 151 or Section 152 of the Code. (1884) ILR 10 Cal 612 & AIR 1926 Cal 512 & (1903) ILR 30 Cal 613 & (1912) ILR 36 Bom 77 & AIR 1933 Bom 205, Dissented from.

The rule contained in Section 96 (3) of the Civil P. C. is based on the principle that a person who gives his consent to a decree being passed against him, is later on estopped from challenging the same. Therefore, once a decree is passed with the consent of parties and the decree ex facie shows that both the parties had consented to it, no appeal can lie against such decree on the ground that the consent to such decree was not free and was obtained by fraud, misrepresentation, coercion, undue influence etc. (Para 9)

If one of the parties to the litigation asserts before the appellate Court that his consent to the decree was not free and it was obtained under coercion, the appellate Court obviously cannot decide the

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dispute on the materials before it unless it allows both the parties to adduce additional evidence to prove that fact. Such a procedure is not covered by O. 41, R. 27 which is the only provision under which additional evidence is produced before the appellate Court. Such evidence can be adduced properly in a separate suit filed for that purpose. AIR 1952 All 29 & AIR 1929 Oudh 385 (FB), Dissented from. Case law discussed. (Para 9)

The aggrieved party cannot also avail of remedy of review under O. 47, R. 1. Though the rule states after discovery of new matter or mistake or error apparent on the face of the record "any other sufficient reason" also as a ground for seeking review, these words are taken to mean a reason which is sufficient on grounds analogous to the other grounds in the rule. The party, therefore, cannot employ the procedure of review for making out a contentious case of fraud on this ground. Section 152 also cannot be availed of for seeking the relief as it is confined to clerical or arithmetical mistakes and to an accidental slip or omission only. Further, as the relief can be obtained in a separate suit, there is no justification in invoking Section 151 at all. AIR 1922 PC 112, Rel. on. (Para 16)

Cases Referred:	Chronological	Paras
(1966) 1966 Cur LJ 91 (Punj), Mohinder Singh v. Smt. Rajinder Kaur		23
(1954) AIR 1954 Punj 259 (V 41) = 56 Pun LR 440, Amarnath Radha Ram v. Sm. Malan		18
(1952) AIR 1952 All 29 (V 39) = ILR (1953) 2 All 544, Jagdish Narain v. Rasul Ahmad		24, 25
(1936) AIR 1936 Mad 385 (V 23) = 70 Mad LJ 400, Ramanarayana Rao v. Ram Krishna Rao		19
(1936) AIR 1936 Rang 389 (V 23) = 164 Ind Cas 785, U Po Htu v. Ma Than Yin		17
(1933) AIR 1933 Bom 205 (V 20) = ILR 57 Bom 206, Onkar Bhagwan v. Gamna Lakhaji & Co.		10, 19
(1932) AIR 1932 PC 251 (V 19) = 64 Mad LJ 84, Zahirul-Said Alvi v. Lachmi Narayan		13
(1931) AIR 1931 PC 107 (V 18) = 27 Nag LR 139, Zahirul-Said Alvi v. Lachhmi Narayan		13
(1929) AIR 1929 Cal 470 (V 16) = ILR 57 Cal 154, J. C. Galstaun v. Pramatha Nath		16
(1929) AIR 1929 Oudh 385 (V 16) = ILR 4 Luck 562 (FB), Mohammad Raza v. Ram Saroop		26
(1926) AIR 1926 Cal 512 (V 13) = 91 Ind Cas 620, Madhusudan Chakravarti v. Satish Chandra Nag		10
(1925) Appeal No. 34 of 1923, D/- 29-7-1925, (Punj & Har)		21

- (1922) AIR 1922 PC 112 (V 9) =
 ILR 3 Lah 127, Chhajju Ram v. Neki 11, 16
 (1912) ILR 36 Bom 77 = 13 Bom LR 573, Fatmabai v. Sonabai 10
 (1903) ILR 36 Cal 613 = 7 Cal WN 419, Rakhal Moni Dassi v. Adwyta Prosad Roy 10
 (1884) ILR 10 Cal 612, Aushootosh Chandra v. Tara Prasanna 10
 H. S. Gujral, for Appellant; H. L. Sarin Sr. Advocate with A. L. Bahl and H. S. Awasthy, for Respondent No. 1.

P. C. PANDIT, J.:— Mahant Shiv Kumar brought a suit against Mahant Kewal Krishan and Mahant Ram Sarup for partition of a house situate in Batala, District Gurdaspur. During the trial of the suit, a compromise was effected between the parties on 24th of October, 1967. Mahant Shiv Kumar plaintiff and his counsel made a statement to the effect that the case had been compromised. The plaintiff agreed to pay Rs. 500 to Mahant Kewal Krishan by 3rd of November, 1967, a preliminary decree to that effect might be passed in his favour and the parties be ordered to bear their own costs. On that very date, the statement of Mahant Kewal Krishan and his counsel was also recorded. The defendant stated that he had heard the statement made by the plaintiff and a preliminary decree be made in accordance therewith. The Subordinate Judge, who was trying the case, then at that very time passed the following order:

"In view of the terms of the compromise set out in the statements of the parties, recorded today, the plaintiff is granted a preliminary decree on the basis of compromise for the partition of the suit property according to the shares specified in the plaint on payment of a sum of Rs. 500 to Kewal Krishan defendant on or before 3-11-1967. In case, the plaintiff does not pay the stipulated amount to Kewal Krishan defendant or deposits the same in the Court for payment by the due date, the suit of the plaintiff shall stand dismissed." The above order was followed by a preliminary decree. Against this decree, Mahant Kewal Krishan has filed the present appeal in this Court.

2. On 28th of November, 1967, the following order was passed on this appeal:—

"Notice. D. B. Print record. Stay the passing of the final decree ad interim. Notice as to this also for a very early date."

3. On 5th of February, 1968, an application (Civil Miscellaneous No. 317/C of 1968) under Section 151 of the Code of Civil Procedure was filed on behalf of Mahant Shiv Kumar respondent alleging that the appellant who had got only about 1/9th share in the property in dispute, had filed the appeal against the consent decree dated the 24th of October, 1967, mainly

with the object of prolonging the proceedings pending in the trial Court for the passing of the final decree, so that he might retain his possession over a much larger portion of the house in dispute than the one that fell to his share. The appeal was liable to be dismissed on the sole ground that it was not competent in view of the provisions of Section 96 (3) of the Code of Civil Procedure. It was prayed that the question of the maintainability of the appeal be decided in the first instance before the printing of the record of the case.

4. Notice of this application was given to the counsel for the appellant and this matter has now been placed before us.

5. Learned counsel for Mahant Shiv Kumar respondent has relied on the provisions of Section 96 (3) of the Code of Civil Procedure which lay down that no appeal shall lie from a decree passed by the Court with the consent of parties. From the statements made by the respondent Mahant Shiv Kumar and the appellant Mahant Kewal Krishan and the order passed by the Court below, it is apparent that the matter had been compromised between them and on the basis of the same, a preliminary decree was passed by the trial Judge. According to Section 96 (3) of the Code of Civil Procedure, no appeal would lie against a decree passed by the Court with the consent of parties.

6. Learned counsel for the appellant, on the other hand, raised two submissions before us. In the first place, he contended that according to the statements made by the parties, it appeared that the plaintiff wanted a decree for an injunction to be passed in his favour, while he Court below granted a preliminary decree for the partition of the house in dispute. Consequently, according to the learned counsel, the decree and the judgment of the Court below were not in accordance with the statements of the parties as recorded.

7. There is no substance in this submission. Learned counsel is not quite correct when he says that the plaintiff mentioned in his statement that a decree for injunction might be passed in his favour. He desired that a preliminary decree be made in his favour. Naturally, when a co-owner files a suit for partition of some joint property, he would like a preliminary decree to be passed and not a decree for an injunction. This is precisely what happened in the instant case. The plaintiff prayed that a preliminary decree be made in his favour on the basis of the compromise arrived at between the parties. After recording their statements, the said prayer was granted by the Court below.

8. It was then submitted that the appellant never agreed to enter into any compromise with Mahant Shiv Kumar. The Court below, without obtaining the

free consent of the appellant, proceeded to dispose of the suit by forcing the appellant to sign the proceedings, which he was not willing to do. He never consented to the passing of the decree on payment of Rs. 500 only to him, when he was claiming that he had spent Rs. 6,000 on the house in question.

9. Section 96 (3) of the Code of Civil Procedure says that no appeal shall lie from a decree passed by the Court with the consent of parties. The rule enunciated in this sub-section seems to have been based on the principle that a person, who gives his consent to a decree being passed against him, is later on estopped from challenging the same. Disputes between parties are either settled on the merits or on their consent. If the latter course is adopted then the parties are not allowed to challenge the decrees passed with their consent. In order to attract the provisions of this sub-section, it is, however, necessary that the decree *ex facie* must show that it was passed with the consent of both the parties to the suit. If that is not done, there is likelihood of a controversy arising before the appellate Court as to whether the decree passed by the Court below was with the consent of the parties or not, and for that purpose the appellant Court may have to either itself decide or ask the Court below to determine that matter after taking evidence. With a view to obviate this difficulty, it is, therefore, required that the decree under appeal itself must show that both the parties had agreed to it.

In a case like the present, when one of the parties to the litigation asserts before the appellate Court that his consent to the decree under appeal was not free, and it was obtained under coercion and he was not a willing party to the adjustment of the suit, the appellate Court obviously cannot decide the dispute raised by him on the material before it. For the disposal of that allegation, the appellate Court may have to permit the appellant to lead evidence in support thereof and, similarly, the respondent will also then have to be given an opportunity to rebut the evidence so produced. Such a procedure, in my opinion, will not be covered by Order 41 rule 27 of the Code of Civil Procedure, which is the only provision under which additional evidence is produced before the appellate Court. In order to meet such a situation, the Legislature had, therefore, provided that no appeal would lie from a decree passed by the Court with the consent of parties. That, however, does not mean that the aggrieved party is left without a remedy. He can get rid of a consent decree on any of the grounds which renders an agreement ineffective, namely, fraud, misrepresentation, coercion, undue influence etc. This, in my opinion, can be done by bring-

ing a regular suit where these matters would be thoroughly gone into after both the parties have led evidence thereon. The allegations made to raise issues which are entirely different from those in the main suit, and, being serious in nature, can be examined in a separate suit.

10. I am aware of the fact that certain authorities (see in this connection *Aushootosh Chandra v. Tara Prasanna Roy*, (1884) ILR 10 Cal 612, *Rakhal Moni Dassi v. Adwyta Prosad Roy*, (1903) ILR 30 Cal 613, *Madhusudan Chakravarti v. Satishchandra Nag*, AIR 1926 Cal 512; *Fatmabai v. Sonabai*, (1912) ILR 36 Bom 77, and *Onkar Bhagwan v. Gamna Lak-haji & Co*, AIR 1933 Bom 205, have also laid down that, apart from a separate suit, the aggrieved party can also file a review application or an application under Section 151 or 152 of the Code of Civil Procedure, for the purpose before the Court that passed the decree.

11. In my opinion, the appellant cannot avail of those provisions. There is no ground for him for filing a review application, as the case would not be covered by the provisions of Order 47 rule 1, Code of Civil Procedure. He cannot say that he has discovered a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. He cannot also urge that there was some mistake or error apparent on the face of the record which calls for review of the decree. As regards the third ground mentioned in O. 47, R. 1, C. P. C. namely, "for any other sufficient reason", it has been held by the Privy Council in *Chhajju Ram v. Neki*, AIR 1922 PC 112, that this expression should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. This ground also would, therefore, be not available to the aggrieved party. The case is not covered by the provisions of Section 152 of the Code of Civil Procedure as well, because there was neither any clerical or arithmetical error nor any error arising from any accidental slip or omission in the decree. It would also not be proper to invoke the provisions of Section 151, Civil P. C., because the appellant could adequately get his grievances redressed by instituting a separate suit.

12. Coming to the decided cases on this subject, it is pointless to make a reference to a large number of them. I shall refer to a few.

13. First of all, there is the decision of the Privy Council in *Zahirul-Said Alvi v. Lachhmi Narayan*, AIR 1932 PC 251, where in the case of a consent decree, it refused to entertain an appeal or to consider the sufficiency or

otherwise of the consent, as, according to it, the decree could only be set aside by substantive proceedings appropriate to that particular remedy. It may be mentioned that when this very case came before the Privy Council in the first instance, and that also is reported in AIR 1931 PC 107, it was urged before it that there had in fact been no consent to the decree, and, consequently, their Lordships of the Privy Council called for a report from the Court of the Judicial Commissioner of the Central Provinces, being the Court which pronounced the decree in question, asking it to inform them whether or not the decree was in fact made by consent. Subsequently, when the requisite report was sent to the Privy Council to the effect that the decree appealed from was made with the consent of the parties, the appeal was held to be incompetent.

14. Learned counsel for the appellant submitted that since it was argued before the Privy Council that consent, as a matter of fact, had not been given, the Privy Council thereupon remitted the case to the Court below to verify that fact and then send its report. His argument was that in the instant case also, the appellant was contending that he had not given his free consent to the compromise in question and he was forced to do so by the Court below. For determining that matter, this Court should send the case back to the trial Court for giving a finding on this question, as was done by the Privy Council. In this connection, it could be pertinent to mention that the Privy Council had to call for a report from the Judicial Commissioner, because the decree in that case did not make reference to any consent of the parties. An application also was made before the Privy Council, supported by an affidavit, that there had in fact been no consent to the judgment under appeal. After referring to the judgment in some detail, their Lordships observed—

“Under ordinary circumstances, their Lordships would not hesitate to take the statements contained in this judgment as correct, and would refuse summarily such an application as is now made to them. But the circumstances in the present case are peculiar.”

After making reference to certain proceedings, they further observed—

“The record discloses nothing except the judgment set out above of 21st October. A formal decree of the same date was drawn up in the ordinary course which recites only the hearing of 5th October, makes no reference at all to the 13th or to any consent of parties, but proceeds to set aside the decree of the lower Court and in lieu thereof passes a decree in conformity with the effective terms of the judgment.”

Then again, they observed—

“Under these circumstances, which their Lordships have characterised not without reason as peculiar, it is impossible for them to accept without further question the affirmation by the judgment of the Judicial Commissioners that the decree they were about to pass was a decree by consent of parties. If it was so in fact, it clearly could not be challenged by way of appeal, and the certificate should have been refused.” Later on, in this very judgment, it was held:

“Their Lordships feel no doubt that where a decree, or any part of a decree, is passed by consent of parties, it should always so appear on the face of the decree when drawn up.”

15. In the instant case, however, the decree itself shows that it had been passed on the basis of a compromise, which was effective between the parties. That being so, according to the Privy Council decision, quoted above, no appeal is competent against such a decree. If the appellant says that his consent had been obtained by coercion and it was not a free consent, then the only remedy available to him is to get this decree set aside by means of a regular suit.

16. Then there is the decision of Rankin C. J. and Ghose J. in *J. C. Galstaun v. Pramatha Nath Roy*, AIR 1929 Cal 470. There, it was held—

“Now, it appears to me that if a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course and indeed his only course, is to proceed by separate suit for the purpose. The matter is certainly grave enough to deserve a separate suit. The questions which have to be decided are entirely different from those at issue in the original suit. The relief sought is a very well recognised form of relief appropriate to a suit. In English practice it is old law that a fresh action is necessary to set aside a consent decree upon the ground of fraud and that such relief is not properly sought in an action of review. It appears to me that Section 152 of the Code which is confined to clerical or arithmetical mistakes and to an accidental slip or omission, is based upon this general principle, and that Sec. 151 is in no way intended as a violation of that principle. If the relief can be properly obtained in a separate suit, it does not appear that there is any justification for invoking Section 151 at all.” Later on, in this very judgment, it was observed—

“Now, I desire to say that in my opinion, it is not competent under Order 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. It appears to me

that before such a doctrine can be taken as authorised by the Code, it is very necessary to lay one's finger upon some enactment which is clearly intended to make so large and inconvenient an exception to the general principles which govern this matter. Rule 1, Order 47, after speaking of a case where a party has discovered new and important matter which was not within his knowledge or could not be produced by him at the time when the decree was passed and of mistake or error apparent on the face of the record, introduces the words "or for any other sufficient reason." In AIR 1922 P.C. 112, the Judicial Committee had occasion to point out that these words were not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. It appears to me that if mistake or error is *prima facie* intended to be beyond the scope of the rule unless the mistake or error be apparent on the face of the record, it is curious to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud."

17. In *U Po Htu v. Ma Than Yin*, AIR 1936 Rang. 389, it was held that a review of a consent decree on the ground that it was obtained by fraud, or by mistake, cannot be had, and the consent decree can be set aside only by means of a separate suit.

18. Learned counsel for the appellant, in the first instance, referred to a Bench decision of this Court in *Amarnath Radha Ram v. Smt. Malan w/o. L. Ram Chand*, AIR 1954 Punj. 259. In that case, a suit was compromised in the trial Court. At first, two counsel representing all the defendants made a statement and then, in the presence of the plaintiff, her counsel stated that he was in agreement with the statements of the two counsel for the defendants and prayed that orders might be passed accordingly. The plaintiff's thumb impression as well as the signature of her counsel were obtained on the statement. As one of the defendants was a minor, the sanction of the Court was obtained to the compromise as being in the interests of the minor. The Court then passed an order giving effect to the compromise based on the statements of the parties. Thereafter, the plaintiff filed an appeal under Order 43, Rule 1(m) of the Code of Civil Procedure in this Court, against the order recording the compromise saying *inter alia* that she had been tricked into the compromise, the terms of which had not been explained to her. This appeal came up for hearing before a Single Judge of this Court and one of the objections raised was that no appeal lay against the order of the lower Court. This objection was repelled

by the learned Single Judge and against that decision, a Letters Patent Appeal was filed, which was being disposed of by the Division Bench in question. While accepting the appeal and holding that the learned Single Judge was in error in overruling that objection, *Falshaw, J.*, with whom *G. D. Khosla J.* concurred, observed:

"Apart from any authorities it seems to me to be clearly implied by the provisions of Order 43, Rule 1(m) which gives the right of appeal against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction, that an appealable order under Order 23, Rule 3, must be done in which there has been a contest between the parties in the trial Court regarding whether the parties had settled their differences, and if a compromise has been recorded without any such contest, the proper remedy of the aggrieved party is to approach the Court and allege, as for instance in the present case, that the compromise was consented to because its terms had not been properly explained or understood, and if the Court then refuses to take any action and maintains its order recording the compromise it seems to me that the only remedy to the party concerned is to challenge the compromise by means of a separate suit."

It is pertinent to mention that this was not a case of an appeal against a consent decree under Section 96(3) of the Code of Civil Procedure. It was an appeal under Order 43, Rule 1(m) of the Code against an order recording a compromise under Rule 3 of Order 23 of the Code of Civil Procedure. Order 43, Rule 1(m) specifically says that an appeal would lie from an order under Rule 3 of Order 23, recording or refusing to record an agreement, compromise or satisfaction. On the other hand, Section 96(3) of the Code clearly bars an appeal against a consent decree.

19. During the course of this judgment, *Falshaw J.* observed that, in any case, he preferred the reasoning of *Murphy and Nanavati JJ.* in AIR 1933 Bom. 205, to that of *Wadsworth J.* in *Ramanarayana Rao v. Ramkrishna Rao*, AIR 1936 Mad. 385. *Falshaw J.* had also given the following observations of the Bombay Division Bench:—

"No appeal lay against an order recording a compromise where there was no contest at the time between the parties regarding the recording of the compromise, the proper remedy of the aggrieved party being either to appeal against the decree passed on the compromise or to reopen the matter in the trial Court either by way of review or otherwise."

20. On the strength of the remarks of *Falshaw J.* learned counsel for the appel-

lant submitted that the Division Bench of this Court was of the view that an appeal was competent against a decree passed on the basis of a compromise even when there was no contest at the time between the parties regarding the recording of the compromise.

21. In the first place, the aforesaid Division Bench was not dealing with a case of an appeal against a decree based on the consent of the parties under Section 96(3) of the Code of Civil Procedure. Secondly, the Division Bench of the Bombay High Court, the reasoning of which was preferred by Falshaw J. to that of the learned Single Judge of the Madras High Court, had not held that an appeal was competent against a decree passed in terms of the compromise where there had been no contest in the Court below regarding the recording of the compromise. They had, as a matter of fact, followed an earlier decision of the Division Bench of that Court in Appeal No. 34 of 1923, D/- 29th July, 1925 (Punj. & Har.), by Macleod C. J. and Madgaykar J. With regard to that earlier decision, Murphy J. observed—

"The ratio decidendi of that case, which binds us, is that where there has been no contest in the Court below, but an application for compromise has been put in and recorded and a decree passed in its terms, no appeal lies, either against the decree itself, an appeal therefrom being barred under Section 96(3), or against the order under Order 43, Rule 1(m), since there are no materials for an adjudication. What the learned Chief Justice meant was that before there can be an appeal under Order 43, Rule 1(m), there must have been some contest in the original Court, a contest which might be brought about, conceivably by one party alleging that there was a compromise and the other not, or, where the circumstances are similar to those in the present case, where one of the parties is disowning the authority of his agent or pleaded to compromise for him, either by an application for a review, or under Section 151, Civil Procedure Code, which would open the whole matter and allow an adjudication from which an appeal might lie. A direct appeal was not possible on the facts in that case, and in the present one as there was and is no material before the Court on which a decision can be come to. The ruling is of a Division Bench and binds us."

22. So it would be seen that the earlier Division Bench had clearly laid down that an appeal against such a decree was barred under Section 96(3), Code of Civil Procedure. It is true that during the course of the judgment, Murphy J. did observe that the proper course in a case where the order for making a decree was

passed practically simultaneously with the one recording the compromise, and where the compromise was challenged on the ground that none had really been arrived at, would be to challenge the decree, either by an appeal or by an application for review, or one under Section 151, Code of Civil Procedure in the original Court, when the matter could be gone into on the merits. But the learned Judge had also observed that it was not necessary to decide that point, because that appeal was concluded by the previous decision of the Division Bench of that Court. Following that ruling, they had held that no appeal was competent against the order recording the compromise.

23. Counsel then relied on a decision of A. N. Grover J. in *Mohinder Singh v. Smt. Rajinder Kaur*, 1966 Cur. L. J. 91 (Punj.). In that case, the learned Judge merely followed the Division Bench authority in *Amarnath Radha Ram's case*, by which he was bound.

24. Reference was then made by the learned counsel to a Bench decision of the Allahabad High Court in *Jagdish Narain v. Rasul Ahmad*, AIR 1952 All. 29, where it was held:—

"When the consent upon the basis of which a decree has been passed by the Court is itself challenged in the Court of appeal, it cannot be taken for granted that the decree was a consent decree. A consent decree must mean a decree validly consented to either by the party himself or by his duly authorised agent. If the question raised is that the agent who consented to the decree was not duly authorised, the question has to be decided and it cannot be prejudged by holding that because on the face of it there was a consent decree, no appeal lies to the appellate Court."

25. In this case, the counsel had entered into a compromise without any authority from his client and it was held that such a compromise was unlawful. The High Court of Allahabad has held in some cases that an appeal lies against a consent decree when the compromise on which it is based, is attacked as unlawful, as for example, when a compromise is entered into on behalf of a minor without leave of the Court under Order 32, R. 7 of the Code of Civil Procedure or without sanction of the Central Board, which is required under Section 51 of the U. P. Muslim Waqf Act, 1936, or when a compromise is entered into by a counsel without authority. If the learned Judges in *Jagdish Narain's case*, AIR 1952 All. 29, intended to hold that an appeal lay against a consent decree on the ground that the consent of the aggrieved party was obtained by fraud or coercion, then I am, I say so with great respect not inclined to agree with their view.

26. Counsel then relied on a Full Bench decision of the Oudh Chief Court in *Mohammad Raza v. Ram Saroop*, AIR 1929 Oudh 385 (FB). One of the two questions referred to the Full Bench for decision in that case was:

"Is it open to a party to a suit to appeal from the decree passed in the suit on the basis of a compromise purporting to be on his behalf when the person verifying or admitting the said compromise had no authority to enter into it on his behalf?"

27. Stuart C. J., with whom Raza J. concurred, answered that question in the affirmative, but, I say so with respect, without giving any reason therefor. Wazir Hasan J., however, observed as under:—

"On the first of these questions the argument of the learned counsel for the applicant is that having regard to the provisions of sub-section (3), Section 96, Civil Procedure Code, an appeal from the decree passed in this case being a decree with the consent of the parties was excluded by those provisions. The argument in answer is that having regard to the facts which exist behind the decree and the circumstances in which it came to be passed the decree in question in this case must be treated as a decree not passed with the consent of the parties. Speaking for myself I am inclined to accept the argument advanced on behalf of the applicant. It is admitted that the decree on the face of it is a decree passed with the consent of the parties. It is true that if we are to enter into the merits of the circumstances in which the decree in question came to be passed it might be found that the decree is a nullity; but I should think that the proper procedure for discovering the nullity or otherwise will be to initiate proceedings under Section 151 or by way of review of judgment. But if the decree *ex facie* is a consent decree it seems to me that an appeal is barred. It appears to me to be wholly immaterial as to whether the decree can be shown by proof of circumstances aliunde to be not a consent decree. But when it is shown, it is only then that it would cease to be a decree without consent. The present proceedings are clearly intended to bring about the last mentioned result. The proceedings may fail or may succeed. If they succeed the decree will only then cease to be a consent decree.

In the present case, however, it is not necessary for me to commit myself definitely to the view stated above. I will assume in answering the first question that an appeal could be preferred and would, therefore, answer that question in the affirmative."

28. It would, therefore, be seen that Wazir Hasan J. was of the view that if

the decree *ex facie* was a consent decree, an appeal against it was barred. The other two Judges did not give any reasons for their decision.

29. In view of what I have said above, I would hold that the decree passed by the Court below in the instant case, being based on a compromise arrived at with the consent of the parties, is not appealable under Section 96(3) of the Code of Civil Procedure. The appeal filed by Mahant Kewal Krishan was, therefore, not competent. The same is, accordingly, dismissed on that ground. The parties are, however, left to bear their own costs.

30. H. R. SODHI, J.: I agree.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 182 (V 57 C 24)

B. R. TULI, J.

Gurbux Singh and others, Appellants
v. Bishan Dass 'Chela' Kaul Dass and
others, Respondents.

Second Appeal No. 1499 of 1963, D/-
9-9-1968 from decree of Addl. Dist. J.,
Bhatinda, D/- 25-10-1963.

(A) Evidence Act (1872), Ss. 65 and 63
— Registration Act (1908), S. 60 — Regis-
tered Will — Certified copy of Will —
Admissible in evidence.

The certificate issued by the Registrar is to some extent an evidence of the execution of the document and the admission of signature before the Registrar by the executant can form an evidence of the execution of the document. The execution of the Will can also be proved by approved circumstantial evidence. Case law discussed.

(Paras 13, 24)

(B) Religious Endowments Act (1863),
S. 14 — Will — Public trust created by
Will — Manager appointed — Manager
not competent to alienate the property
of the trust — Manager, held, could not
make a gift of the property in favour of
his Chela.

(Para 27)

(C) Religious Endowments Act (1863),
S. 14 — Public trust — H creating by a
Will a trust for religious purposes — T
made manager of Dera along with its
properties for carrying out objects of the
Dera and effect improvements — T select-
ed for his ability and learning — Pancha-
yat given right to remove him in case he
became bad character — Property not to
be alienated except for the purposes of
the Dera itself — Held, that a public trust
for religious purposes was created by the
Will.

(Para 26)

Cases Referred: Chronological Paras
(1964) AIR 1964 Andh. Pra. 284

(V 51), Ketharaju Rajeshwari v.

Kanthamraju Varalakshamma 13

- (1964) AIR 1964 Pat. 45 (V 51)=
1964 B.L.J.R. 339, Gulab Chand
v. Sheo Kuran Lal Seth
- (1963) AIR 1963 Punj. 208 (V 50)=
ILR (1962) 2 Punj. 915, Arya
Prithinidhi Sabha Punjab v. Dev
Raj
- (1962) AIR 1962 Ori. 40 (V 49)=
ILR (1961) Cut. 249, Subudhi
Padhan v. Raghu Bhuyan
- (1957) AIR 1957 Punj. 146 (V 44)=
ILR (1957) Punj. 418, Mehtab
Singh v. Amrik Singh
- (1956) AIR 1956 Bom. 65 (V 43)=
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Martand v. Vinayak Ganesh
- (1955) AIR 1955 Cal. 398 (V 42)=
59 Cal. W. N. 757, Naresh Chandra
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- (1954) 1954-2 Mad. L. J. (Andh) 75
=1954 Andh. L. T. (Civil) 35,
Padmanabhachari Annamraju
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- (1954) AIR 1954 Mad. 486 (V 41)=
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Gounder
- (1953) AIR 1953 Mys. 49 (V 50)=
Huthegowda v. Chennigegowda
- (1952) AIR 1952 Madh. Bha. 146
(V 39)=MBLJ 1952 HCR 389,
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Singh
- (1950) AIR 1950 Mad. 634 (V 37)=
1950-1 Mad. L. J. 720, Gadey Ven-
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ramayya
- (1946) AIR 1946 Bom. 193 (V 33)=
47 Bom. L. R. 962, Pandappa
Mahalingappa v. Shivalingappa
Murtappa
- (1935) AIR 1935 P.C. 132 (V 22)=
ILR 57 Ali. 494, Basant Singh v.
Brijraj Saran Singh
- (1934) AIR 1934 Lah. 282 (V 21)=
149 Ind. Cas. 1109, Kartar Singh
v. Didar Singh
- (1929) AIR 1929 Lah. 711 (V 16)=
116 Ind. Cas. 911, Piara v. Fattu
- (1925) AIR 1925 All. 56 (V 12)=
82 Ind. Cas. 306, Sheikh Karim-
ullah v. Gudar Koeri
- (1924) AIR 1924 Lah. 303 (V 11)=
71 Ind. Cas. 568, Chuha Mal v.
Rahim Bakhsh
- (1923) AIR 1923 Mad. 1 (V 10)=
ILR 46 Mad. 92 (FB), Subrah-
manya Somayajulu v. Seethayya
- (1922) AIR 1922 P.C. 56 (V 9)=
24 Oudh Cas. 272, M. Ihtishan
Ali v. Jamna Prasad
- J. N. Kaushal with Harbhagwan Singh
and Ashok Ehan, for Appellants; K. C.
Puri with S. K. Goyal and H. C. Garg,
for Respondent No. 1; Suraj Parkash, for
Respondent No. 2; Harbans Lal, for Res-
pondent No. 4.

JUDGMENT:— Bishan Dass Chela
Kaul Dass and Brahm Parkash Chela

Tara Dass brought a suit under Sec. 92
of the Code of Civil Procedure against
Mahant Tara Dass and others for declara-
tion that the alienation made by Tara
Dass, defendant No. 1, by way of gift in
favour of Arjan Muni, defendant No. 2,
of the whole land in village Sibian
through Mutation No. 3987 dated 22-5-
1954 was illegal being beyond his powers
and was against the purpose of the religi-
ous trust of which Tara Dass defendant
was the trustee and was, therefore, void.
The plaintiffs also prayed for declaration
that the alienation of 96 bighas & 9 biswas
of land described in the heading of
the plaint made by defendant No. 2,
Arjan Muni, in favour of Gurbux Singh
and others by a registered sale deed dated
22-5-1958 for Rs. 20,000/- was beyond the
powers of defendant No. 2 and was with-
out legal necessity and consideration and
was, therefore, void.

The plaintiffs also prayed for the re-
moval of Shri Tara Dass, defendant No. 1,
from the Mahantship of the Dera Udasian
Sibian on the ground that the alienations
in dispute were acts of mismanagement.
The plaintiffs further prayed for posses-
sion of the property including the land
sold to Gurbux Singh and others. This
suit had been filed after obtaining the
consent in writing of the Advocate Gene-
ral. On 7-8-1962, the suit was decreed by
the trial Court in terms of the prayers
made in the plaint except that the decree
for possession was not granted. The
defendants filed an appeal which was
heard by Shri Surinder Singh, Additional
District Judge, Bhatinda and was dismiss-
ed by his order dated 25-10-1963. This
regular second appeal is directed against
the decree passed by the learned Addi-
tional District Judge, Bhatinda.

2. The facts are that there is a Dera
of Udasi Sadhus in village Sibian which
was founded by Bawa Amar Dass, grand
Guru of Bawa Hira Dass for a religious
public purpose. Initially only 12 Gham-
aons of land belonged to the Dera but later
on Mahant Hira Dass acquired further
land for the Dera and dedicated the entire
property as a public trust property for reli-
gious purposes. There was also some land
acquired in village Kotra and by his will
dated Har 18, 1988 Bk. =Ist July, 1931
A.D. registered on the next day, he
demised the property of the Dera situate
at village Kotra in favour of his first
Chela Roop Ram giving him all the rights
of a proprietor without any restriction as
to alienation etc. There is no dispute
about this land in this suit. The land
situate in village Sibian was given to
Mahant Tara Dass who was the second
Chela of Mahant Hira Dass for the pur-
poses of management and carrying out the
objects of the Dera. By this will, Mahant
Tara Dass was appointed Mahant of the

Dera after the testator on the basis of his ability and learning and because he was fully conversant with the customs and rituals of the Bhek (sect); he was directed to manage all the property for the benefit and improvement of the Dera and he was not entitled to sell the Dera property for personal use.

The property could be alienated only for the benefit of the Dera and any sale in contravention of this direction was to be void. In case Tara Dass became a person of bad character, the respectables of the Panchayat were given the right to remove him from Mahantship and to appoint Kaul Dass in his place. After the death of Hira Dass, Tara Dass came into possession of the property and through Mutation No. 3987 dated 22-5-1964 he gifted the whole of the land of the Dera Sibian measuring 244 bighas & 10 biswas to his Chela Arjan Muni, defendant No. 2, which was contrary to the directions given in the will of Hira Dass. Arjan Muni in turn sold 96 bighas and 6 biswas of land out of the above land to Gurbux Singh and Jang Singh, sons of Hardit Singh (one half) and Gurbachan Singh and Gurbux Singh, sons of Bhag Singh (the other half) for Rs. 20,000/- by means of a registered sale deed dated 22-5-1958. This sale by Arjan Muni, according to the plaintiffs, was void and did not affect the rights of the Dera.

3. The defendants resisted the suit and stated that no will had been executed by Mahant Hira Dass nor did Bawa Amar Dass found any Dera for religious or other purposes nor did Hira Dass create any religious trust by virtue of his will; Tara Dass had got the land from Hira Dass as a Chela and he had the right to make a gift thereof to Arjan Muni who in turn was within his rights to sell it to Gurbux Singh and others and, as such, the sale in favour of Gurbux Singh and others was valid.

4. On the pleadings of the parties, following issues were framed by the learned trial Court:—

(1) Whether Bishan Dass is the Chela of Kaul Dass and Brahm Parkash Chela of Tara Dass? O.P.

(2) Whether Dera Udasian in village Sibian was founded by Bawa Amar Dass, grand Guru of Hira Dass, for a religious purpose? O.P.

(3) Whether initially only 12 Ghamaons of land was the property of the said Dera? O.P.

(4) Whether Mahant Hira Dass, guru of defendant No. 1, acquired land in village Sibian, Kotra and in tehsil Qasur for the purpose of Dera as religious trust property? O.P.

(5) Whether property at village Bam-biha was allotted in lieu of property left in tehsil Qasur? O.P.

(6) Whether Bawa Hira Dass created a religious trust in respect of his entire property? O.P.

(7) Whether Hira Dass on 18-3-1988 Bk. made a will of his property except the property in village Kotra in favour of defendant No. 1 with a condition that the property would remain as a trust property and that Tara Dass would have no power to alienate the same? O.P.

(8) Whether Tara Dass was appointed trustee of the said property? O.P.

(9) Whether Tara Dass was the owner of land measuring 244 bighas and 10 biswas situated in the area of village Sibian and as such the gift of the same made by him in favour of Arjan Muni defendant was valid? O.D.

(10) Whether the alienation of land measuring 96 bighas and 6 biswas out of the said land made by Arjan Muni in favour of defendant No. 3 was void and as such is liable to be set aside? O.D.

(11) Whether Mahant Tara Dass was guilty of mismanagement and liable to be removed from the Mahantship of the said Dera? O.P.

(12) Whether the plaintiffs are entitled to get possession of the said land alienated in favour of defendant No. 3? O.P.

(13) Whether the plaintiffs are grand chelas of Mahant Hira Dass and members of the Bhek and as such are entitled to sue in a representative capacity? O.P.

(14) Whether the suit is within time? O.P.

(15) Whether the suit is properly valued for the purpose of court-fee? O. P.

(16) Whether the plaintiffs should have mentioned in their plaint the property of the said Dera from which Mahant Tara Dass is sought to be removed as a Mahant? If so, what is its effect? O.D.

(16-A) Whether the suit under Sec. 92 of the Code of Civil Procedure is not maintainable against the alienees of the suit property? O.D. No. 3.

(17) Relief.

The learned trial Court decided all the issues except Nos. 5, 12 and 16-A in favour of the plaintiffs and as a consequence thereof, decreed the suit as prayed for except as regards the restoration of the possession of the suit land.

5. In appeal, before the learned Additional District Judge, the following three points were argued by the learned counsel for the defendants-appellants:—

(1) The copy of the will (P. 2) is not admissible in evidence without proper proof of the execution of the original will;

(2) Even if the execution of the will (P. 2) is proved, there is no public trust created by the said deed; and

(3) Tara Dass was fully competent to gift the property in dispute to Arjan Muni and hence the sale by the latter was valid.

The learned lower appellate Court after an exhaustive study of the case law held that the copy of the will Exhibit P. 2 being a copy obtained from the office of the Sub-Registrar was admissible in evidence without proving the execution of its original; that the trust in question was a public, religious and a charitable trust and not a private one and Mahant Tara Dass was not competent to gift the land of the Dera in favour of Arjan Muni. As a necessary corollary the sale of the land made by Arjan Muni in favour of Gurbux Singh and others was held to be void and ineffective.

6. In appeal before me, Shri Jagan Nath Kaushal, the learned counsel for the appellants, has argued the same three points. For point No. (1), the learned counsel has relied upon Sections 63, 65, 67, 68 and 72 of the Evidence Act and has emphasised that the secondary evidence can be given of the existence, condition or contents of a document in the cases mentioned in Section 65 of the Evidence Act and that the proof of the execution of the original document is not dispensed with. The counsel submits that the secondary evidence cannot be placed on a higher footing than primary evidence in which case the original document, if produced, has to be proved by evidence by calling the scribe, the executant or the attesting witnesses thereof or by any other mode prescribed by the law. According to the learned counsel, it is only under Section 90 of the Evidence Act that the proof of the execution of the original document purporting or proved to be 30 years old which is produced from any custody which the Court in the particular case considers proper, the due execution of the document is presumed and in no other case. The learned counsel has cited judgments of various High Courts which I proceed to notice.

7. The first judgment cited by the learned counsel is that of Shadi Lal, C. J. and Fforde, J. in *Chuha Mal v. Rahim Bakhsh*, AIR 1924 Lah. 303, in which it was observed as under:—

"There is, however, no evidence to prove the execution of the original sale deed of which P. 5 is a copy. It is urged that the plaintiff could not prove the execution of a document which was not produced before the Court, but we do not think that the difficulty, if any, should relieve the party from the duty which the law casts upon him. The scribe, to whose evidence our attention has been invited, only states that the original deed might have been executed by Matu, but that ambiguous statement cannot be treated as proof of the execution of the document."

The sale-deed in this case does not appear to have been a registered document.

8. Reference is then made to the judgment of Dalal, J., in *Sheikh Karimullah v. Gudar Koeri*, AIR 1925 All. 56, in which the learned Judge held that:—

"a certified copy is sufficient secondary evidence under Section 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under Section 68." The document in this case also appears to have been not registered.

9. The next case relied upon by the learned counsel is the judgment of Chaturvedi, J., in *Brajraj Singh v. Yogendrapal Singh*, AIR 1952 Madh. Bha. 146, in which it was held that:—

"a copy of a will is not a sufficient evidence of the fact of adoption recited in the will. It is necessary for a party to prove the execution of the original. A certified copy is sufficient secondary evidence under Section 63 of the existence, conditions and contents of the deed but not of its execution which must be proved as required under Section 68 of the Evidence Act and that the evidence of the scribe or of an attesting witness was necessary for proving the will and this evidence has been lacking in this case."

10. In *Gulab Chand v. Sheo Karan Lal Seth*, AIR 1964 Pat. 45, a Division Bench of the Patna High Court held that the secondary evidence should be given to prove the existence, condition or contents of a document and nothing more beyond that. If a document is alleged to have been signed by any person, the signature must be proved to be in the handwriting of that person.

11. These cases do not relate to copies of registered documents obtained from the office of the Sub-Registrar or Registrar under the Indian Registration Act and, therefore, are not of any help to the learned counsel for the appellants. He has, however, cited some judgments relating to registered documents, first of which is the judgment of Jai Lal, J., in *Kartar Singh v. Didar Singh*, AIR 1934 Lah. 282, in which the learned Judge observed as under:—

"The proviso (to Section 68 of the Indian Evidence Act) recently added makes it unnecessary to call an attesting witness in the case of such a document, except a will, if the document is registered unless its execution is expressly denied by the person by whom it purports to have been executed. From this the counsel asks me to infer that according to law as it now exists it is not necessary to prove by any evidence the execution of a registered document. I cannot accede to this suggestion. Section 68 merely provides a special rule relating to the proof of documents required to be attested. This proviso, therefore, is merely an exception to that special rule. It is not intended to override the general provi-

sions of the law as to the proof of documents relied upon by the parties." This case related to the original sale-deed and does not take into consideration the provisions of Section 60(2) of the Indian Registration Act and is, therefore, of no help.

12. The next case relied upon by the learned counsel is a Division Bench judgment of Madras High Court (Subba Rao and Panchapakesa Ayyar JJ.) in *Gadey Venkata Ratnam v. Gadey Sitaramayya*, AIR 1950 Mad. 634 and he has drawn my attention to para 6 of the judgment in which it was held that in view of the decision of the Privy Council in *Basant Singh v. Brijraj Saran Singh*, AIR 1935 P.C. 132, "the view expressed by this Court in *Subrahmanya Somayajulu v. Y. Seethayya*, AIR 1923 Mad. 1 (FB), that the presumption under Section 90, Evidence Act, with regard to documents 30 years old arises in the case of copies as well as originals, and that if a copy is proved to be a true copy a presumption may be made of the genuineness of the original itself, is no longer good law, though Mr. Somasundaram argues that it is good law. It follows that the defendant must prove the execution of the original will by Venkataratnam in some way known to law, at least by approved circumstantial evidence". The learned counsel in that case had contended that the lower Court had erred in presuming the execution of the original will by Venkataratnam in a sound and disposing state of mind from the production of a copy Exhibit D. 8 more than 30 years old.

13. The next case relied upon by the learned counsel is *Ketharaju Rajeshwari v. Kanthamraju Varalakshamma*, AIR 1964 Andh. Pra. 284, the head-note of which is as under:—

"Mere production of a certified copy of a document more than thirty years old is not sufficient to raise a presumption under Section 90 of the Evidence Act regarding its genuineness or execution although the certified copy may be used to prove the contents of the document.

Where the document is registered then although its mere registration may not by itself constitute sufficient proof of the execution of the document, in view of Sections 57 and 60 of the Registration Act the certified copy and the certificate issued by the Registrar, would constitute sufficient evidence to prove the contents of the document 'and be also to some extent an evidence of the execution of the document'. It may be that proof of admission of execution before the Registrar may not satisfy completely the requirements of Section 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. But it cannot be argued that admission of signature before the

Registrar cannot in any case form an evidence of the execution of the document'. If apart from the admission incorporated in the certificate of the Registrar under Section 60(2) of the Registration Act, there is other evidence to corroborate the admission, the execution of the document can be considered as proved."

The sentences underlined (here in ' ') by me clearly show that the certificate issued by the Registrar is to some extent an evidence of the execution of the document and that the admission of signature before the Registrar by the executant can form an evidence of the execution of the document. This judgment, therefore, does not help the learned counsel for the appellants.

14. The judgment of G. C. Das, J., in *Subudhi Pachan v. Raghu Bhuvan*, AIR 1962 Orissa 40, has then been referred to by the learned counsel in which the learned Judge observed as under in para 8 of the report:—

"By reason of the admission made by the first defendant of the genuineness of the certified copy within the meaning of Section 65(b) of the Evidence Act, the certified copy became admissible in evidence under Section 65. By reason of Section 57(5) of the Registration Act, the said copy becomes admissible for the purpose of proving the contents of the original document itself. The certified copy is also admissible under Sec. 65 (e) of the Evidence Act. Secondary evidence may be given if the original is a public document within the meaning of Section 74. The definition of a public document under Section 74 takes in public records kept in any State of private documents. The Registrar's office certainly keeps a public record of all sale-deeds registered in that office. Section 76 enables an officer having the custody of a public document to give a certified copy. The certified copy is therefore admissible under Section 65(e) and (f) of the Evidence Act. The certified copy is therefore secondary evidence of the public record of the mortgage deed kept in the Registrar's office.

Again by invoking Section 57(5) the said copy becomes admissible for the purpose of proving the contents of the original document. The certified copy of the suit mortgage deed is admissible in evidence. But this will not dispense with the proof of the execution of the same. Assuming this decision to be correct, which I have no doubt that it is so, the certified copy of the mortgage-bond dated March 26, 1907 may be admissible in evidence as secondary evidence but that does not dispense with the proof of actual execution."

Reliance in that case was placed on a judgment of the Andhra Pradesh High

Court in the case of Padmanabhachari Annamraju Sitapathirao, (1954) 2 Mad. L. J. (Andhra) 75.

15. The learned counsel has then brought to my notice a Division Bench judgment of the Bombay High Court (Gajendragadkar and Shah, JJ.) in Kashi-bai Martand v. Vinayak Ganesh, AIR 1956 Bom. 65, in which it was held that a copy of a document of mortgage which has been admitted under Section 65 of the Evidence Act as secondary evidence and is produced from proper custody and is over thirty years old, the signatures authenticating the copy may be presumed to be genuine under Section 90. Even so, under Section 90, when a copy is produced, the presumption cannot be made that the signature, handwriting, execution or attestation of the original document were in order. This part of the decision of the learned Judges does not concern us but their Lordships in para 7 of the report held as under:—

"In the case of a certified copy of a registered document, however, the party would be justified in contending that under the provisions of Section 60, sub-section (2), Registration Act, it would be competent to the Court to hold that the execution of the document had been admitted by the executant before the Sub-Registrar. That is the endorsement, which the certified copy produced bears and the said endorsement must be given its due legal effect having regard to the provisions of S. 60, sub-section (2)."

This observation of the learned Judges goes against the contention of the learned counsel for the appellants and helps the other side.

16. The last authority relied upon by the learned counsel is Naresh Chandra Bose v. State of West Bengal, AIR 1955 Cal. 398, in which it was held that by simply producing the registers of the Registration Office without calling for the original documents from the custody of the persons in whose favour they are executed, the documents cannot be admitted in evidence and that the signatures of the executant of the document must be proved. Mere production of a document is not by itself sufficient proof of its execution and unless there is formal proof of its execution, its admission in evidence is improper and illegal.

17. It will be observed that in some of the judgments cited by the learned counsel for the appellants, it has been held that the certificate of the Registrar, on a registered deed is some proof of execution of the document and it cannot be said that by the certificate of the Registrar, the document cannot be said to have been proved at all. There are two Division Bench judgments of this Court which are directly against the contention of the

learned counsel for the appellants. The first is the judgment of Bishan Narain and Chopra, JJ. in Mehtab Singh v. Amrik Singh, ILR (1957) Punj. 418= (AIR 1957 Punj. 146), and the relevant observations which are at pages 422-423 (of ILR Punj) = (at p. 148 of AIR) are as under:—

"I shall first deal with the point relating to the execution of the will of 1901. The original will has not been produced. The lower appellate Court has held that it was in possession of Mst. Bhagwani and is being withheld by the plaintiff, and that in any case it is lost and, therefore, secondary evidence is admissible. The learned counsel for the appellant has not contested the correctness of this finding. The defendants have produced a certified copy of the will which was obtained from the Registration Office. This will is more than 30 years old but production of a copy cannot be considered to be sufficient to justify the presumption of due execution of the original will under the provisions of Section 90, Indian Evidence Act (AIR 1935 PC 132). It is, therefore, necessary to see in the present case if there is any evidence on the record to justify the lower Courts' finding that the execution of the original will has been proved. The copy produced is a certified copy of the original will. It has been produced by the registration clerk from his office. It bears the endorsement of the Sub-Registrar which records that Jawahar Singh, whom he personally knew, admitted before him that he had written and completed the will and that the thumb marked it in his presence. This endorsement under Section 60 of the Registration Act is admissible for the purposes of proving that the executant admitted the execution of the will that was produced before him. The will was made about 50 years ago and I would consider this endorsement as sufficient evidence in support of the finding that Jawahar Singh in fact executed it. In this case, however, there is the statement of Bishan Das, Sub-Registrar who has deposed in Court that he had made the endorsement on the will, and that he knew Jawahar Singh previously who had admitted its execution before him. He has also stated on oath that Jawahar Singh was in a disposing mind and the will had been read out to him. This evidence to my mind conclusively proves execution of the will and disposing mind of the testator. The lower Courts have also come to the same conclusion. The will is a natural one and is attested by two witnesses. There is nothing suspicious about it. It has been acted upon and the widows took possession of the property in accordance with the directions given in the will. It was only in 1937 that Mst. Bhagwan Kaur decided to ignore it. I am, therefore, clear in my mind that

Jawahar Singh did in fact execute the will and got it registered in 1901." It is true that in this case Bishan Das, Sub-Registrar had been produced as a witness and he deposed that the certificate made by him was correct.

18. The second judgment is by Daya Krishan Mahajan and Prem Chand Pandit, JJ., in *Arya Pritinidhi Sabha, Punjab v. Dev Raj*, ILR (1962) 2 Punj. 915=(AIR 1963 Punj. 208), in which after considering the case-law on the subject, the learned Judges held:—

"So far as the execution of the original will is concerned, it is proved by the endorsement of the Registrar. That endorsement leaves no manner of doubt that the will was executed by Girdhari Lal to whom it was read over and who admitted its contents to be correct. Therefore, a certified copy of that will would be admissible in evidence in view of the fact that the original is not forthcoming and is being withheld by the respondents".

19. The learned counsel for the respondents has also relied upon the following observations of the Privy Council in *M. Ihtishan Ali v. Jamna Prasad*, AIR 1922 PC 56 at page 58:—

"It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed. And if in addition he was not cross-examined, this result would follow all the more. There is no doubt that the deed was executed, for it was registered, and registered in a regular way, and it is the duty of the registrar, before registering, to examine the grantor, or some one who, he is satisfied, is the proper representative of the grantor, before he allows the deed to be registered."

From this observation of their Lordships of the Privy Council, the learned counsel submits that in the instant case, the will was duly registered by the Registrar and it should be held that it was duly registered by that officer after satisfying himself that the person presenting and admitting its execution was the person who had executed it.

20. The next case relied upon by the learned counsel for the respondents is the Division Bench judgment of Lahore High Court (Fforde and Bhide, JJ.) in *Piara v. Fattu*, AIR 1929 Lah. 711, the head-note of which states:—

"The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend to the parties during the registration and see that the proper persons are present,

are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Therefore the certificate endorsed on the sale deed by the Registering officer under Section 60 is a relevant piece of evidence for proving its execution."

In view of this decision, the learned counsel submits that the certificate by the Registering Officer is a relevant piece of evidence for proving the execution of the will in the instant case.

21. Lokur, J. in *Pandappa Mahalingappa v. Shivalingappa Murteppa*, AIR 1946 Bom. 193, held:—

"It is true that when a certified copy is allowed to be produced under Section 65, no presumption can be drawn under Section 90 as to the genuineness or execution of the original and the Court should not admit a document merely on the ground that it is a certified copy of a document more than thirty years old and should call for proof of the execution of the document. But when the document is registered, such proof is to be found in the certified copy itself. The deed being registered, the certified copy bears the necessary endorsements of the Sub-Registrar before whom the executant acknowledged the execution and was duly identified. Sections 58, 59 and 60, Registration Act, provide that the facts mentioned in the endorsements may be proved by those endorsements, provided the provisions of Section 60 have been complied with.

Hence, where a registered mortgage-deed more than thirty years old is lost, the certified copy produced under Section 65 is admissible in evidence."

22. A Division Bench of the Mysore High Court (Balakrishnaiya and Mallappa, JJ.) in *Huthegowda v. Chennigowda*, AIR 1953 Mys. 49, held after discussing the case-law that evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed and that the lower appellate Court was right in regarding the copies of the two registered documents as some evidence of the genuineness of their originals.

23. The last judgment to be noticed is by Govinda Menon, J., in *Karuppanna Gounder v. Kolandaswami Gounder*, AIR 1954 Mad. 486, the head-note of which is in these words:—

"When once the case for the introduction of secondary evidence is made out, certified copy got from the Registrar's office can be admitted under Section 57, sub-section (5) of the Registration Act, without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. As the

certified copy obtained from a Registrar's office is admissible under Section 57 (5), Registration Act, for the purpose of proving the contents of the original documents, the mere production of such copy, without any further oral evidence to support it, would be enough to show what the original document contained."

24. The judgments relied upon by the learned counsel for the respondents certainly support his contention that there was no necessity to produce any evidence to prove the execution of the will by Mahant Hira Dass and that the certificate of the Registering Officer on the will was sufficient proof of the execution of the will and its contents. The learned counsel for the respondents has then submitted that Bihan Dass, appellant, appeared as P.W. 6 and stated in his examination-in-chief that Mahant Hira Dass executed a will in favour of Tara Dass and through that will, Tara Dass had been made the Manager of the property. The witness stated that he was living in those days in the Dera. In cross-examination, he stated that Hira Dass had acquired all the property for the purposes of the Dera and the portion of the will (P. 2) marked 'A' to 'A' had been correctly recorded. This evidence of P.W. 6 proves the execution of the will, copy of which is Exhibit P. 2. Tara Dass, defendant, came in the witness-box as D. W. 8 and stated that he had got the land from his Guru, Hira Dass and that he did not know whether Hira Dass had executed any will in his favour. He then denied that Hira Dass had executed any will in his favour and stated that Hira Dass had given him this property in the capacity of a Chela. He had mortgaged a part of it because he needed money for the purposes of the Dera.

Apart from the evidence of Bihan Dass, there is circumstantial evidence to show that the will, copy of which is Exhibit P. 2, had been executed by Mahant Hira Dass. It had been held in AIR 1950 Mad. 634, that the execution of the original will can also be proved by approved circumstantial evidence. The strong circumstances leading to the conclusion in favour of the execution of the will are first that Roop Ram took possession of the land in village Kotra as a full owner without any restriction on his right to alienate which was only in accordance with the will. The second circumstance is that Tara Dass mortgaged a part of the land for the purposes of the Dera and the third circumstance is that his assertion that Hira Dass had given him land as a Chela is not proved by any evidence of mutation etc. If Hira Dass had given him the land as a Chela in his life-time, Tara Dass would certainly have completed his title by some deed or mutation recorded

in the revenue records. No such evidence has been produced.

25. For the reasons given above, I hold that the copy of the will (Exhibit P. 2) has been properly admitted into evidence.

26. On the second point, the contents of the will make it abundantly clear that Hira Dass had created a public trust for religious purposes with regard to the property in dispute. The Dera had been founded by Bawa Amar Dass, and Tara Dass had been made the Manager of the Dera along with its properties for carrying out the objects of the Dera and effecting improvements therein. He had been selected because of his ability and learning and in addition because he was practising as a Hakim. The land which had been given to Roop Ram in village Kotra had been given in full ownership whereas the land in village Sibian was only put under management of Mahant Tara Dass and the Panchayat was given the right to remove him and appoint Kaul Dass in case he became a bad character. He could not alienate the property of the Dera except for the purposes of the Dera itself. It is thus clear that a public trust for religious purposes had been created by this will by Mahant Hira Dass. The second point is also decided against the defendants-appellants.

27. In view of the contents of the will, the third point has also to be decided against the defendants-appellants. According to the will, Tara Dass was not competent to alienate the property of the trust except for the purposes of the trust and he could certainly not make a gift thereof in favour of his Chela Arjan Muni.

28. For the reasons given above, this appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 189 (V 57 C 25)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR & R. S. NARULA, JJ.

Ad Lal Shiv Lal and another, Petitioners v. State of Punjab and others, Respondents.

Civil Writ No. 516 of 1965, D/- 27-2-1969.

(A) Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), S. 5(2) (cc) — Co-option under — Not automatic — It has to be done in meeting convened under R. 3(1) read with R. 4-A of Panchayat Samitis (Co-option of Members) Rules, 1961: AIR 1966 Punj 274, Approved — (Point conceded.) (Para 3)

DM/FM/B629/69/RSK/D

(B) Panchayats — Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961), S. 16 read with Rr. 3 and 4-A of Panchayat Samitis (Co-option of Members) Rules, 1961 — Convening meeting for purpose of co-option — Requirement of five days notice is mandatory — Lots drawn by Returning Officer in a meeting convened without giving five days notice — Deputy Commissioner after noticing defect reconvened a meeting but instead of drawing lots as required under R. 4-A approving lots already drawn by Returning Officer, with consent of candidates — Held, co-option in this manner was patently illegal and had to be set aside — Jurisdiction could not be conferred by mere consent where it does not exist in law. (Paras 4 and 5)

(C) Constitution of India, Art. 226 — Election case — Co-option of two members to Block Samiti found to be illegal — Petitioner praying that Court should also declare elections of Chairman and Vice-Chairman of Block Samiti as well as election of representatives of Samiti to Zilla Parishad as illegal — Petitioner was not contesting any of those elections — Held, no further relief as prayed for could be granted and that it would also be improper to interfere with those elections after expiry of more than four years. (Para 6)

Cases Referred: Chronological Paras (1966) AIR 1966 Punj. 274 (V 53) =

67 Pun. L. R. 1238, Charan Dass Dogra v. Punjab State 2, 3

H. S. Wasu, (Sr.) with B. S. Wasu and L. S. Wasu, for Petitioner; B. S. Dhillon, for Advocate General (Punjab) with B. S. Shant (for Nos. 1 to 4), H. L. Sarin (Sr.) with A. L. Bahl, H. S. Awasthy and B. S. Malik (for Nos. 5, 10 & 11), for Respondents.

ORDER OF REFERENCE

R. S. NARULA & D. K. MAHAJAN, JJ.— The co-option of respondents Nos. 9 to 14 as members of the Panchayat Samiti Khuian Sarwar, has been questioned by the petitioners in this case. Petitioner No. 1 claims to have been elected as a primary member of the said Panchayat Samiti. Petitioner No. 2 was a Harijan and had contested the election, but was bracketed with respondents Nos. 10 and 11, each of which three candidates secured two votes. None of them was elected in the straight contest on the 22nd of January, 1965. Just after the result of the election of the primary members was declared, the Returning Officer proceeded to decide as to which of the three Harijan members who had contested the election, but had not been elected, were entitled to be co-opted under Section 5(2) (cc) of the Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961) (hereinafter called the Act). At the meeting of the

Samiti convened under Section 16 of the Act for co-opting the other members on February 16, 1965, an objection was raised to the manner in which new ballot papers had been prepared by the Presiding Officer. The objection was turned down by the written order of the Presiding Officer (Annexure 'A'). This related to the co-option of respondents Nos. 9 and 12 to 14 only.

2. Mr. Harnam Singh Wasu, the learned counsel for the petitioners has contended that the Returning Officer had no jurisdiction to draw the lots between the three Harijan members, that is, petitioner No. 2 and respondents Nos. 10 and 11, so as to decide as to which two out of them were entitled to be co-opted. He has also argued that according to the law laid down by a Division Bench of this Court in Charan Dass Dogra v. Punjab State, (1965) 67 Pun. L. R. 1238 = (AIR 1966 Punj. 274), the co-option under clause (cc) of sub-section (2) of Section 5 of the Act is not automatic in any circumstances and has to be done in a meeting convened under Rule 3(1) read with Rule 4-A of the Panchayat Samitis (Co-option of Members) Rules, 1961. The learned Advocate General contests this proposition and has submitted that the earlier Division Bench judgment of this Court needs reconsideration. We are bound by the Division Bench judgment and since its correctness is doubted, it would be appropriate that the whole case is heard by a larger Bench. It is, therefore, directed that the papers of this case may be placed before my Lord, the Chief Justice for constituting a Full Bench to hear this petition, and to decide the matter. At the request of the learned counsel for the petitioners, it is directed that the case may be fixed before the Full Bench as early as possible.

JUDGMENT OF THE FULL BENCH.

3. **R. S. NARULA, J.**— The facts leading to the filing of this writ petition have been narrated in requisite detail in the order of reference made by the Division Bench on February 14, 1967, which may be read as a part of this judgment. This reference was necessitated by vehement arguments addressed before the Division Bench by Mr. J. N. Kaushal, the then Advocate-General for the State of Punjab, asking the Bench to reconsider the decision of an earlier Division Bench of this Court (Dua, J. and myself) in (1965) 67 Pun. L. R. 1238 = (AIR 1966 Punj. 274). At the hearing of the writ petition before us today Mr. B. S. Dhillon, the learned Additional Advocate-General for the State of Punjab, as well as Mr. Harbans Lal Sarin, learned counsel for respondents Nos. 5, 10 and 11, have unequivocally stated that they cannot find any fault with the earlier Division Bench judgment of this

Court in the case of Charan Dass Dogra, (1965) 67 Pun. L. R. 1238=(AIR 1966 Punj. 274) (supra) and conceded that the said case was correctly decided. We accordingly hold that Charan Dass Dogra's case, (1965) 67 Pun. L. R. 1238=(AIR 1966 Punj. 274) lays down correct law.

4. This petition under Articles 226 and 227 of the Constitution relates to the co-option of Harijan members to the Block Samiti in question. Sub-section (2) of Section 5 of the Punjab Panchayat Samitis and Zilla Parishads Act (3 of 1961) (hereinafter called the Act) provides that where a Panchayat Samiti is to be constituted for a block, it shall consist of primary members to be elected in the manner prescribed by the provisions contained in clause (a) of sub-section (2) of Section 5. Clause (a) states that sixteen members have to be elected by the Panches and Sarpanches, two members have to be elected as representatives of the Co-operative Societies, and one member has to be elected as representing the Market Committees in the block. Cl. (b) of sub-section (2) deals with Associate Members with whom we are not concerned in this case. Sub-clause (ii) of clause (c) states:—

"Co-opted Members, to be co-opted in accordance with the provisions of Section 16, comprising—

(i)

(ii) four persons belonging to Scheduled Castes and Scheduled Tribes, if no such person is selected under clause (a):

Provided that if only one, two or three persons are elected under clause (a), then three, two or one such person respectively shall be co-opted."

By Section 2 of the Punjab Panchayat Samitis and Zila Parishads (Amendment) Act, 1964, the following was added as clause (cc):—

"After the first general election of primary members of Panchayat Samitis is held, Co-opted Members to be co-opted in the following manner, notwithstanding anything contained in clause (c) or Section 16, comprising—

(i)

(ii) four persons belonging to Scheduled Castes and Scheduled Tribes securing in the election under sub-clause (i) of clause (a) the highest number of votes amongst candidates of those Castes and Tribes, where no such person is elected under clause (a):

Provided that if only one, two or three such persons are elected under clause (a), then three, two or one such person, respectively, securing in the election under sub-clause (i) of clause (a) the highest number of votes amongst candidates of those Castes and Tribes, shall be co-opted:

Provided further that where no such person or less than four such persons contested the election, then four such persons or the requisite number of such persons, as the case may be, shall be co-opted in accordance with the provisions of Section 16."

Section 16 of the Act states:—

"The Deputy Commissioner concerned, or any gazetted officer appointed by him in this behalf, not below the rank of an Extra Assistant Commissioner, shall, as soon as possible after notification of election of Primary Members, call a meeting of such Members in the manner prescribed for the purpose of co-opting Members required by clause (c) of sub-section (1) of Section 5 and clauses (c) and (cc) of sub-section (2) of that section. The aforesaid officer shall preside at such meeting." It is apparent from the provisions of Section 16:—

(i) that proceedings for co-option under that section cannot be taken in hand before the notification of the election of Primary Members;

(ii) that such co-option as is referred to in Section 16 has to be made only in a meeting of the Primary Members, and

(iii) the meeting in which Members have to be co-opted has to be called in the manner prescribed for the purpose of holding such a meeting, i.e., it has to be called by the Deputy Commissioner concerned or by any gazetted officer appointed by him in that behalf and as provided in the rules framed under the Act.

Rule 3 of the Panchayat Samitis (Co-option of Members) Rules, 1961 is in the following terms:—

"(1) After a notification of election of Primary Members of a Panchayat Samiti has been issued the Deputy Commissioner or any Gazetted Officer appointed by him in this behalf, not below the rank of Extra Assistant Commissioner (hereinafter referred to as 'Presiding Officer'), shall convene a meeting of these members at the office of the Panchayat Samiti or at such other place as he may determine in this behalf for the purpose of co-opting members as required by clauses (c) and (cc) of sub-section (2) of Section 5. Such meeting shall be convened after giving five days clear notice to the Members.

(2) The notice referred to in sub-rule (1) shall state—

(i) the date, time and place of meeting;

(ii) the number of women, elected as Primary Members, and the number, if any, of women to be co-opted; and

(iii) the number of persons belonging to Scheduled Castes and Scheduled Tribes elected as Primary Members and the number, if any, of such persons to be co-opted."

The abovequoted rule adds to the three requirements of Section 16 already enu-

merated above a fourth one as a sub-requirement under item (iii). A valid meeting called by the competent authority for purposes of co-option has to be convened only after giving five days clear notice to the Members.

5. What happened in the instant case is not in dispute. The election of Primary Members was concluded on January 22, 1965. Immediately after the result of the election of Primary Members was declared, the Returning Officer there and then took up the matter of co-option without having been delegated the authority of the Deputy Commissioner to convene a meeting for that purpose and without giving any five days notice of the meeting to the Members and without even holding a formal meeting for that purpose drew lots between petitioner No. 2 on the one hand and respondents Nos. 10 and 11 on the other. All the said three parties to this case had contested the election for Primary membership, but had not been declared successful and had polled an equal number of votes. This was clearly in violation of all the mandatory requirements of Section 16 and R. 3. In the written statement of the Returning Officer (Shri Dhyan Singh respondent No. 2), it has been stated by him in this behalf as below:—

"It is admitted that at the time of counting votes on January 22, 1965, it was found that three Depressed Class candidates received equal number of votes while only two were to be co-opted. However, the co-option was not required to be done by me. I did this because all the candidates had approached me to draw out two names by lots which was done publicly. Two out of these three candidates received the benefit and all the three signed on a paper that they agreed with the lots drawn. However, all this was done on pressure from all sides which is regretted."

The legality and the manner in which the co-option was done in this case has, therefore, not been supported even by the Returning Officer. When this defect came to the notice of the Deputy Commissioner, he called a meeting of the Primary Members for February 3, 1965, but instead of drawing lots as required by Rule 4-A which is in the following terms, the Presiding Officer of the meeting merely approved of the lots that had already been drawn by the Returning Officer on January 22, 1965:—

"Notwithstanding anything contained in Rule 4, no quorum shall be necessary for the purpose of co-opting members under clause (cc) of sub-section (2) of Section 5 from amongst women or persons belonging to Scheduled Castes and Scheduled Tribes, securing the highest number of votes, and their names shall be determined and declared by the Pre-

siding Officer in the presence of Members, if any, attending the meeting convened under Rule 3:

Provided that if on account of equality of votes secured by women candidates or those belonging to Scheduled Castes and Scheduled Tribes, as the case may be, it cannot be determined as to who amongst them is or are to be co-opted, the matter shall be decided by the Presiding Officer in the presence of Members, if any, by drawing lots and the candidate or candidates, whose name or names is or are drawn first shall be declared to have been duly co-opted."

Mr. Sarin contends that since respondent No. 2 drew the lots with the consent of petitioner No. 2, he cannot impugn the action of the Returning Officer and of the Deputy Commissioner though, he concedes that, it is impossible to support the same in law. It is settled law that jurisdiction cannot be conferred by mere consent where it does not exist in law. In these circumstances, the co-option of respondents Nos. 10 and 11 is patently illegal and has to be set aside.

6. Learned counsel for the petitioners next contended that as a necessary consequence of our decision on the first point, we should further hold that the elections of the Chairman and Vice-Chairman of the Block Samiti as well as the election of the representatives of the Samiti to the Zila Parishad were illegal as two persons not entitled to participate therein had voted in those elections. Petitioner No. 1 contends that he intended to stand for all those offices, but could not do so. There is no force in this contention. The fact remains that petitioner No. 1 never stood for the election to any of those offices. Even if he had been a candidate at one or more of those elections, he has to show in order to succeed that respondents Nos. 10 and 11 had voted against him in the relevant election and that if only one of them was there and petitioner No. 2 had been there in place of the other one of them, this would have made material difference in the result of the concerned election. No such allegation has been made in this petition. We are, therefore, unable to entertain the prayer for any further relief being granted in this case. Even otherwise, we are inclined to think that in view of the discretion vested in us by Article 226 of the Constitution, it would be improper to interfere with those elections at this stage after the expiry of more than four years. The co-option of respondents Nos. 10 and 11 being wholly illegal, we proceed to set it aside.

7. For the reasons already recorded, this writ petition is allowed with costs to the extent that co-option of respondents Nos. 10 and 11 made by the Returning

secution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law."

But in that very case their Lordships have pointed out that it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and that if upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused, he would be entitled to be acquitted.

18. Learned Additional Government Advocate has further relied on the following observations in Director of Public Prosecutions v. Smith, 1961 AC 290 (331):

"Another criticism of the summing up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial Judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again: 'the intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts.' It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable."

19. This case has been the subject-matter of great controversy and so far as we are concerned, it may be stated that in this very passage it has been mentioned in unmistakable terms that the presumption arising that a man intends the natural and probable consequences of his act is rebuttable. In order to put the law beyond any controversy in England, the Parliament enacted section 8 Criminal Justice Act, 1967 which runs as follows:

"A Court or jury, in determining whether a person has committed an offence,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being

a natural and probable consequence of those actions; but,

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances."

The effect of this new section is that there is no room for doubt to interpret Smith's case in the light that the presumption that a person intends the natural consequences of his act will be irrebuttable. Now, under the English Law, the subjective intent to cause grievous bodily harm must be proved though it may be inferred taking into account the totality of all the circumstances pertaining to the case.

20. Under the Indian law, it has been enacted in Section 300 that "culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." In one way this provision makes the presumption that a person intends the natural and probable consequence of his act irrebuttable to the extent that if it is proved that the particular injury intended to be inflicted by the accused turned out objectively to be sufficient in the ordinary course of nature to cause death, the accused cannot plead that he had not the intention of causing a bodily injury sufficient in the ordinary course of nature to cause death. The subjective test is confined to proving that the accused intended to cause such bodily injury as was likely to cause death and it is not necessary that it must further be proved by the prosecution that the accused intended to inflict bodily injury sufficient in the ordinary course of nature to cause death. It is sufficient if it is proved that the particular bodily injury was sufficient in the ordinary course of nature to cause death for holding the accused guilty for the offence of murder. This law has been clarified in Virsa Singh v. State of Punjab, AIR 1958 SC 465, Anda v. State of Rajasthan, AIR 1966 SC 148, and Harjinder Singh v. Delhi Administration, AIR 1968 SC 867. Apart from this, there is no difference between the Indian law and English law as clarified by the Criminal Justice Act, 1967, on this point.

21. It is, however, urged before us that at least in the case of gunfire it was for the accused to explain that he was acting without any intention to cause such bodily injury as was likely to cause death and that in the absence of any plea or explanation, the presumption has remained un rebutted. It is further pointed out that in this case Ram Kumar appellant took up the defence that he acted under intoxication of liquor which was forcibly administered to him, and that this defence has been rejected by the trial Court. We accept that the trial Court was right in rejecting this plea. But we are of the view that if the circumstances of the

case otherwise show that the prosecution has failed to prove that the accused had the requisite intention required to be proved under Sections 299 and 300 I. P. C. we can rely on those circumstances in spite of the fact that he had not taken that plea or had not offered an explanation suggesting such defence. In this connection we may quote the following passage from the speech of Viscount Simon L. C. in *Mancini v. Director of Public Prosecutions*, 1942 AC 1 (7):

"Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex v. Hopper*, (1915) 2 KB 431, at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading C. J., in delivering the judgment of the Court of Criminal Appeal, said: 'We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.'"

22. Judged in the light of the aforesaid observations, we are of the view that in spite of the fact that the accused has not taken any definite plea of accident and that he has not explained why he fired the gun at the deceased, we may minutely examine all the circumstances on record and see whether the facts and circumstances pointed out that the appellant must have intended to cause the death of Yuvrajsingh or to cause such bodily injury to him as was likely to cause his death. The circumstances of the case appear to us not to impute such inten-

tion to the appellant for the following reasons:

(1) That the appellant Ramkumar and the deceased Yuvrajsingh had gone for a picnic party to the tank at Sakatpur and whatever they did there all shows that they were engaged in merry making. They drank liquor and took their meals.

(2) The appellant had not taken any weapon with him as it is the prosecution evidence that the gun belonged to Ramsingh who had taken it with him.

(3) It is in the evidence of Mst. Kishni that the gun was used by Ramsingh for shooting at sparrows before the incident.

(4) No motive or enmity has been proved by the prosecution which may have actuated the appellant to commit the crime.

(5) The shooting was performed in broad day light without any attempt to hide it and is consistent with the fact that the appellant may have tried to handle the loaded gun recklessly.

23. We are, therefore, not inclined to draw the inference that the appellant had either the intention of killing the deceased or that he had the intention of causing him such bodily injury as was likely to cause his death.

24. Even if we rule out any such intention on the part of the appellant, there is no room for doubt that the appellant must have had the knowledge that he was doing an act which was likely to cause the death. There can be no doubt that the gun when the appellant took it from Ramsingh was loaded and that he must have had the knowledge that if he pressed the trigger of such a gun aiming in the direction of the deceased, it was likely to cause his death. The distance from which the gun was fired was not more than 5 feet from the deceased according to the medical evidence and even if we do not impute to the appellant the knowledge that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, yet we must impute to the accused the knowledge that he was doing an act with the knowledge that he was likely by such act to cause death. We are, therefore, of the view that the appellant's conviction under Section 302 of the Indian Penal Code be set aside and he be convicted under Section 304 Part 2 of the Indian Penal Code.

25. We therefore set aside his conviction under Section 302 I. P. C. as also the sentence of imprisonment for life and instead convict him under Section 304 Part 2 of the Indian Penal Code and sentence him to five years' rigorous imprisonment.

Order accordingly.

AIR 1970 RAJASTHAN 67 (V 57 C 12)

JAGAT NARAYAN, J.

Smt. Daya Bai, Petitioner v. Badri Narain, Respondent.

Civil Revn. No. 157 of 1968, D/- 17-1-1969, against order of Addl. Munsif No. 1, Jodhpur, D/- 16-10-1967.

Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), Sections 5 (1) (i), 6, 16 and 21 — Applicability — Pending suit for recovery of money, application under Section 6 filed — Application not admitted — However, notices issued to creditors to decide question of its admission — Pending such application Civil Court ordering suit to abate holding that such application should be deemed to have been admitted — Order wrong — (Civil P. C. (1908), O. 4, R. 1 (i)).

Where an application under Section 6 of the Rajasthan Relief of Agricultural Indebtedness Act filed pending a suit for recovery of money is not admitted but notices are issued to creditors to decide the question of its admission, and pending such application, the Civil Court orders the suit to abate holding that such application should be deemed to have been admitted, that order is wrong. (Paras 3 and 4)

It is clear from Section 5 (1) (i) that before a suit can be abated, the application under Section 6 should not only have been made but should have been admitted and should be pending. There is a distinction between the making of the application and its admission. As soon as an application is made it has to be registered but its registration does not mean it has been admitted. Section 16 shows that the procedure to be followed in the case of an application to the Debt Relief Court is not exactly the same as the procedure followed by a Civil Court when a plaint is filed. In the case of a suit instituted on a plaint there is no question of not admitting the suit. When the Debt Relief Court expressly declines to admit the application under Section 6, and issues notices to creditors to decide the question of its admission, the order of the Civil Court abating the suit holding that that application should be deemed to have been admitted is erroneous. Further, under Section 21, the jurisdiction of the Civil Court is barred in respect of any matter pending before the Debt Relief Court. When notices are issued to creditors to decide the admissibility of the application under Section 6, the matter pending before the Debt Relief Court is only whether that application should be admitted. The jurisdiction of the Civil Court in such a case therefore, is not barred. (Para 4)

It will however, be open to the defendant-applicant to apply for stay of the Civil Court proceedings till his application before

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the Debt Relief Court is admitted or dismissed. (Para 5)

Pan Raj Bhansali, for Petitioner; S. N. Chhangani, for Respondent.

ORDER :— This is a revision application by the plaintiff against an order of Additional Munsif No. 1, Jodhpur, abating her suit for recovery of money pending before him.

2. During the pendency of the suit the defendant filed an application in the Debt Relief Court under Section 6 of the Rajasthan Relief of Agricultural Indebtedness Act, 1957. That application was not admitted, but notices were issued to the creditors to show cause why it should not be admitted. The question as to whether or not the defendant is a debtor within the meaning of the Act is pending investigation before the Debt Relief Court. During the pendency of that application the defendant filed an application before the Civil Court purporting to be under Section 21 of the Act in which a prayer was made that the plaintiff be asked to prosecute her remedy before the Debt Relief Court as the Civil Court had ceased to have any jurisdiction.

3. On this application the learned Additional Munsif abated the suit holding that because the application of the defendant under Section 6 has been registered and notices have been issued to the creditors, it should be deemed to have been admitted. This order is clearly erroneous. Section 5 (1) (i) lays down that the Court shall abate the suit if it is satisfied that an application to the Debt Relief Court under Section 6 has been made and admitted and is pending. It is clear from the wordings of this provision that before a suit can be abated the application should not only have been made but should have been admitted and should be pending. It is also clear that the Legislature has drawn a distinction between the making of application and admission of it. As soon as an application is made it has to be registered and the fact that it has been registered does not mean that it has been admitted. Section 16 of the Act runs as follows :—

“Application of Civil Court procedure to Debt Relief Court — The Debt Relief Court, in regard to proceedings under this Act shall so far as practicable, have the same powers and shall follow the same procedure as it would have and follows if it were a Court of original civil jurisdiction.”

(Underlining (here into ‘ ’) is mine.)

4. The underlined words go to show that the procedure to be followed in the case of an application under the Debt Relief Court is not exactly the same as the procedure to be followed by a Civil Court when a plaint is filed. In the case of a suit instituted on a plaint there is no question of not admitting the suit. In the present case the Debt Relief Court has ex-

pressly declined to admit the application, but has issued notices to the creditors to decide the question whether or not it should be admitted. The order abating the suit is therefore, erroneous. Section 21 lays down that the jurisdiction of the Civil Court is barred in respect of any matter pending before the Debt Relief Court. At present the matter pending before the Debt Relief Court is only whether the application of the defendant should be admitted. The jurisdiction of the Civil Court is therefore, not barred.

5. It will however, be open to the defendant to make an application for staying proceedings in the Civil Court till his application before the Debt Relief Court is either admitted or dismissed.

6. The revision application is accordingly allowed and the order of the trial Court abating the suit is set aside. In the circumstances of the case, I leave the parties to bear their own costs.

Petition allowed.

AIR 1970 RAJASTHAN 68 (V 57 C 13)

JAGAT NARAYAN J.

Sita Ram and others, Appellants v. Govind, Respondent.

Civil Misc. Appeal No. 14 of 1967, D/- 21-1-1969, against order of Dist. J., Bharatpur, D/- 23-12-1966.

Limitation Act (1908), Article 139 — Applicability — Suit for arrears of rent and eviction — Suit more than 12 years after expiry of lease — Tenant holding over and asserting hostile title — No rent ever paid by tenant — Mere demand of rent by landlord is no renewal of lease within the meaning of Section 116 Transfer of Property Act — Suit is barred under Article 139. (Transfer of Property Act (1882), Section 116.)

Where a suit for arrears of rent and eviction is filed more than 12 years after the expiry of the lease and the tenant, holding over, asserts a hostile title and has not ever paid any rent, mere demand of rent by the landlord is no renewal of the lease within the meaning of Section 116 of the Transfer of Property Act. The suit is barred under Article 139 of the Limitation Act. (Paras 8 and 10)

From Section 116 of the Transfer of Property Act, it is clear that once a lease is determined a fresh tenancy can be created only by a bilateral agreement between the person in possession and the owner of the property. No fresh tenancy can be created merely by the tenant, whose lease is determined, continuing in possession. Such possession is wrongful and it becomes rightful by fresh contract of tenancy between

the parties. This contract may be express or implied. In an express contract the parties settle all the terms, the rate of rent, the lease period and whether the tenancy is yearly or monthly or otherwise. Section 116 of Transfer of Property Act deals with cases of implied contract in which the tenant holding over makes an implied offer for renewal of the tenancy and the landlord accepts it impliedly. An instance of such implied contract, given in the section, is where the tenant holding over tenders the rent and the landlord accepts it.

(Para 7)

There can thus be no renewal of a tenancy under Section 116 of the Transfer of Property Act by the unilateral act of the landlord in demanding rent from the tenant holding over or where the person in possession does not pay the rent and asserts a title hostile to the landlord.

(Para 8)

As such, when a suit for arrears of rent and eviction is filed more than 12 years after the expiry of the lease and the tenant holding over, asserts a hostile title and has not ever paid any rent, the suit is barred under Article 139. It will be within limitation only when the rent had been recovered any time within the 12 years of the institution of the suit.

(Paras 10 and 11)

H. P. Gupta, for Appellants; Shrikrishna Mal Lodha, for Respondent.

JUDGMENT: This is an appeal by the defendants against an order of the District Judge, Bharatpur, remanding the suit under Order 41, Rule 23, Civil P. C. after reversing the finding of the trial Court on the question of limitation.

2. Govind plaintiff filed the present suit on 8-4-63 against the 4 defendants for the recovery of arrears of rent and for eviction on the grounds of default and personal necessity in respect of a building containing two shops and an upper storey. The building was originally owned by Ram Gopal father of Sitaram and Radhey Shyam defendants and grand-father of Kishori Shyam and Ram Babu defendants. Ram Gopal executed a sale-deed of this property in favour of Ratanlal on 30-1-1938.

On the same date Ram Gopal executed a rent-note in favour of Ratanlal taking the property on lease for a period of 3 years. This rent-note was not registered. On 19-9-38 Ratanlal sold the building to Gyasi Ram father of the present plaintiff. The case in the plaint is that Ram Gopal used to pay rent to Ratanlal after he had sold the property to the latter and to Gyasi Ram after Ratanlal had sold it. It was alleged that rent was paid upto 30-11-60 regularly but that it was not paid from 1-12-60. The suit was brought for the recovery of arrears of rent from 1-12-60 to 31-3-63.

3. The suit was contested by the defendants who alleged that the sale-deed in favour of Ratanlal was fictitious and was executed to save the property from credi-

tors, that Ratanlal was a friend of Ram Gopal, that no rent was ever paid to Ratanlal or to Gyasi Ram or to Gyasi Ram's sons and grand-sons. It was admitted that Ram Gopal executed a rent-note in favour of Ratanlal. But it was alleged that the rent-note was also fictitious and was executed in order to make it appear that the sale-deed was genuine. It was asserted that Ram Gopal continued to be in possession of the property as owner and whenever rent was demanded from Ram Gopal or his sons by Gyasi Ram the latter was told that Ram Gopal was the owner of the property and he had no right to recover any rent. The trial Court framed the following issues:

(1) Is the suit within limitation?
 (2) Whether the suit premises are with the defendants on lease on a monthly rent of Rs. 10?

(3) Whether the plaintiff is entitled to recover rent for 28 months from 1-12-60 to 31-3-63 at Rs. 10 per month from the defendants?

(4) Is the plaintiff entitled to evict the defendants from the suit premises?

Both parties produced evidence on the whole case pleaded by them in the plaint and the written statement respectively. All the pleas raised in the pleadings will be taken to be covered by the above issues and a decision shall have to be given under the above 4 issues of all the pleas.

4. The trial Court assumed that Ram Gopal became the tenant of Ratanlal by executing a rent-note in his favour. No decision was given by it on the plea that the sale-deed as well as the rent-note in favour of Ratanlal were fictitious. On the assumption that Ram Gopal had become the tenant of Ratanlal by executing the rent-note for a period of 3 years it held that the suit was barred by limitation under Article 139 of old Limitation Act on the expiry of the period of 12 years from the date of the expiry of the tenancy under the rent-note. It repelled the contention of the plaintiff that merely by a demand of rent on the part of the plaintiff there was a renewal of the lease within the meaning of Section 116 of the Transfer of Property Act on the expiry of the period of tenancy.

5. The appellate Court was under the impression that by admitting the execution of a rent-note the defendants had admitted that Ram Gopal was a tenant of Ratanlal and his successors. This was erroneous as the case of the defendants was that the rent-note as well as the sale-deed were both fictitious. They did not admit that Ram Gopal was ever the tenant of Ratanlal or Gyasi Ram.

6. Further the appellate Court held that as Ram Gopal and his sons remained in possession of the premises after the determination of the lease and rent was demanded from them there was a renewal of the tenancy under Section 116 of the Transfer of Property Act and the suit of the plaintiff

could not be barred under Article 139 of the old Limitation Act. This finding is also erroneous. Section 116 of the Transfer of Property Act runs as follows:

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106."

7. What the section contemplates is that from the side of the person in possession there should be an offer of continuing in possession as tenant and the landlord should assent to it by accepting rent from him or otherwise. Once the lease is determined a fresh tenancy can only be created by a bilateral agreement between the person in possession and the owner of the premises. No fresh tenancy can be created merely by the tenant, whose lease is determined, continuing in possession. Such possession is wrongful. It becomes rightful if there is a fresh contract of tenancy between the parties. This contract may be express or implied.

In an express contract of lease the parties settle all the terms of it—the rate of rent, the period of lease and whether the tenancy is yearly or monthly or otherwise. Sec. 116 deals with cases of an implied contract in which the tenant holding over makes an implied offer for the renewal of the tenancy and the landlord accepts it impliedly. It lays down that in such a case in the absence of an agreement to the contrary the lease will be renewed from year to year or from month to month according to the purpose for which the property is leased as specified in Section 106. One instance of how the implied contract may take place has been given in the section. That is a case where the tenant holding over tenders rent and the landlord accepts it.

8. It will thus be seen that there can be no renewal of the contract of tenancy under Section 116 of the Transfer of Property Act by the unilateral Act of the landlord in demanding rent from the tenant holding over. There can be no renewal under this section where the person in possession does not pay rent and asserts a title hostile to the landlord.

9. I would like to mention here that in a case governed by the Rajasthan Premises (Control of Rent and Eviction) Act a tenant becomes a statutory tenant on the determination of his contractual lease and this statutory tenancy is neither heritable nor transferable.

10. The trial Court disbelieved the evidence of the plaintiff and his witnesses that rent was ever paid by Ram Gopal or the defendants to Ratanlal or to plaintiff's father

or to the plaintiff. On this finding the suit was rightly dismissed as being barred by limitation under Article 139.

11. The suit can only be held within limitation under Article 139 if there is a finding that rent was recovered from the defendants at any time within 12 years of the institution of the suit. No such finding was recorded by the learned District Judge.

12. The appeal is accordingly allowed and the order of remand is set aside. The appeal is remanded to the Court of the District Judge, Bharatpur, for decision of the question of limitation in the light of the observations made above.

13. As the entire evidence on all the issues had been recorded the learned District Judge should have decided all the issues himself instead of remanding the case to the trial Court.

14. The costs of this appeal shall abide the final result of the suit.

Appeal allowed.

AIR 1970 RAJASTHAN 70 (V 57 C 14)

**D. M. BHANDARI, C. J. AND
V. P. TYAGI, J.**

Purshottamdas Bangur, Applicant v. Commissioner of Income-Tax, Rajasthan, Jaipur, Respondent.

Income-Tax Ref. No. 34 of 1966, D/-31-1-1969.

Finance Act (1957), S. 2 (3) (a) and (1) (a) — "Income-tax" — Meaning — Income-tax on dividend income for 1957-58 assessment year calculated under Section 2 (3) (a) — Special surcharge under Section 2 (1) (a) levied on that income-tax — Levy correct.

Where income-tax on dividend income for 1957-58 assessment year is calculated under Sec. 2 (3) (a) of the Finance Act, 1957 and a special surcharge under Sec. 2 (1) (a) is levied on that income-tax, the levy is correct. (Para 6)

Under the scheme of S. 2 (1), the income-tax on dividend income shall be charged in accordance with Section 2 (3) (a) because it is that sub-clause that is attracted. It is then that the amount of income-tax shall be increased by a surcharge and special surcharge in the manner provided in Sec. 2 (1). This scheme of Section 2 (1) and its language leave no room for doubt that the term "income-tax" as used in it and in Section 2 (3) (a) is used in a limited sense denoting the income-tax simpliciter and it does not include the surcharge or the special surcharge. Therefore it cannot be said that the special surcharge as prescribed by the Act cannot be added to the amount of income-tax determined under Section 2 (3) (a).

(Para 5)

Thus, when the income-tax on dividend income for 1957-58 assessment year is calculated

under Sec. 2 (3) (a) and the special surcharge under Sec. 2 (1) (a) is imposed on that income-tax, the imposition is correct. (Para 6)

Dr. D. Pal and S. L. Chowdhari, for Applicant; S. C. Bhandari, for Respondent.

ORDER: This is a reference under Section 66 (1) of the Indian Income-Tax Act, 1922 (hereinafter called the Act) made by the Income-Tax Appellate Tribunal, Delhi Bench 'B' and it arises out of the following circumstances:

2. The assessee in this case has been assessed as an individual. The assessment year concerned is 1957-58 for which the relevant previous year is the financial year ending on 31st of March, 1957. The assessee had various sources of income out of which one source was the income from dividends. The Income-tax Officer, Special Investigation Circle, Jaipur, while assessing the income of the assessee increased the income-tax on dividend income which was undoubtedly included in the unearned income by 15 per cent to compute the amount of special surcharge as per the Finance Act, 1957. The assessee challenged the assessment order by filing an appeal before the Appellate Assistant Commissioner of Income-Tax, 'A' range, Jaipur, on various grounds, but this question that special surcharge at the rate of 15 per cent could not be imposed on his dividend income was not raised in that appeal by the assessee.

It was for the first time that an objection was taken by the assessee before the Income-Tax Appellate Tribunal, Delhi Bench 'B' that the special surcharge on unearned income at the rate of 15 per cent as provided by the Finance Act of 1957 could not be imposed on the dividend income of the assessee for that year because of the provisions of Section 2 (3) (a) of the Finance Act, 1957, which provides that the income-tax on dividend income could be calculated as per the rates under operation of the Finance Act, 1956. The Tribunal did not see any merit in the contention raised by the assessee and, therefore, it dismissed this ground. On an application filed by the assessee under Section 66 of the Act, the Income-Tax Appellate Tribunal came to the conclusion that a question of law arises from its order in Income-Tax Appeal No. 6347 of 1964-65 filed by the assessee against the assessment for the assessment year 1957-58 and referred the following question to this Court under Section 66 (1) of the Act:

"Whether on the facts and in the circumstances of the case surcharge was a separate item of taxation different from income-tax and therefore the special surcharge imposed as per Finance Act, 1957 was leviable on income from dividends in spite of the provisions contained in clause (a), sub-section (3) of Section 2 of this Finance Act to the effect that income-tax on income from dividends would be charged for 1957-58 assessment

year at the rate prescribed by the Indian Finance Act, 1956?"

3. Dr. Pal appearing on behalf of the assessee urged that under the scheme of the Indian Income-tax Act, 1922, no other tax except the income-tax could be charged from the assessee and the surcharge or special surcharge as provided by the Finance Act of 1957 is included in the term "income-tax". He also urged that the mode for computing income-tax on dividend income is given in Section 2 (3) (a) of the Finance Act of 1957, according to which the income-tax on dividend income can be computed by applying the rate or rates applicable under the operation of the Finance Act of 1956, and, therefore, according to him, the assessing authority could not have charged special surcharge at the rate of 15 per cent as provided by the Finance Act No. 2 of 1957 as that rate could not be made applicable for computing income-tax on the dividend income of the assessee. He, therefore, urged that the income-tax authorities under the Act were not empowered to levy a special surcharge for which there was no provision made in the Finance Act of 1956.

4. Mr. Bhandari, appearing on behalf of the Department, on the other hand, argued that income-tax on the income accrued to the assessee in the accounting year 1956-57 could be calculated as per the provisions of the Finance Act of 1957 which provides under clause (a) of sub-section (3) of Section 2 that the income-tax on dividend income shall be computed by applying the rate or rates applicable under the operation of the Finance Act of 1956, but his contention is that the term "income-tax" as used in clause (a) of sub-section (3) does not include the amount of surcharge or special surcharge, and it simply requires that the tax on the dividend income shall be calculated at the rate or rates applicable under the operation of Finance Act, 1956 (No. 18 of 1956), and then that amount of tax on income shall be increased for the purposes of levying the special surcharge on unearned income by 15 per cent under the provisions of S. 2 (1) (a) of the Finance Act 1957 (Act No. 2 of 1957).

He urged that simply because the income-tax on the dividend income of the assessee is to be computed with reference to the rate or rates applicable under the operation of the Finance Act of 1956 it does not mean that the dividend income shall escape the levy of a special surcharge which is required to be imposed under Section 2 (1) (a) of the Finance Act, 1957 read with the First Schedule appended to that Act which prescribes the rate for the special surcharge on unearned income.

5. There is no controversy on this point between the parties that the amount of surcharge or special surcharge is the part of income-tax calculated under the provisions of the Finance Act No. 2 of 1957. Special surcharge has been for the first time levied

by the Parliament in 1957 on unearned income at 15 per cent and the income derived from dividend undoubtedly falls within the term "unearned income". The controversy that has been raised before us centres round the interpretation of the words "income-tax" as used in clause (a) of sub-section (3) of Section 2. This controversy can be resolved by taking the scheme of the Finance Act into consideration as a whole.

Sub-section (1) of Section 2 of this Act provides that subject to the provisions of sub-sections (2), (3), (4) and (5) for the year beginning on the 1st day of April, 1957, income-tax shall be charged at the rates specified in Part I of the First Schedule, and, in the cases to which Paragraphs A, B and C of that Part apply, shall be increased by a surcharge for the purposes of the Union and a special surcharge on unearned income. This language of sub-section (1) makes it clear that the term "income-tax" as used in this sub-section does not include the amount of surcharge or special surcharge because the requirement of this sub-section (1) is that income-tax shall be charged at the rates specified in Part I and then if Paragraphs A, B and C of that Part apply to a case then that amount of income-tax shall be increased by a surcharge for the purposes of the Union and a special surcharge on unearned income.

In our opinion, the term "income-tax" has been used in sub-sec. (3) (a) of the Finance Act, 1957 in that limited sense in which it has been used in sub-section (1), and while computing the amount of income-tax on dividend income under clause (a) of sub-section (3) of Section 2 of the Finance Act of 1957 by applying the rate or rates applicable under the operation of the Finance Act, 1956 it is the amount of income-tax simpliciter which is determined and which does not include the amount either of surcharge or special surcharge. Under the scheme of Sub-section (1) of Section 2 of the Finance Act, 1957, the income-tax shall be charged on the dividend income in accordance with the provisions of sub-section (3) of that section because for calculating the income-tax on dividend income the provisions of sub-section (3) are attracted and it is then that the amount of income-tax so calculated shall be increased by a surcharge for the purposes of the Union and a special surcharge on unearned income calculated in either case in the manner provided therein.

This scheme of sub-section (1) of Sec. 2 of the Finance Act of 1957 leaves no room for doubt that while applying the provisions of clause (a) of sub-section (3) of Section 2 of that Act on dividend income which makes the rate or rates under the operation of the Finance Act, 1956, applicable to calculate the amount of income-tax on dividend income, the amount of income-tax so calculated would not include the amount of surcharge or special surcharge. In order to compute the aggregate income-tax which includes the surcharge or special surcharge,

the amount of income-tax as found out under Section 2 (3) (a) on dividend income shall be increased by 5 per cent to determine the amount of surcharge and then by 15 per cent to calculate the special surcharge as per the requirements of Section 2 (1) (a) of 1957 Act.

In this view of the provisions of the Finance Act, 1957, it is difficult to accept this contention of Dr. Pal that the income-tax on the dividend income could be determined only under clause (a) of sub-sec. (3) of Section 2 of the Finance Act of 1957 by applying the rate or rates applicable under the Finance Act, 1956, and special surcharge as prescribed under 1957 Act could not be added to the amount of income-tax as the Finance Act of 1956 does not make any provision for the levy of special surcharge. As we are of opinion that the term "income-tax" as used in sub-sec. (3) (a) of Section 2 of the Finance Act, 1957, does not include the amount of surcharge for the Union and also the amount of special surcharge as prescribed under the head "surcharges on income-tax" in the First Schedule of the Finance Act of 1957, the argument of learned counsel for the assessee loses all its force. We are definitely of opinion that words "income-tax" as used in Section 2 (3) (a) of the Finance Act, 1957 simply connote that amount of tax on dividend income which does not include the surcharge or special surcharge.

6. It may also be observed that the levy of a special surcharge was for the first time provided by the Finance Act, 1957 and it is contended by Mr. Bhandari that the provision was made by Parliament to meet the financial exigencies of that particular year and it was laid down that special surcharge should be realised on all kinds of unearned income in that financial year. This argument of Mr. Bhandari cannot be said to be devoid of any force because we find in the scheme of sub-section (1) of Section 2 of 1957 Act that the Legislature while imposing a special surcharge for the year 1957-58 specifically provided that subject to the provisions of sub-sections (2), (3), (4) and (5) for the year beginning on the 1st day of April, 1957, income-tax shall be charged at the rates specified in Part I of the First Schedule of that Act and in the cases to which Paragraphs A, B and C of that Schedule apply, shall be increased by a surcharge for purposes of the Union and a special surcharge on unearned income calculated in either case in the manner provided in the Schedule.

It is not disputed that in the case of the assessee Paragraph A of the First Schedule of the Finance Act, 1957 applies. Under this provision of Sec. 2 (1) (a) of the Finance Act which is made subject to sub-section (3) of that section, the assessee is entitled to claim that the income-tax on his dividend income should be calculated by applying the rate or rates as prescribed in the Finance

Act, 1956, but he cannot claim that the amount of income-tax so determined should not be increased by five per cent to add the surcharge and by fifteen per cent to add special surcharge calculated in the manner provided under the heading "surcharges on income-tax" in the First Schedule of the Finance Act, 1957. In our opinion, the assessing authority has rightly imposed special surcharge on the dividend income of the assessee in this case.

7. For the reasons given above, the question referred to us is replied in the affirmative.

Reference answered.

AIR 1970 RAJASTHAN 72 (V 57 C 15)

P. N. SHINGHAL, J.

Maharaja Bhagwatsingh of Udaipur, Appellant v. Maharana Bhopal Electric Supply Co. Ltd. and another, Respondents.

Second Appeal No. 707 of 1960, D/-2-12-1968, against decree of Dist. J., Udaipur, D/-9-8-1960.

(A) Electricity (Supply) Act (1948), Sections 57, 23 and Sch. 6 — Object — Concessional supply made to consumer by electricity company under an agreement — Licence under Section 3 of Electricity Act, 1910 granted to that company — Such agreement made part of that licence — Under Electricity (Supply) Act, 1948, Government appointing Rating Committee — Committee recommending withdrawal of such concessional supply — Government accepting that recommendation — Discontinuance of such concessional supply correct — (Electricity Act (1910), S. 3).

Where an agreement for concessional supply to a consumer by an electricity company is made part of the licence granted to that company under Sec. 3 of the Electricity Act, 1910, but a Rating Committee, subsequently appointed by the Government under Sec. 57 of the Electricity (Supply) Act 1948, recommends the withdrawal of such concessional supply and the Government accepts the recommendation, the discontinuance of such concessional supply is correct. (Paras 16 and 17)

In such a case, it follows that S. 57 applies to the licensee-company. It is therefore the duty of the licensee to adjust the rates by periodical revision in accordance with the procedure under that section.

(Para 11)

Undue preference and discrimination are not permissible in fixing the tariff for supply of electricity. When the Rating Committee, takes notice of the fact that the Act does not contemplate any free supply of energy and in view of Section 23 bases its recommendations on new rates on the withdrawal

CM/FM/B305/69/JRM/B

of the concessional supply made to the consumer under the agreement, there can be no doubt that it is justified in taking such a view. (Para 13)

When in accepting the Rating Committee's report the Government clearly accepts the recommendation for the abolition of the concession, and makes its order in accordance with Section 57. (2) (c), such an order is final and binding on all concerned and no grievance can be made if the licensee-company refuses to continue the concessional supply. The object of the Act and its Schedule 6 is to statutorily rationalise and regulate the rates for the supply of energy, in the interests of the public and electrical development. Therefore it cannot be said that such licence providing for the concessional supply to that consumer should continue despite the order made in accordance with Section 57. Discontinuance of such concessional supply is thus correct. (1915) 1 Ch 124 and (1940) 1 Ch 180 and AIR 1966 SC 30, Foll. (Paras 14, 16 and 17)

(B) Electricity (Supply) Act (1948), S. 57 (2) (c) — New rates fixed on recommendations of Rating Committee — Retrospective effect for such rates not permissible.

New rates fixed on the recommendations of a Rating Committee cannot be made applicable with retrospective effect in view of Section 57. (2) (c) of the Electricity (Supply) Act. Thus when the report of the Rating Committee is published on 26-9-1953, the new rates cannot be made effective earlier than two months thereafter so that a customer will be liable to pay according to the revised rates after the expiry of two months from the date of publication of that report. That is such a report cannot be made applicable from 1-7-1953. (Para 17)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 30 (V 53) = 1965-3 SCR 818, Poona Electric Supply Co., Ltd., Bombay v. Commr. of Income Tax Bombay City 1, Bombay 16
- (1940) 1940-1 Ch 180 = 109 LJ Ch 56, Attorney General v. Wimbledon Corporation 13
- (1915) 1915-1 Ch 124 = 84 LJ Ch 131, Attorney General v. Long Eaton Urban Dist. Council 13
- M. B. L. Bhargava, for Appellant; C. L. Agarwal, for Respondent No. 1; A. R. Mehta Dy. G. A., for Respondent No. 2.

JUDGMENT: As both the Courts below have dismissed the suit of the plaintiff, he has preferred the present second appeal which arises from the appellate judgment and decree of the District Judge of Udaipur dated August 9, 1960, in the following circumstances.

2. The plaintiff is the ruler of the former Udaipur State. He raised the present suit on April 14, 1955, with the allegation that the Maharana Bhopal Electric Supply Company Limited, Udaipur, Defendant No 1 (herein-

after referred to as 'the Company') was constituted in 1950 to generate and supply electricity, which was the responsibility of the firm of Messrs. Bhandari Iron and Steel Company. The Company has been discharging that responsibility. It was pleaded in paragraph 6 that an agreement was made with the aforesaid firm of Messrs. Bhandari Iron and Steel Company on October 10/11, 1946 (Ex. 11) according to which electricity was to be supplied to the Maharana on the following condition:

"Free power to palaces up to a maximum of 2000 units per month. For power consumed above these units, concession rates will be charged which should not exceed fifty per cent of the general rates for lights, fans and power respectively."

According to the plaintiff, this agreement was accepted as binding by the Company when it was formed by the owners of Messrs. Bhandari Iron and Steel Company. Thereafter the former State of Mewar merged into the former United State of Rajasthan and that Government reiterated the aforesaid condition of the agreement dated October 10/11, 1946 in the document dated December 31, 1948. This was in fact notified in the form of a licence which was issued in favour of the Company by the successor State of Rajasthan on August 26, 1950. The plaintiff further pleaded that the Company supplied electricity to him from 1946 up to February 1954 in accordance with the above mentioned agreement, but that it wrote to the plaintiff's Master of Household on February 10, 1954 that if the plaintiff did not pay the bill which, according to the plaintiff, was not in conformity with the terms of the agreement, up to February 13, 1954, the Company would stop the supply of electricity.

The supply was in fact disconnected on March 4, 1954 and it was not resumed in spite of all efforts of the plaintiff. The Company however re-started the supply from April 2, 1955 on a temporary basis but as the plaintiff apprehended that it would be discontinued in a few days, he instituted the present suit alleging that as he himself had not committed a breach of the agreement with the Company and was always prepared to make the payment in accordance with it, a decree may be passed granting an injunction against the Company that it shall continue to make the supply of electricity in accordance with the agreements dated October 10/11, 1946 and December 31, 1948, and that the supply will not be disconnected as long as the plaintiff continued to pay for it in accordance with those agreements.

3. The Company filed a written statement and admitted that an agreement was made earlier, but pleaded that the plaintiff was not a party to it and was not entitled to the rights and the benefits thereof. Further, it pleaded that the agreement had become nugatory. The Company also pleaded that the Indian Electricity (Supply) Act came

into force in Rajasthan with effect from April 1, 1951, so that Section 57 and Schedules VI and VII thereof became parts of the licence of the Company. On this basis it was stated that the Rajasthan Government appointed a Rating Committee to fix a proper rate for the supply of electricity for the consumers living in Udaipur city, and that the Government thereafter determined the new rates for the supply of electricity in accordance with the recommendations of that committee, and the concession received by the plaintiff earlier came to an end as it was illegal.

It was therefore pleaded that the bill which had been prepared for the period after July 1, 1953 was in accordance with the rates fixed by the State Government and that the plaintiff's electric supply connection was disconnected because it was not paid in full. It was also pleaded that any contract, or licence, or instrument which contravened the provisions of the Electricity (Supply) Act, was void. So also, it was pleaded that the Rajasthan State had terminated the earlier concession and made a new agreement with the Company and it was not open to the plaintiff to challenge it.

4. The State of Rajasthan filed a separate written statement in which the plaintiff's claim was denied and it was pleaded that he had no right to enforce the agreement. It was also pleaded that while an agreement was made on December 31, 1948, it made it quite clear that the expression "Government of United State of Rajasthan at Udaipur" and the word "Government" shall include their successors in office, administrators and assigns, and it was therefore, contended that the State of Rajasthan was entitled to all the rights and advantages then accruing to the Government of the United State of Rajasthan at Udaipur. In this connection it was also pleaded that on the date on which the agreement was made, the Maharana of Udaipur was the Rajpramukh of the United State of Rajasthan and that the agreement was made "for the benefit of its own Head."

It was therefore, contended that on account of the constitutional changes, the State of Rajasthan was entitled to demand 2,000 units of electric energy from the Company for the bona fide use of its public offices and officers, while the plaintiff was not entitled to any such advantage because he was no longer the Head of the State.

5. Issues were framed on the questions whether the plaintiff was entitled to enforce the above-mentioned terms for the supply of free and concessional electricity and whether the agreement which incorporated that term became void after the enforcement of Electricity (Supply) Act with effect from April 1, 1951. Issues were also framed on the questions whether the plaintiff was entitled to enforce the terms of the agreement even though he was not the "head

of the State" and there was no privity of contract between him and the defendants.

6. The trial Court, as has been stated, dismissed the suit and as its judgment has been confirmed on appeal by the learned District Judge as aforesaid, the plaintiff has filed the present second appeal.

7. It may be mentioned here that when the case came up for hearing on April 27, 1967, it was reported that Parts 'B', 'C', and 'D' of the file of the trial Court had been weeded out, so that only part 'A' was available. An order was, therefore, made directing the parties to take steps for the reconstitution of the record. It is admitted that the record has been reconstituted with the consent of the learned counsel for the parties. As a result of the reconstitution, exhibits 1 to 8 and 11 to 15 have been placed on the record and the learned counsel are in agreement that all these documents may be read in evidence along with the following gazette notifications and that the case may be decided on their basis,—

1. Commerce & Industries Department notification No. F. 8 (201) C. I./M. P./50, dated August 21, 1950, appearing in the State gazette, Part I, dated August 26, 1950;

2. Public Works Department notification No. F. (149) P. W. E. M./51, dated September 14, 1953, appearing in Part I of the State gazette dated September 26, 1953;

3. Public Works Department notification No. F. 6 (149) P. W. E. M./51, dated October 24, 1953, appearing in Part I of the State gazette, dated October 31, 1953.

8. It is clear from the pleadings that one of the important points in controversy between the parties was whether the plaintiff was entitled to enforce the terms mentioned in the initial agreement dated October 10/11, 1946, in spite of the above-mentioned order dated October 24, 1953 of the State Government to the contrary, notified in Notification No. F. 6 (149) P. W. E. M./51, dated October 24, 1953. This was the subject matter of Issue No. 1. As I shall presently show, the fate of the case depends upon the finding on this issue.

9. It is admitted that the original agreement (Ex. 11) dated October 10/11, 1946 was re-iterated in the letter (Ex. 1) of the Director of Industries and Supplies of the former United State of Rajasthan, Udaipur, dated October 22, 1948 inasmuch as the Director took notice of the clause providing for the free and concessional supply of electricity to the palaces of His Highness the Maharana of Udaipur. It is also admitted that the State executed an agreement with the Company on December 31, 1948 on the lines of the original agreement Ex. 11, dated October 10/11, 1946. This agreement is on the record as Annexure 2 of the State Government's letter Ex. 3. Further, it is admitted that ultimately a licence was issued to the Company and it

was notified under notification No. F. (201) C. I. M. P./50, dated August 26, 1950.

A perusal of the notification shows that the licence was issued on the lines of the agreement dated December 31, 1948 and this was specifically stated to be so while defining the term "agreement" in clause 2 (7) of the licence. It was further stated in clause 11 that the licence would be subject to the terms and conditions of the said agreement. It is therefore, quite apparent that clause 6 of agreement Ex. 11 which provided for the free and concessional supply of electricity to the Maharana, became a part of the licence issued to the Company. The plaintiff specifically pleaded in paragraph 8 of the plaint that this was so, and both the defendants took the same stand. There can therefore, be no doubt that the initial agreement Ex. 11 or the subsequent agreement Ex. 3 merged in the licence, and this is the case of the parties also.

10. The question then is whether the clause providing for free and concessional supply of electricity to the Maharana, continued to be in force on the date of the suit. It may be mentioned that it was clearly stated in the licence that it had been granted to the Company by the State Government under the Indian Electricity Act, 1910, as applied to the United State of Rajasthan by the United State of Rajasthan Electricity Ordinance, 1948. Further, it was stated in the interpretation clause of the licence that the expression "Act" in the licence shall mean "the Indian Electricity Act, 1910 as applied to the United State of Rajasthan." The licence of the Company was, therefore, for all practical purposes, a licence under Section 3 of the Indian Electricity Act, 1910. It could therefore, be revoked or amended only in accordance with the provisions of Section 4 of that Act as it was then in force.

It has however, been clearly admitted by all the learned counsel that the licence was not revoked or amended under that section. Besides, it is also admitted by the learned counsel that the Indian Electricity (Supply) Act, 1948 came into force in Rajasthan in the meantime and that it was under the provisions of that Act that the Government appointed a Rating Committee which gave its report Ex. 2 on which the Government made the order dated October 24, 1953 referred to above.

11. When these are the admitted facts, it would follow that Section 57 of the Indian Electricity (Supply) Act applied to the licence of the Company for sub-section (1) of that section made the following provision:—

"57. Licensees' charges to consumers.—

(1) The provisions of the Sixth Schedule and the Table appended to the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority, from the date of the

commencement of the licensee's next succeeding year of account, and from such date the licensee shall comply therewith accordingly and any provisions of such licence or of the Indian Electricity Act, 1910 (IX of 1910), or any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of the section and the said Schedule and Table."

The Sixth Schedule of the Indian Electricity (Supply) Act provides the financial principles on which the rates of a licensee are to be adjusted for the sale of the electricity. According to it the rates have to be so adjusted by periodical revision so that the clear profit of the licensee in any year may not, as far as possible, exceed the amount of "reasonable return". The expression "reasonable return" has been defined in the Schedule which provided for its calculation and the determination of the rates for the sale of electricity by every licensee. It therefore, became the duty of the licensee to adjust the rates by periodical revision in accordance with the procedure laid down by Section 57 of the Indian Electricity (Supply) Act.

12. The Company actually applied for a revision of the rates. It is not in dispute that on May 12, 1953 the Company applied to the State Government for revision and removal of the concession in favour of the Maharana of Udaipur. The State Government accordingly appointed a Rating Committee under Section 57 of the Indian Electricity (Supply) Act by a notification published dated June 21, 1952 and the terms of reference of the committee were, as follows,—

"To examine the charges of the said company for the supply of electric energy and to recommend thereon to the said Government separately for the period commencing on the 1st February, 1951, and ending on the 30th June, 1952, and for the period commencing on the 1st July, 1952 onwards."

The Rating Committee went into the matter and its report has been published in notification No.F. (149) P. W. E. M./51, dated September 14, 1953, appearing in Part I of the State Gazette dated September 26, 1953. The Committee took into consideration the existing agreement with the Company and before recommending the rates for different classes of consumers, it considered it necessary to examine the concessional charges which were made by the Company in favour of the Maharana of Udaipur under the agreement dated December 31, 1948. It reached the conclusion, inter alia, that the Electricity Act did not contemplate any free supply of energy and recommended, as follows, —

"The Electricity Act does not contemplate any free supply of energy and now when the rates of supply of energy to the

consumers are being revised in conformity with the Act it would be unfair to place the extra burden of this concession on the general body of consumers. We consider this concession as one of the causes of losses to the licensee and the concession, if continued, can only be made by proportional increase in the rates to be charged from the general body of consumers for which we find no justification. If there is any implied agreement between the Government and H. H. the Maharana in regard to the supply of free energy to the palaces, as part of their maintenance, it is for the Government to consider the way out of the difficulty but the consumers of the licensee cannot be unfairly burdened on that account. We would, therefore, recommend the concession should be cancelled and the general rates of supply to the consumers should be applicable to the palaces also."

On the basis of this recommendation, the Rating Committee went on to consider what would be the "reasonable return" to the Company in accordance with the considerations and the criteria laid down in the Indian Electricity (Supply) Act and made its recommendation for the revised charges for the sale of electricity by the Company.

13. It is therefore clear that the Rating Committee based its recommendation regarding the new rates on the withdrawal of the concessional rate in favour of the Maharana of Udaipur and, as has been stated, in reaching that conclusion the Rating Committee took notice of the fact that the Electricity Act did not contemplate any free supply of energy. It has not been disputed that the Committee formed this view on account of the provisions of Section 23 of the Indian Electricity Act which provides that a licensee shall not, in making any agreement for the supply of energy, "show undue preference to any person". It is in fact fairly well settled that undue preference and discrimination is not permissible in fixing the tariff for the supply of electricity so that those concerned cannot show undue preference to any person or exercise undue discrimination against any person.

A similar provision existed in the Electric Lighting Act, 1882 in England and it was held in *Attorney-General v. Long Eaton Urban District Council*, 1915-1 Ch 124, that any differentiation in the rates of supply was a breach of that provision. A similar view has been taken in *Attorney-General v. Wimbledon Corporation*, 1940-1 Ch 180. There can therefore be no doubt that the Rating Committee was justified in taking a similar view.

14. The report of the Rating Committee went to the State Government and, as has been stated, it was notified in the State Gazette dated September 26, 1953. The State Government thereupon made an order which was notified in notification No. F. 6 (149) P. W. E. M./51, dated October 24, 1953, which appeared in Part of the State

gazette dated October 31, 1953. It was clearly stated in the notification that His Highness the Rajpramukh had approved the rates for the supply of electricity as recommended by the Rating Committee. The notification mentioned the rates, and it is significant that it did not provide for the supply of electricity to anyone free of charge, or at half the rate, so that the earlier provision regarding the supply of electricity free of charge and at concessional rate to the Maharana of Udaipur ceased to be applicable on the enforcement of the new rates under the orders of the State Government.

As has been stated, it was an intrinsic part of the report of the Rating Committee that the concession admissible to the Maharana of Udaipur should be cancelled and that the general rates of supply to the consumers should be applicable to his palaces because, in the opinion of the Rating Committee, it would be "unfair to place the extra burden of this concession on the general body of consumers." In accepting the Rating Committee's report the Government, therefore, undoubtedly accepted this recommendation for the abolition of the concession.

15. It appears however that the Maharana felt aggrieved by the decision of the State Government on the report of the Rating Committee and his Master of Household made a representation to the State Government that the concession regarding the supply of electricity to His Highness was a "privilege" granted in His Highness's favour, which was maintained in the covenant and safeguarded in the Constitution. As will appear from the State Government's order dated November 19, 1953 (Ex. 15), it consulted the Law Department and took the view that, under the law, His Highness could not "benefit under the licence" and that the concession was revocable. It was further stated in that document that in the private property settlement the concession of free electricity was not agreed upon in the case of the ruler of Udaipur. All concerned were therefore informed that the Government had ordered that the Company could not be compelled to continue the concession of free supply of 2,000 units of electricity per mensem to the ruler of Udaipur if the Company did not find it economical and that the Company was free to discontinue the concession or reduce it after negotiation with the ruler.

16. It therefore appears that the State Government adhered to its order which was notified under notification No. F. 6 (149) P. W. E. M./51, dated October 24, 1953, and saw no reason to revise it. The order of the State Government having been made in accordance with the provisions of Section 57 (2) (c) of the Electricity (Supply) Act, it was final and binding on all concerned and no grievance can be made if the Company has refused to continue the free or concessional supply of electricity to the disadvantage of

the Maharana. It is well settled that the object of the Electricity (Supply) Act and of the Sixth Schedule thereto is to statutorily rationalise and regulate the rates chargeable for the energy supplied, in the interest of the public and for electrical development, as has been held by their Lordships of the Supreme Court in *Poona Electric Supply Co. Ltd., Bombay v. Commissioner of Income Tax Bombay City I, Bombay*, AIR 1966 SC 30, and there is no force in the argument that the licence which was published on August 26, 1950 providing for the free and a concessional rate of supply of electricity to the Maharana of Udaipur should continue to prevail in spite of the order made in accordance with Section 57 of the Electricity (Supply) Act.

17. In the view I have taken, there is no force in the claim of the plaintiff in the present suit, except that there is justification for the submission that the new rates fixed by the State Government on the recommendation of the Rating Committee could not be made applicable with retrospective effect from July 1, 1953 in view of the provisions of Section 57 (2) (c) of the Electricity (Supply) Act. The State Government made its order on the approved rates recommended by the Rating Committee on October 24, 1953 and, in accordance with the provisions of the section, the effective date could not be earlier than two months after the date of publication of the report. As the report was published on September 26, 1953, the new charges could not be effective earlier than two months thereafter so that the plaintiff will be liable to pay according to the revised rates after the expiry of the period of two months from the date of publication of the report. While therefore the appeal fails and is dismissed, it is clarified that the revised rates would be payable from the date mentioned above. In all the circumstances of the case, I do not think it is necessary to make any order as to the costs.

Appeal dismissed.

AIR 1970 RAJASTHAN 77 (V 57 C 16)

JAGAT NARAYAN, J.

Rajeshwar Dayal and another, Petitioners v. Padam Kumar Kothari and others, Respondents.

Civil Revn. Nos. 469 of 1967 and 152 of 1968, D/-2-12-1968, against orders of Munsif, Jaipur City West, D/-4-8-1967 and Addl. Munsif No. 2, Jaipur, D/-15-1-1968, respectively.

Civil P. C. (1908), Ss. 153, 151 and 115 (c) and O. 6, R. 17 — Amendment of plaint long after institution of suit to include cause of action not accrued on date of suit — Power of Court — Governing conditions —

Eviction suits instituted on ground of personal necessity — Default in payment of rent by tenant, thereafter — Application to amend plaint for inclusion of such ground made at belated stage — Amendment of plaint, if allowed, amounts to material irregularity — (Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) (as amended by Act 12 of 1965), S. 13 (1) (a)).

It is clear from Section 153 and O. 6, Rule 17, that the power of the Court to allow an amendment is circumscribed by the words "as may be necessary for the purpose of determining the real question in controversy between the parties". An amendment cannot be allowed if it is not necessary for such a purpose. (Para 6)

The plaintiff can be allowed to add a relief not claimed originally where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate. (Para 7)

But the Court has no power either under Section 153 or under Order 6, Rule 17, to allow an amendment of the plaint to include a cause of action which had not accrued on the date of institution of the suit. (Para 9)

However, in exceptional circumstances the Court may allow such an amendment under Section 151 provided the four conditions, that there is no change of jurisdiction; that the application is not greatly belated; that no fresh enquiry on facts is necessary and that the opposite party will not be deprived of any defence which will be open to him if a fresh suit on the new cause of action were to be brought, are satisfied.

(Paras 14 and 10)

Where in an eviction suit filed on 24-1-1966 on ground of personal necessity, though the rent is alleged to have been defaulted on 24-5-1966, an application to amend the plaint on ground of such default is made on 3-4-1967 and in another similar suit, filed in 1960, such an amendment application is made in 1967 in respect of a default alleged to have been committed in 1962 and in both the cases the fact of such default is seriously disputed, there is no special circumstance justifying the exercise of the inherent power of the Court to allow those applications. Further, both those applications are belated. Therefore, the Court commits a material irregularity within the meaning of Section 115 (c) in such cases in allowing those applications. AIR 1926 Mad 6, followed in AIR 1959 Andh Pra 9, Foll.; (1932) 1 KB 254 referring to (1877) 5 Ch D 713 and (1932) 1 KB 423, Rel. on; Reasons given in Civil Revn. No. 191 of 1966, D/-16-10-1968 (Raj) and Civil Revn. No. 113 of 1967, D/-18-10-1968 (Raj). Held wrong. AIR 1922 PC 249 and AIR 1945 PC 62 and AIR 1950 PC 68 and AIR 1957 SC 363, Following (1909) ILR 33 Bom 644 and AIR 1965 Andh Pra 98 and ILR (1953) 3 Raj 866, Ref. (Para 16)

Cases Referred:	Chronological	Paras
(1968) Civil Revn. No. 113 of 1967, D/- 18-10-1968 (Raj), Umardeen v. Chhagan Lal		15
(1968) Civil Revn. No. 191 of 1966, D/- 16-10-1968 (Raj), Gopichand v. Khel Shankar		15
(1965) AIR 1965 Andh Pra 98 (V 52) = ILR (1963) Andh Pra 931, P. Manga Rao v. C. Kishan Rao	12, 14	
(1959) AIR 1959 Andh Pra 9 (V 46) = ILR (1958) Andh Pra 509, A. N. Shah v. Annapurnaamma	11, 14	
(1957) AIR 1957 SC 363 (V 44) = 1957 SCR 595, P. H. Patil v. K. S. Patil		9
(1953) ILR (1953) 3 Raj 866, Ram Dayal v. Maji Devdiji of Riyan	13, 14	
(1950) AIR 1950 PC 68 (V 37) = 77 Ind App 15, Kanda v. Waghu		9
(1945) AIR 1945 PC 62 (V 32) = 72 Ind App 114, Doorga Prosad v. Secy. of State		9, 13
(1932) 1932-1 KB 254, Eshelby v. Federated European Bank Ltd.	9, 11, 14	
(1932) 1932-1 KB 423 = 101 LJ KB 245, Eshelby v. Federated European Bank Ltd.		9
(1926) AIR 1926 Mad 6 (V 13) = 49 Mad LJ 479, Appalasuri v. Kan- namma Nayuralu	10, 11, 14	
(1922) AIR 1922 PC 249 (V 9) = ILR 48 Cal 832, Ma Shwe Mya v. Maung Mo Hnaung		9
(1913) 1 Ir R 48, Creed v. Creed		9
(1909) ILR 33 Bom 644 = 11 Bom LR 1042, Kisandas Rupchand v. Rachappa Vithoba		9
(1886) 2 TLR 410, Tottanham Local Board of Health v. Lea Conservancy Board		9
(1877) 5 Ch D 713 = 46 LJ Ch 311, Original Hartlepool Collieries Co. v. Gibb		9
(1866-67) 11 Moo Ind App 7 = 6 Suth WR 57 (PC), Eshenchunder Singh v. Shamachurn Bhutto		9

D. P. Gupta and H. C. Rastogi for Petitioner (in C. R. No. 469 of 1967) and for Respondent (in C. R. No. 152 of 1968); N. M. Kasliwal, for Respondent (in C. R. No. 469 of 1967); Hastimal, for Petitioner (in C. R. No. 152 of 1968).

ORDER: In these two revision applications the question which arises for consideration is whether the Court committed a material irregularity within the meaning of Section 115 (c) in allowing an amendment of the plaint long after the institution of the suit so as to include a cause of action which had not accrued to the plaintiff on the date of the institution of the suits.

2. Civil Revision No. 469 of 1967 arises out of a suit for eviction filed by the plaintiff on 24-1-66 on the ground of sub-letting and personal necessity. On 3-4-67 the plaintiff moved an application for amendment of

the plaint so as to include another ground for eviction which was not available to him when the suit was filed. The tenancy of the defendant is a monthly one commencing from the 25th of the English calendar month. In his amendment application the plaintiff alleged that the defendant had paid rent upto 24-11-65, but neither paid nor tendered it thereafter so that on 25-5-66 i.e. after the institution of the present suit he has become entitled to evict the defendant on the ground set forth in Section 13 (1) (a) of the Rajasthan Premises (Control of Rent and Eviction) Act 1950 as amended by Act No. 12 of 1965 published in the Rajasthan Gazette dated 9-6-65. This application was opposed by the defendant on various grounds. It was asserted that the defendant had tendered rent to the plaintiff, but he had refused to accept it. On 3-5-67 he made a deposit of the rent due upto 24-4-67 under Section 19-A. It was contended that a cause of action which had not accrued to the plaintiff on the date of the institution of the suit could not be added by way of amendment. The trial Court however allowed the amendment by the following order:

"After careful consideration of legal implication I allow this application for amending the plaint. If the plaintiff cannot succeed on account of subsequent defaults, that will be seen only during the trial of the said case and not in this application for amendment."

3. In Civil Revision No. 152 of 1968 the present suit was instituted on 8-7-60 for the eviction of the defendant from a shop on the ground of personal necessity. Issues were framed on 9-2-61 and the entire evidence adduced on behalf of the plaintiff was recorded by 7-2-62. On 13-4-67 the statement of the defendant was recorded and his evidence was going on when an application for amendment of the plaint was made on 19-12-67. It was alleged in this application that the defendant had paid rent upto 30-9-62 but had not paid rent thereafter and on account of his failure to pay the rent after 30-9-62 he had become liable to ejectment on the ground mentioned in Section 13 (1) (a). A prayer was made to allow an amendment of the plaint so as to add this ground of eviction which had accrued to the plaintiff after the institution of the suit. The plaintiff instituted a separate suit for the recovery of arrears of rent from the defendant from 1-10-62 to 31-12-65 which is pending, but in that suit no prayer for eviction on the ground of default was made.

4. The application for amendment was opposed on the ground that the plaint could not be amended so as to include a cause of action which had not accrued to the plaintiff on the date of the suit. It was asserted that the General Watch Company was the tenant and not the defendant and that rent had been tendered in the name of General Watch Company but the plaintiff had refused to accept it. The learned Additional

Munsif No. 2 Jaipur allowed the amendment without giving any reasons.

5. The contention on behalf of the applicants in these two revision applications is that the Court has no power either under Section 153 or Order 6, Rule 17, Civil P. C. to allow an amendment of the plaint so as to include a cause of action which had not accrued on the date of the suit. These two provisions of law are reproduced below :

"Section 153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

"O. 6, R. 17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

6. It will thus be seen that the power of the Court to allow amendment is circumscribed by the words "as may be necessary for the purpose of determining the real question in controversy between the parties." An amendment cannot be allowed if it is not necessary for such a purpose.

7. There is no reported case of the Privy Council or the Supreme Court in which an amendment was allowed so as to enable the plaintiff to include a cause of action which had not accrued to him on the date of the suit. I may mention here that the plaintiff can be allowed to claim a relief not claimed originally where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate.

8. The following decisions of the Privy Council are helpful in determining the limits of the power of the Court to allow amendment of the pleadings:

9. In *Ma Shwe Mya v. Maung Mo Hnaung*, AIR 1922 PC 249, the plaintiff sued in 1913 for specific performance of the verbal agreement made in 1912 by the defendant with him for transfer of certain land for oil wells in place of the first agreement of 1903 and when the Court found the verbal agreement not proved, the plaintiff applied to amend the plaint by claiming damages for breach of the contract of 1903. It was held that the amendment could not be allowed as it was not open to the Court to permit a new case to be made out. After quoting Section 153 and Order 6, Rule 17, their Lordships observed :

"The real question in controversy between the parties in these proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells speci-

fied and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain. When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing if, when in fact the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made."

In *Doorga Prosad v. Secretary of State*, AIR 1945 PC 62, the suit was filed on 17th February, 1934 and the relief claimed was (1) a declaration that the certificate lodged by the defendant before the Certificate Officer, Howrah, on 1st April 1933, was illegal and void and inoperative; (2) an injunction restraining the defendant from enforcing or attempting to enforce the said illegal certificate; (3) an account of all monies realised by the defendant under the said illegal certificate and refund thereof to the plaintiff and (4) release from civil prison. No claim was made for the modification of the amount alleged to be due on the certificate if valid. Such a claim was however made before their Lordships of the Privy Council in appeal. Their Lordships however declined to entertain it. It was observed :

"The only question which arises in the appeal is whether a certificate dated 1st April, 1933, issued under the provisions of the Bengal Public Demands Recovery Act, 1913, is a valid certificate. The appellant in his case claims further that the certificate, if originally valid, became unenforceable by reason of matters which occurred after the filing of the suit; but their Lordships are of opinion that the relief claimed in this suit must be confined to matters existing at the date when the suit was instituted."

In *Kanda v. Wagh*, AIR 1950 PC 68, the plaintiff brought a suit challenging the validity of a deed of gift relating to land executed on 17th December, 1938 by defendant No. 1, widow of one Amira, in favour of her daughter's son, defendant No. 2, on the ground that the land was ancestral and the gift was contrary to custom. The Subordinate Judge who tried the suit held that the plaintiff had failed to prove the custom alleged by which a widow could not give her deceased husband's property to her daughter's son and that the land was not ancestral. In accordance with these conclusions he dismissed the suit with costs. The appellants appealed to the District Judge who agreed with the findings that the land was not ancestral, but he held that the parties were governed by custom in the matter of alienation and he sent the case back to the trial Court for decision of a further issue which he framed in these words :

"The land in suit having been found to be non-ancestral, do the collaterals exclude the daughter's son according to the custom of the parties and is the gift, therefore, invalid?"

This issue did not arise on the pleadings. Both sides appealed to the High Court which held that the District Judge had erred in framing a new case for the appellants. In their appeal to the Privy Council the plaintiffs asked for leave to amend the plaint in order to cover the new issue. This was refused with the following observations:

"As already indicated the question embodied in the additional issue was not raised in the pleadings. The appellants founded their claim on the ground that the land was ancestral and it was on that ground that they challenged the right of the widow to make the gift. Not once during the proceedings in the trial Court did they suggest that even if the land was found to be non-ancestral, the widow would still be incompetent to dispose of it. In *Eshenchunder Singh v. Shamachurn Bhutto*, (1866-67) 11 Moo Ind App 7 at p. 20 (PC), Lord Westbury described it as an absolute necessity that the determination in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. The course decided upon by the learned District Judge offended against this principle, and their Lordships consider that he was rightly overruled.

In asking the Board to allow the plaint to be amended at this stage attention has been drawn to the provisions of Section 153 and O. 6, Rule 17, Civil P. C. The powers of amendment conferred by the Code are very wide, but they must be exercised in accordance with legal principles, and their Lordships cannot allow an amendment which would involve the setting up of a new case. The judgment of Lord Buckmaster in AIR 1922 PC 249, is directly in point. It was there held that it was not open to a Court under Section 153 and O. 6, R. 17, to allow an amendment which altered the real matter in controversy between the parties."

In *P. H. Patil v. K. S. Patil*, AIR 1957 SC 363, their Lordships of the Supreme Court quoted with approval the following passage from the judgment of Batchelor J. in *Kisandas Rupchand v. Rachappa Vithoba*, (1909) ILR 33 Bom 644 at pp. 649-650.

"All amendments ought to be allowed which satisfy the two conditions (1) of not working injustice to the other side and (2) of being necessary for the purpose of determining the real questions in controversy between the parties.....but I refrain from citing further authorities as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment

would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same; can the amendment be allowed without injustice to the other side, or can it not?" and observed in paragraph 11 of the A.I.R. report (1957 SC 363)—

"The same principles, we hold, should apply in the present case. The amendments do not really introduce a new case, and the application filed by the applicant himself showed that he was not taken by surprise; nor did he have to meet a new claim set up for the first time after the expiry of the period of limitation."

Section 153 and Order 6, R. 17 of the Code of Civil Procedure are based on O. 28, Rules 1 and 12 of the Rules of the Supreme Court of England are as follows:

R. 1 "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

R. 12. "The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

In *Eshelby v. Federated European Bank Ltd.*, 1932-1 KB 254, Swift J., explained as to what was meant by the words "for the purpose of determining the real question or issue raised by or depending on the proceedings" as follows:—

"In some cases neither party has very clear and definite view of the real position until the witnesses have been examined and cross-examined, and documents have been criticized in open Court. If the true points at issue are to be determined, and real justice to be done, the pleadings should not be too rigidly adhered to and the Court should make such amendments as are necessary in the proceedings for the real rights of the parties to be determined."

In the above case a sum of £1500 was payable in 4 instalments £375 on Oct. 22, 1930 and £375 on January 15, 1931 and the other two instalments at subsequent dates. The plaintiff issued the writ on 28-11-30. The action came on for trial before an official referee on March 16, 1931. After

West Bengal, while the remaining Assistants stand on a par with Lower Division Assistants in West Bengal. As already pointed out, due to paucity of chances for promotion, the Tripura Administration Pay Committee suggested that 25% of the posts of the Assistants should be reserved for selection grade with higher pay and that the selection grade might be given to the Assistants on the basis of seniority-cum-merit. Vide page 20 of the report. Accordingly, the Administration of Tripura issued certain instructions regarding the manner in which the 25% of the posts of the Assistants should be selected for the selection grade. Vide Exts. B-5 and B-6. According to the respondents, the respondents 4 to 20 and some others were appointed in the selection grade after they passed the tests and after the departmental promotion committee selected them. The rulings relied on by the respondents' counsel are more to the point in question whether such a reservation could be made and whether recruitment to the selection grade could be made under executive instructions on the basis of merit-cum-seniority. No employee has any right to promotion as a matter of right and the Government can determine the suitability of a person for promotion. Vide *Rudraradhya v. State of Mysore*, AIR 1961 Mys 247. The High Court, Calcutta v. *Amal Kumar*, AIR 1962 SC 1704, *M. A. Moqem v. State of Mysore*, AIR 1963 Mys 219 and *Arun Kumar Bhattacharjee v. State of West Bengal*, AIR 1968 Cal 35. Also, it is clear that the Government can appoint a Committee like the departmental promotion committee as in the present case for obtaining its views about the candidates who are eligible to be promoted. Vide *K. N. Thankam v. State of Kerala*, AIR 1965 Ker 233. It was held in that case that it was open to the Government to seek the advice of an expert body in the matter of selection to a post, that the said power is inherent in the executive power of the Government and that it is not necessary that there should be any statutory provision or rules under Article 309 of the Constitution to enable the Government to declare a post a selection post.

In two rulings the Supreme Court held that in the matters of appointment and promotion no rules regarding the same need be shown before the Government exercises its executive powers. In *B. N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942, rule 3 of the Mysore State Civil Services (General Recruitment) Rules of 1957 contained the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf". It was held that rule 3 did not imply that, till the rules were made in that

behalf, no recruitment could be made to any service, that it was not obligatory under the proviso to Article 309 of the Constitution to make rules of recruitment before a service could be constituted or a post created or filled up, that the State Government had executive power in relation to all matters, with respect to which the Legislature of the State had power to make laws and that, therefore, there is nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. It was further held that the rules usually take a long time to make, that various authorities have to be consulted and that it could not have been the intention of Rule 3 to halt the working of the public departments till the rules were framed. It was also pointed out that if the Government advertised the appointments and the conditions of service of the appointments and made a selection, after advertisement, there would be no breach of Article 15 or Article 16 of the Constitution, because everybody, who was eligible in view of the conditions of service would be entitled to be considered by the State.

Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910 is more to the point. The Supreme Court held that promotion to selection grade posts (in Indian Police Service) was not automatic on the basis of ranking in gradation list, that promotion was primarily based on merit and not on seniority alone and that it could not be said that till the statutory rules governing promotion to the selection grade posts were framed the Government could not issue administrative instructions regarding the principles to be followed and that, if the cases of all the eligible candidates were considered before appointment to such posts, there would be no violation of Articles 14 and 16 of the Constitution.

17. It is also clear from the rulings of the Supreme Court that persons doing the same kind of work are not bound to get the same scales of pay and that in one cadre there can be different scales of pay. In *Kishori Mohanlal v. Union of India*, AIR 1962 SC 1139 it was held that the abstract doctrine of equal pay for equal work has nothing to do with Article 14 of the Constitution and that it could not be said to be violated where the pay scales of Class I and Class II Income-tax officers are different, though they do the same kind of work.

In *State of Punjab v. Joginder Singh*, AIR 1963 SC 913 it was held that it cannot be contended that the State cannot constitute two services consisting of employees doing the same work but with different scales of pay or subject to

different conditions of service and that constitution of such services is not violative of Article 14 of the Constitution. It was also held that the proposition Article 14 requires that equal work must receive equal pay or that if there is equality in pay and work there have to be equal conditions of service is untenable and that the Government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and that the limitations imposed by the Constitution are not such as to preclude the creation of such services.

The latest decision of the Supreme Court in *State of Mysore v. Narasinga Rao*, AIR 1968 SC 349 has very material bearing on the question at issue. The Mysore State created two separate pay scales for matriculates and non-matriculates in the same category of tracers. It was held that Article 14 does not forbid reasonable classification for the purposes of legislation. When any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Hence, there is no denial of equality of opportunity unless the person, who complains of discrimination, is equally situated with the person or persons who are alleged to have been favoured. Article 16 (1) does not bar a reasonable classification of employees or reasonable tests for their selection. The provisions of Article 14 or Article 16 do not exclude the laying down of selective tests, nor do they preclude the Government from laying down qualifications for the post in question. Such qualifications need not be only technical, but they can also be general qualifications relating to the suitability of the candidate for public service as such. It was, therefore, held that the classification of two grades of tracers—one for Matriculate tracers with higher pay scale and the other for non-Matriculate tracers with a lower pay scale was not violative of Article 14 or Article 16 of the Constitution.

18. In the present case, therefore, creation of 25% of "selection grade" posts out of the Assistants amounted to creation of "Upper Division Assistants"

corresponding to West Bengal Secretariat and the remaining 75% of the Assistants would correspond to Lower Division Assistants in West Bengal. So, in effect the order of the Government of India as per Ext. A-1 was brought into force by creating two separate divisions among the Assistants. The Government would have been well advised if they separated 25% posts out of 101 posts of the Assistants and designated them as "Upper Division Assistants" carrying higher scale of pay. The Government should have made a separate classification in serial no. 7 in schedule I of Tripura Employees' (Revision of Pay and Allowances) Rules of 1963 by separating Upper Division Assistants from Lower Division Assistants and mentioning the number of their posts and their separate scales of pay instead of creating a confusion by adding "25% of the posts" with a separate scale of pay. But, this is not violative of the provisions of Articles 14 and 15 of the Constitution of India. As already pointed out, the Government of the Union Territory has the executive power to lay down separately the principles for the selection of the Assistants for the selection grade posts and these instructions are found in Exts. B-5 and B-6. So, that portion of classification as "25% of the posts" in serial no. 7 in schedule I of the Tripura Employees' (Revision of Pay and Allowances) Rules of 1963 cannot be struck down on the ground that the said rules themselves do not indicate the method in which the "25% of the posts" should be filled up.

19. The further contention of the learned counsel for the petitioners that either all the Assistants should be given the same scale of pay namely, Rs. 150-250/- or, preferably, the selection grade scale of pay of Rs. 225-475/- by deleting the expression "for 25% of posts" from Col. 4 of serial No. 7 in schedule I of Tripura Employees Revision of Pay & Allowances Rules of 1963 does not arise. No doubt, under the doctrine of severability a rule, which is invalid, can be separated and the rule which is valid can be upheld. Vide *M/s. Jalan Trading Co. Private Ltd. v. Mill Mazdoor Sabha*, AIR 1967 SC 691, *Gulabbhai Vallabbhai v. Union of India*, AIR 1967 SC 1110, and *State of Madhya Pradesh v. Ranojirao Shinde*, AIR 1968 SC 1053. But, this question does not arise in view of my finding that the separation of 25% of the posts towards the selection grade with higher scale of pay is not invalid.

20. It may be noted that Ext. A-5, copy of the petition dated 15-3-1967 sent by the petitioners by way of demand for justice, shows that their grievance was that the revision of pay scales of the Assistants was not made on par with that

in West Bengal. So, they demanded that their pay scales should be revised in accordance with the pay scales obtaining for the same cadre in West Bengal. But, in the course of the arguments it transpired that in making the selection of the Assistants for the selection grade some irregularities were committed. The petitioners and the remaining Assistants in the Civil Secretariat were informed about the test, which was arranged to be held in the Umakanta Academy Campus Hall from 9-30 A. M. to 5 P. M. on 17-9-1961. Vide Ext. B-7. Ext. B-8 contains a list of 84 Assistants who were eligible to sit for the test. The five petitioners bearing serial Nos. 51 to 53, 59 and 74 as per Ext. B-8 did not sit for the examination. Some other Assistants also did not sit for the examination. After the remaining Assistants appeared for the examination, their marks were listed out. Then there was correspondence between the Chief Commissioner and the Chief Secretary, who suggested that no further oral interview was necessary and that a panel of Assistants eligible for promotion as selection grade Assistants might be prepared on the basis of seniority-cum-merit. Vide Ext. B10. Ext. B11 shows that three Assistants were absent and that the special test for them might be conducted on 15-10-1961, that in the meanwhile the others who stood in the test should be promoted as mentioned in Para 4 of Ext. B-11 and that two posts should be left vacant to be filled up after the remaining three Assistants sat for the examination. Ext. B-12 shows that 18 Assistants were selected and promoted to the selection grade on 7-10-1961 and that they were given higher scale of pay. Ext. B-14 shows that the test for the absentee Assistants was held on 6-6-1965 and not on 15-10-1961 as proposed and that they were selected and appointed to the selection grade on 11-6-1965. The said two Assistants Shri Birendra Kishore Roy and Shri Usha Ranjan Das Gupta, who were selected in 1965, were not made parties to the Writ petition. It further appears that three more Assistants serial Nos. 8, 15 and 35 in Ext. B-8 were also subsequently promoted in 1968 as selection grade Assistants. They too were not made parties to this Writ petition. After the respondents filed documents showing the instructions issued by the Government for selecting the Assistants and the lists of candidates etc., the petitioners filed counter affidavit refuting the documents. The respondents filed a rejoinder to the petitioners' counter. It is not necessary to examine the further question whether the respondents 4 to 20 and some others, who are not parties to this Writ petition, were valid-

ly appointed in the selection grade or not. For, the petitioners never challenged their appointments in the Writ petition. This matter is outside the scope of the present Writ petition. As already stated the Writ petitioners want only that all the Assistants should have one uniform scale of pay and grade—either the lower scale or the increased scale given to the selection grade. The petitioners never prayed that the appointments of the respondents 4 to 20 to the selection grade should be set aside. So, it is not necessary to decide a question, which is not pleaded in the Writ petition. Vide *Vidya Sagar v. Board of Revenue, U. P.* Lucknow, AIR 1964 All. 356, *Pratap Singh v. State of Punjab*, AIR 1964 SC 72, though according to *Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras*, AIR 1965 SC 1578 a plea raised in the affidavit-in-rejoinder for the first time may also be considered. The faint contention of the learned Counsel for the petitioners that the appointments to the selection grade are invalid because the executive instructions contained in Exts. B-4 and B-5 were not correctly followed is not tenable. For, the respondents 4 to 20 were taken by surprise. They did not file any counter, because no relief was asked for by the petitioners against them. Besides, this Court cannot issue any Writ against the other Assistants, who were promoted to the selection grade, in their absence as parties to the Writ petition. In fact, the learned Counsel for the petitioners did not seriously press this aspect of the case. He concentrated his argument only on the question of the alleged discrimination in the pay scale—lower scale for 75% of the Assistants and a higher scale for 25% of them.

21. Before concluding the judgment, it is necessary to point out that it is desirable that the respondents 1 to 3 should separate 25% posts out of the Assistants and designate them as posts of upper division Assistants carrying the revised scale of pay of Rs. 225-475/- and frame rules for filling up the said posts.

22. Thus, there are no grounds for making the rule absolute and the rule is accordingly discharged. In the circumstances of the case, I direct the parties to bear their respective costs.

Rule discharged.

AIR 1970 TRIPURA 19 (V 57 C 3)

R. S. BINDRA, J. C.

Shri Manmatha Bhattacharjee, Petitioner v. Union Territory of Tripura, now known as Government of India, Agartala and another, Respondents.

JM/JM/E600/69/MVJ/P

Writ Petn. No. 12 of 1964, D/- 1-9-1969.
Civil Services — Revised Leave Rules, 1933, R. 14 (c) — Removal from service for over-staying leave other than extraordinary leave — R. 14 (c) does not apply — Compliance with Art. 311 necessary.

Rule 14 (c) and Regulation 13 of the Jodhpur Service Regulations are almost identical in nature and effect though they are differently worded. A plain reading of R. 14 (c) would bring out that it applies to a Government servant who overstays the extraordinary leave granted to him and to one who absents himself from duty without taking any leave or who overstays leave other than extraordinary. Therefore where a Government servant remains absent from duty without earned leave applied for being sanctioned, he is guilty of misconduct but for such misconduct he could be removed from service only on compliance with the constitutional requirements enshrined in Art. 311. In such case removal or discharge from service of the servant under R. 14 (c) is clearly unsustainable. AIR 1966 SC 492 Applied. (Para 9)

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 492 (V 53) =

1966-1 SCR 825, Jai Shankar v.

State of Rajasthan

6, 7

B. C. Dev Barma and Shri R. L. Chakraborty, for Petitioner; H. C. Nath, Government Advocate, for Respondents.

ORDER: In this writ petition, filed under Article 226 of the Constitution, the petitioner Manmatha Bhattacharjee, who was employed as Lower Division clerk in the Education Directorate of the Tripura Administration, challenges the validity of his removal from service.

2. Manmatha Bhattacharjee was recruited on 30th of December, 1952, as primary teacher and joined on 1-1-1953 under the Tripura Administration in the Education Department, Relief and Rehabilitation, and from there he was transferred to the Education Department, Tripura, wherein he was absorbed as Lower Division clerk. In the year 1958 his services were placed at the disposal of the Territorial Council. He was upgraded in course of time as Upper Division clerk and transferred to the office of the Inspector of Schools, Sadar. By an order dated 14-3-1962, he was transferred from there to the office of the Inspector of Schools at Dharmanagar, where he took over on 1-5-1962 after having been released on 24-4-1962 by the Inspector of Schools at Sadar. On 2-5-1962, he applied for 6 days' casual leave for bringing his family from Agartala to Dharmanagar. On reaching Agartala on 3-5-1962, he found his wife gravely ill. Consequently, he applied for 2 months'

earned leave, with effect from 2-5-1962, to the Inspector of Schools at Dharmanagar. The relevant application was accompanied by a medical certificate respecting his wife's illness. However, that application fetched no reply. He then submitted an application on 22-6-1962 for payment of his salary. Thereafter, he submitted another application praying for extension by one month of the earned leave effective from 2-7-1962. That too remained unresponded. Faced with critical situation arising out of his wife's continued illness and non-response to his applications for leave and payment of salary already earned, in sheer frustration the petitioner tendered his resignation on 6-7-1962 per registered cover addressed to the Inspector of Schools, Dharmanagar.

By a letter dated 11-7-1962, he was informed by the Inspector of Schools that his resignation may not be accepted as he had not resumed duty in compliance with the direction contained in letter dated 29th of June/3rd of July, 1962, sent to him. The petitioner wrote back stating that he had not received any such letter. Some more correspondence was exchanged between him and the Inspector of Schools until 30th of November, 1962, when the petitioner addressed a communication to the Chief Executive Officer of the Tripura Territorial Council, praying for acceptance of his resignation earlier submitted and claiming leave salary due to him. Some dispute was also pending between the petitioner and the Department respecting his T. A. bill in connection with his transfer to Dharmanagar. He had drawn Rs. 175/- in advance before proceeding to that station. The Principal Officer of the Tripura Territorial Council directed the petitioner, by a communication dated 8-2-1963, that unless "the final T. A. bill" was submitted, his representation dated 30th of November, 1962, addressed to the Chief Executive Officer shall not be considered. The petitioner sent a reminder on 17-5-1963 for acceptance of his resignation and payment of arrears of salary, and also submitted a duplicate T. A. bill on 6-3-1963. Having received no further communication from any quarter, he was forced to make a representation on 22-8-1963 to the Director of Education Department. That Director communicated to him, by a letter dated 3rd/9th September, 1963, that the order regarding his service had been communicated to the Inspector of Schools, Dharmanagar. A copy of that order was also sent to the petitioner. That order was to the effect that Manmatha Bhattacharjee having remained absent from duty for a period exceeding 90 days with effect

from 2-5-1965, his services stood automatically terminated from the forenoon of 21-7-1963 in terms of Rule 14 (c) of the Revised Leave Rules of 1933.

3. The petitioner filed an appeal with the Chief Commissioner of Tripura on 16-9-1963 against the order terminating his services. It is alleged that no reply was received by him from the Chief Commissioner.

4. It was claimed in the writ petition that the termination of the petitioner's service is in violation of Article 311 of the Constitution for it is obviously in the nature of penalty. It was also emphasised that though the petitioner had submitted his resignation, on 6-7-1962, no attention was paid to it and he was discharged from service on a different ground.

5. The respondents traversed in their written statement the contention of the petitioner that his removal from service offends the constitutional provisions. It was pleaded that it is a case of automatic termination of service in accordance with Rule 14 (c) of the Revised Leave Rules, 1933, and not a case of dismissal, removal or reduction in rank by way of punishment, and that, as such, the applicability of Article 311 is not attracted. Another point urged was that since the petitioner had resigned from his post on 5-7-1962 with one month's notice, his service came to an end on 5-8-1962.

6. Shri Dev Barma, appearing for the petitioner, submitted on the authority of AIR 1966 SC 492, *Jai Shanker v. State of Rajasthan*, that the removal of a Government servant from service for over-staying his leave is illegal even though the Service Regulations by which he is governed contain a provision to that effect. *Jai Shanker* (of the cited authority) had challenged the validity of termination of his service, which termination, it was claimed on behalf of the Government, had come about in terms of Regulation 13 of Jodhpur Service Regulations. The Regulation runs as under:

"An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority.

Note:- The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission".

Rule 14 (c) of the Revised Leave Rules of 1933 relied upon by the respondents in our case is in the following terms:—

"Where a Government servant, who is not in permanent employ or quasi-per-

manent employ, fails to resume duty on the expiry of the maximum period of extraordinary leave granted to him, or where such a Government servant who is granted a lesser amount of extraordinary leave than the maximum amount admissible, remains absent from duty for any period which together with the extraordinary leave granted exceeds the limit upto which he could have been granted such leave under sub-rule (b), he shall, unless the President in view of the exceptional circumstances of the case otherwise determine, be deemed to have resigned his appointment and shall, accordingly, cease to be in Government employ".

This Rule and Regulation No. 13 appear to be almost identical in nature and effect though they are differently worded.

7. The Supreme Court posed the question, in *Jai Shanker's* case, AIR 1966 SC 492, whether Regulation 13 is sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment. It was represented before the Supreme Court by the counsel for the Government that the Government does not order removal of the employee under Regulation no. 13 because the incumbent himself gives up the employment. Repelling the contention, the Supreme Court held:

"We do not think that the constitutional protection can be taken away in this manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if he wants until his service is terminated in accordance with law. One circumstance deserving removal may be over-staying one's leave. This is a fault which may entitle Government, in a suitable case, to consider a man as unfit to continue in service. But even if a regulation is made, it is necessary that Government should give the person an opportunity of showing cause why he should not be removed."

At another place in the judgment the Supreme Court observed:

"Whichever way one looks at the matter, the order of the Government involves a termination of the service when the incumbent is willing to serve. The Regulation involves a punishment for over-staying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented

himself by over-staying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise". Yet another relevant observation made by the Supreme Court was:

"A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Art. 311 and this is what has happened here".

8. I think these observations of the Supreme Court are decisive of the matter debated before this Court. Admittedly the petitioner was never called upon to show cause against his proposed termination of service on account of his absence from duty for a period exceeding 90 days from 2-5-1962. It is really tragic that the Director of Education should make an order on 26th of August, 1963, to the effect that the service of the petitioner stood automatically terminated with effect from 31-7-1962 forenoon, when the petitioner had submitted his resignation as long ago as 6th of July, 1962. It is obvious that the Department was out to smite the petitioner for having enjoyed leave without getting the same first sanctioned. In fairness to the petitioner, the Department should have referred the matter to the President of India in terms of Rule 14 (c) asking instructions whether the resignation of the petitioner should be accepted or his service considered terminated. In face of the peculiar situation created by the resignation of the petitioner, the Education Department would have been well advised to place the relevant papers before the President for his necessary directions. It reflects on the efficiency of the Department that an application for earned leave should remain unattended for a period of more than two months. According to para 7 of the written statement of the respondents, the petitioner was addressed a letter on 3rd of July, 1962, communicating rejection of his leave and directing him to resume duty by 5th of July, 1962. The petitioner has denied the receipt of that letter and his denial is supported by affidavit. There is no counter-affidavit that such a letter had actually been posted to the address of the petitioner. A copy of that letter was supplied to the petitioner at his request on or about 31st of July, 1962 vide para 8

of the written statement. It follows that the petitioner did not receive any official communication earlier than 31st of July, 1962, that his leave application had been rejected. Anyway, in view of the Supreme Court authority cited above it is not open to the respondents to contend that the petitioner's discharge from service does not offend the provisions of Article 311 inasmuch as admittedly he was not afforded an opportunity of showing cause against his proposed removal or discharge from service.

9. I am also not satisfied that the case of the petitioner is covered by R. 14 (c). A plain reading of the rule would bring out that it applies to a Government servant who overstays the extraordinary leave granted to him, and not to one who absents himself from duty without taking any leave or who overstays leave other than extraordinary. Rule 14 (a) provides that the extraordinary leave may be granted to an officer in special circumstances—

(i) where no other leave is by rule admissible, or

(ii) when other leave is admissible, but the officer concerned applies in writing for the grant of extraordinary leave. It is not the contention of the respondents that no variety of leave was due to the petitioner when on 3rd of May, 1962, he applied for two months' earned leave. Nor it can be urged that the petitioner had ever moved the authority concerned in writing for grant of extraordinary leave to him. The entire correspondence exchanged between the parties has been placed on the record by the petitioner. That correspondence shows that he had applied only for earned leave and not for extraordinary leave. Therefore, I fail to see how could the Government dispense with petitioner's services under rule 14 (c). If the petitioner had remained absent from duty without earned leave applied for having been sanctioned, he was guilty, none may seriously dispute, of misconduct but for such misconduct he could be removed from service only on compliance with the constitutional requirements enshrined in Art. 311. That, of course, never happened. The removal or discharge from service under Rule 14 (c) is clearly unsustainable because in terms that rule does not apply to the instant case. The petitioner had remained absent without earned leave having been granted to him, and it cannot be the charge against him that he had overstayed extraordinary leave.

10. Shri H. C. Nath, the learned Government Advocate appearing for the respondents, submitted, towards the close of his arguments, that in view of the resignation tendered by the petitioner on

6-7-1962, his service terminated on the expiry of period of one month mentioned in the letter of resignation, and that as such he is not entitled to claim the declaration that he is still in service. Shri Dev Barma, on the other hand, urged that since the Government has never accepted the resignation of the petitioner, though the latter had requested repeatedly for its acceptance, the submission made by Shri H. C. Nath has no foundation to rest upon. He, therefore, prayed that the petitioner is entitled to the declaration that he is still in service. The matter at issue does not appear to be free from difficulty. It can be looked at from three angles. Firstly, it can be said that the resignation became effective from 6-8-1962 on the expiry of one month's notice given per letter of resignation itself. In the second place, it may be legitimately contended that the resignation having not been accepted thus far, despite petitioner's repeated requests to accept it, the Government may not see its way in accepting it even at present. Lastly, the resignation having admittedly not been accepted so far the petitioner may have the right to withdraw it and he may withdraw it. It is also conceivable that the Government may accept the resignation before it is withdrawn by the petitioner. All these matters require serious scrutiny and consideration. I have decided not to adjudicate on that aspect of the dispute between the parties in the present writ petition. I may now set out in a few words what has weighed with me in reaching that conclusion.

11. The petitioner came to the Court to challenge his discharge or removal from service, which the Director of Education, Tripura, declared on 26-8-1963 to have come about on the basis of R. 14 (c), as being unconstitutional. That relief, as held above, he is clearly entitled to claim. Another two reliefs asked for by him were the declaration that he still continues to be in service and that he is entitled to all benefits of pay and allowances from 1-5-62 to date. It is these reliefs that I am not inclined to grant in this petition because of the complication created by the resignation submitted by the petitioner on 6-7-1962. The petitioner did not solicit this Court to determine his rights in the context of his resignation; he only prayed that his removal from service on the footing of Rule 14 (c) be quashed and his consequential rights determined. It were the respondents who pleaded, alternatively, that the petitioner's service had terminated on the basis of resignation submitted by him. The respondents did not aver, however, in their written statement, nor did their counsel say so during the course of arguments in this Court, that

the petitioner's resignation had been accepted. The only plea adopted by the respondents in the written statement was that the resignation had become operative by its own force on the expiry of one month's notice given by the petitioner. If such were the factual and legal consequence of the language in which the resignation was couched, the Principal Officer of the Tripura Territorial Council would not have mentioned in the letter dated 8th February, 1963, (copy marked "T"), that unless the final T. A. bill were adjusted no action on the representation dated 30th of November, 1962, made by the petitioner could be taken. A copy of that representation of the petitioner is marked "S". Therein he had prayed that his resignation dated 6th of July, 1962, should be accepted and its acceptance communicated to him.

After the petitioner had submitted the final T. A. bill in duplicate along with his letter dated 6-3-1963 (marked "U"), and that had fetched no reply, he addressed the application dated 17-5-1963 (Marked "U-1") to the Principal Officer of the Education Department, Tripura Territorial Council, repeating the request for acceptance of his resignation at an early date with the remark "this is long overdue". It was on 26th of August, 1963, that the curtain was drawn on the extensive correspondence between the parties when the Directorate of Education, Tripura, addressed a letter to Education Inspectorate, Dharmanagar, that since the petitioner had absented himself from duty for a period exceeding 90 days from 2-5-1962, his service stood automatically terminated with effect from 21-7-1963 (forenoon) in terms of Rule 14 (c). The correspondence exchanged between the parties, thus brings out clearly that even until 26th of August, 1963, the Department had not taken into consideration the resignation of the petitioner. Nor was it evidently of the view that the resignation had become effective from 6-8-1962.

12. As against the petitioner, it can be urged quite plausibly that since he had submitted his resignation on 6-7-1962 with one month's notice and since he had not thereafter offered to work in his post, he cannot contend that he is still in service or that he is entitled to his salary right upto this date. All through his correspondence he insisted on his resignation being accepted and never prayed in the alternative that he should be permitted to resume duty. In such circumstances, it passes comprehension how can he claim salary etc. right upto this day.

13. Further, the salary of the petitioner will depend on the nature of the leave due to him from 2-5-1962. There is no data on the present record to

enable the Court to give a finding on that point. Obviously, some evidence is required for determination of that dispute between the parties.

14. Taking all these factors into consideration, I have come to the conclusion that I should grant the petitioner only this declaration against the respondents that his removal from service on the basis of Rule 14 (c) is illegal and inoperative, being violative of Article 311 of the Constitution, and that declaration is hereby made. The other disputes between the parties, namely, (i) whether he still continues in service, (ii) what is the effect of the resignation tendered by him, and (iii) to what salary, if any, the petitioner is entitled, are left open between them. They should better be resolved amicably, else the aggrieved party may seek relief in the Civil Court. I feel clear that those disputes can best be settled after a regular trial in a Civil Court and not in a writ Court.

15. I direct that the respondents shall pay one-half costs of this petition to Manmatha Bhattacharjee, the petitioner. Advocate's fee Rs. 50/-.

Order accordingly.

AIR 1970 TRIPURA 24 (V 57 C 4)

R. S. BINDRA, J. C.

Nilambar Roy, Petitioner v. Durga Charan Saha Roy, Respondent.

Civil Revn. No. 40 of 1966, D/- 30-8-1969, against order of Munsiff, Belonia, D/- 22-8-1966.

(A) Civil P. C. (1908), O. 26, Rr. 7 and 8 — Examination of witness on commission — Statement shall form part of record of suit subject to R. 8.

The statement taken on commission does not ipso facto form part of the record and be read as evidence in the case. It shall form part of the record of the suit subject to the provisions contained in R. 8 of O. 26. The intention of the legislature is that unless some one of the disabilities or peculiar circumstances, which govern the issuing of a commission for examination of a witness continues to obtain until the stage for reading of his evidence is reached in the suit, or the witness whose statement had been recorded on commission has died by that stage, the witness must be brought to the Court for personal statement to enable the Presiding Officer to judge his veracity in the back-ground of his conduct and demeanour while in the witness-box. It should, therefore, be only in exceptional cases that the Court exercise its discretion under clause (b) of Rule 8 if only because every conscientious and

devoted-to-the-job presiding officer of the Court would be anxious to have a look at the witness whose statement may influence his judgment one way or the other. (Para 6)

(B) Civil P. C. (1908), S. 115 and O. 26, R. 8 — Statement of plaintiff taken on Commission — Trial Court rejecting the objection of defendant regarding reading the statement as evidence without considering provisions of R. 8 of O. 26 — Held the Court acted in exercise of its jurisdiction both illegally and with material irregularity. (Para 7)

M. R. Choudhury, for Petitioner; B. B. Gupta, for Respondent.

ORDER: In the suit, filed by Durga Charan Saha Roy, against Nilambar Roy in the Court of Munsiff at Belonia, an application was made, on 9-6-1966, for examination of the plaintiff on commission since he was much too ill to make statement by personal appearance in Court. That application was granted and the commission issued. The commissioner recorded the statement of the plaintiff on 21-8-1966. When the case was taken up in the Court on the next day, 22-8-1966, for examination of plaintiff's other witnesses, the defendant moved an application praying that the evidence of the plaintiff recorded on commission should not be read as evidence in the case because the plaintiff was in good health and so could appear in Court for making his deposition. The defendant also objected to the examination of the plaintiff's two witnesses, who were in attendance, on the ground that list of the witnesses whom the plaintiff wanted to examine had not been filed in the Court in time.

2. The plaintiff vigorously opposed both the objections raised by the defendant.

3. The trial Court rejected the first objection with the observation that the evidence recorded on commission could not be "rejected" only for the reasons that "the plaintiff may have stated that he has now recovered from his illness". The other objection of the defendant was also disallowed on the score that the plaintiff is not bound in law to furnish the list of witnesses to the Court earlier than the date fixed for recording evidence on his behalf.

4. The defendant having felt aggrieved with that order of the Munsiff has come up in revision to this Court under Section 115 of the Civil Procedure Code.

5. Shri M. R. Choudhury, appearing for the defendant-petitioner, has not pressed the ground pertaining to the non-submission of list of witnesses by the plaintiff. I think he has adopted the right course. The relevant provision of

law is contained in Rule IA of Or. XVI of the Civil Procedure Code. That rule enacts that where any party to the suit has, at any time on or before the day fixed for the hearing of evidence, filed in the Court a list of persons either for giving evidence or for producing documents, the party may, without applying for summons under Rule 1, bring any such person, whose name appears in the list, to give evidence or to produce documents. It is apparent that the rule gives option to the party to submit the list of witnesses either on or before the day fixed for the hearing of his evidence. Since the hearing of evidence of the plaintiff of the case in hand had to begin on 22-8-1966, he could well submit the list of witnesses on that day. There was no obligation on him to put in that list earlier. Therefore, the trial Court was justified in rejecting the contention of the defendant that the plaintiff should not be permitted to examine the two witnesses who had put in appearance in the Court on 22-8-1966.

6. Shri Choudhury was very vehement in canvassing the proposition that the defendant's objection against the evidence of the plaintiff recorded on commission being read in the suit had been unjustifiably turned down. I think his stand is sustainable in law. Rule 7 of Or. XXVI of the Code prescribes that the commission and the return thereto, as also the evidence taken under it, shall form part of the record of the suit, but subject to the provisions contained in Rule 8. Rule 8 may usefully be reproduced here. It runs as under:

"Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the service of Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same."

The substance of the rule is that evidence taken on commission shall not be read as evidence in the suit without the consent of the party against whom it is meant to be utilised, unless some one of the circumstances mentioned in clause (a) is proved to exist, or the Court in exer-

cise of its discretion vested in it by clause (b) authorises the evidence being read in the suit on dispensing with the proof of any such circumstance despite the fact that the cause for taking such evidence by commission has ceased to exist at the time of reading the same. If the Court, however, exercises the discretion under clause (b), that fact must appear on the record in the shape of a specific order, which should preferably contain the reasons which have weighed with the Court. If all these essential precautions are observed, the superior Court shall not be confronted with any problem if the aggrieved party happens to challenge the discretion exercised by the trial Court.

The point that requires emphasis is that the statement taken on commission does not ipso facto form part of the record and be read as evidence in the case, as appears to have been assumed by the Munsiff in the present case, and this point is clearly brought out by the specific words "subject to the provisions of the next following rule" put in parenthesis in Rule 7 of Or. XXVI. It appears to be the anxiety of the legislature that unless some one of the disabilities or peculiar circumstances, which govern the issuing of a commission for examination of a witness continues to obtain until the stage for reading of his evidence is reached in the suit, or the witness whose statement had been recorded on commission has died by that stage, the witness must be brought to the Court for personal statement to enable the Presiding Officer to judge his veracity in the back-ground of his conduct and demeanour while in the witness-box. Therein lies the philosophy behind and the reason or justification for enacting Rule 8. It should, therefore, be only in exceptional cases that the Court exercise its discretion under clause (b) of Rule 8 if only because every conscientious and devoted-to-the-job presiding officer of the Court would be anxious to have a look at the witness whose statement may influence his judgment one way or the other.

7. Coming now to the case in hand it looks abundantly clear that while rejecting the prayer of the defendant the Court did not have the provisions of Rule 8 before its mind, and that it laboured under the impression that the evidence recorded on commission can form part of the record and be read in the case without anything more. This conclusion can be easily spelled out from the observation of the Court,

"I do not think that although the plaintiff may have stated that he has now recovered from his illness, the deposition (recorded on commission) can be rejected on that ground only."

If the attention of the Court had been directed to R. 8 (b) it must have express-

ed itself quite differently while overruling the objection raised by the defendant. Shri B. B. Gupta, appearing for the plaintiff-respondent, wanted this Court to assume that the trial Court had dismissed the objection of the defendant in exercise of its discretion vested in it by Rule 8 (b). However, there is nothing on the record to lend weight to that contention. Hence, the inescapable conclusion that I am driven to is that the trial Court had rejected the objection on wrong assumption and so a case for interference in revision is made out. The Court appears to have acted in the exercise of its jurisdiction both illegally and with material irregularity, to use the words of Section 115 of the Code under which the revision petition has been filed, since it failed to take into consideration the provisions of Rule 8 (b) while making the impugned order.

8. As a result, I allow the revision petition to the extent that the order, overruling the objection of the defendant in regard to the evidence of the plaintiff recorded on commission, is quashed. I remit the case to the trial Court for redecision of that objection of the defendant in the light of the provisions of Rules 7 and 8 of Or. XXVI and of the observations made above.

9. In view of partial success of the parties, I leave them to bear their own costs in this Court. Advocates fee Rs. 32/-
Revision partly allowed.

AIR 1970 TRIPURA 26 (V 57 C 5)

R. S. BINDRA, J. C.

Shri Hem Chandra Sarkar, Appellant v. Smt. Jyoti Bala Chakraborty, Respondent.
Civil Misc. Petn. No. 138 of 1969, in First Appeal No. 1 of 1969, D/- 11-9-1969.

(A) Civil P. C. (1908), Ss. 149, 107, O. 7 R. 11 (b) and (c) — Discretion under S. 149 — Exercise of — Privilege of making up deficiency in Court-fee — Can be claimed as of right under O. 7, R. 11 (b) and (c) read with S. 107 though not under S. 149.

The appellant cannot claim as of right while moving the Court under Section 149, the payment of the additional Court-fee for it is plain from the language used therein that the matter rests in the discretion of the Court. However, the appellant can claim as of right the privilege of making up the deficiency in Court-fee in view of clauses (b) and (c) of Order 7, Rule 11, read with Section 107. The provisions of clause (c) of Rule 11 apply to appeals because the phraseology of sub-section (2) of Section 107 leaves no room for doubt on the point. Therefore the

appellate Court is bound to grant time to the appellant for making up the deficiency in the Court-fee if the memorandum of appeal is insufficiently stamped. That Court cannot in the latter circumstance adjudge the fate of appeal merely on the basis of the provisions of Section 149 in exercise of its discretion without complying with the command given by clauses (b) and (c) of Rule 11 of Order 7 and giving time to the appellant to do the needful. If the appellant fails to make up the deficiency in the Court-fee within the time allowed to him by the appellate Court, then alone the Court may reject the memorandum of appeal as insufficiently stamped and not otherwise. Case law discussed. (Paras 8, 11)

(B) Civil P. C. (1908), S. 149—Memorandum of appeal insufficiently stamped due to wrong advice of counsel — Mistake is bona fide — Appellant can be allowed to pay deficient Court-fee — (Court Fees and Suits Valuations — Court-fees Act (1870), S. 28.)

Where the mistake in filing insufficiently stamped memorandum of appeal on the part of the appellant is attributable to wrong advice given by a highly senior counsel engaged by him and the memorandum of appeal was admitted without objection by the Registrar of High Court it is a case of bona fide mistake and the discretion under Section 149 can be exercised so as to allow the appellant to make up the deficiency in Court-fee. (Para 8)

That an appellant can make up the deficiency in the Court-fee in such manner can also be supported on basis of S. 28 of the Court-fees Act. (Para 12)

Cases Referred: Chronological Paras
(1969) AIR 1969 Punj & Har 308
(V 56), Jai Bhagwan v. Om

Prakash 7, 13
(1968) AIR 1968 Delhi 183 (V 55)=

70 Pun LR (D) 7, Custodian of Evacuee Property v. Rameshwar Dayal 13

(1966) AIR 1966 Punj 332 (V 53)=
1965 Cur LJ 578, State of Punjab v. Nand Kishore 7, 13

(1938) AIR 1938 Lah 361 (V 25)=
40 Pun LR 413 (FB), Jagat Ram v. Misar Kharaiti Ram 13

(1924) AIR 1924 Lah 401 (V 11)=
71 Ind Cas 736, Shahadat v. Hukum Singh 13

R. C. Bhattacharjee, A. K. Shyam Choudhury, N. C. Roy and P. K. Sarkar for Appellant; M. K. Dutta, for Respondent.

ORDER: The prayer made in this application, dated 8-9-69 filed under Section 149 of the Civil Procedure Code by the appellant Hem Chandra Sarkar, is for condonation of the delay that occurred in paying the deficient Court-fee required for the memorandum of appeal presented in this Court on 29-1-1969.

2. The relevant facts are that the respondent Jyoti Bala Chakraborty instituted a suit against the appellant Hem Chandra Sarkar for the latter's ejection from a house and for the recovery of arrears of rent, compensation, and mesne profits. The reliefs granted in the decree made by the trial Court were for the eviction of Hem Chandra from the house in dispute and for payment by him of Rs. 1750/- on account of rent, Rs. 300/- by way of compensation, and Rs. 50/- P. M. as mesne profits until the delivery of possession of the house by him to Jyoti Bala. Hem Chandra went in appeal against that decree and the Additional District Judge, Tripura, set aside the decree for his eviction and for mesne profits but affirmed the rest of it. Jyoti Bala filed second appeal in this Court against the decree of the Additional District Judge and that appeal was accepted and the decree of the trial Court was restored in full. This Court made the following order respecting mesne profits:—

"The appellant will be entitled to recover possession of the house and also damages @ Rs. 50/- per mensem for the subsequent period from 1-10-57 until the date on which she obtains possession of the suit house. They should be ascertained under Order 20, Rule 12 C. P. C. separately on a petition. The appellant will have to pay Court fee on the ascertained amount before she executes the decree for arrears of rents or for damages."

3. Pursuant to the direction given by this Court, Jyoti Bala moved a petition in the trial Court for ascertaining the damages. Hem Chandra filed objections pleading non-maintainability of the petition and bar of limitation. The trial Court held, by its order dated 16th of December, 1968, that Jyoti Bala was entitled to a decree for mesne profits at the rate of Rs. 50/- per mensem from 1-10-1957 until 4-11-1968, the date preceding the one on which she had secured possession of the demised house. A final decree in accordance with this finding was consequently passed. It is against that decree that Hem Chandra filed an appeal in this Court on 29-1-1969.

4. The appeal was filed on a Court-fee stamp of Rs. 10/- and the nature of the appeal was mentioned as miscellaneous. The appeal was admitted by this Court and notice issued to the respondent. When the appeal came up for hearing before me on 29-7-1969, none put in appearance on behalf of the respondent Jyoti Bala. However, I raised the following two objections suo motu:—

(i) Whether the memorandum of appeal has been properly and adequately stamped and

(ii) Whether this Court has jurisdiction to entertain and try this appeal.

5. I adjourned the case on that day to 23-8-1969 to enable the appellant's counsel to prepare himself for addressing the Court respecting those two points. On that date the appellant put in an additional Court-fee of Rs. 538.25 to make up the deficiency.

6. The appeal was put up before me on 8-9-1969 in the presence of the counsel for both the parties. It was urged on behalf of the appellant that the deficiency in the Court-fee having been made up, arguments on point no. (ii) raised by the Court on 29-7-1969 be heard. However, since there was no application for condoning the delay in making up the deficiency in Court-fee, an adjournment was granted until 9th of September for presenting such an application. The application was filed on 8th of September, 1969, itself and since it was opposed by the respondent on the 9th, parties' counsel addressed arguments on its merits.

7. Shri P. K. Sarkar urged on the authority of AIR 1966 Punj 332, State of Punjab v. Nand Kishore, that the appellant should be permitted to make up the deficiency in terms of Section 149 of the Code. Shri M. K. Dutta, representing the decree-holder, contended, on the other hand, that the prayer made by the appellant should be rejected for the reasons that it was not proved that it was on account of some bona fide mistake that the full Court-fee had not been paid when the appeal was filed on 29-1-1969, and that no application under Section 149 had been made at the time the appeal was presented in this Court. He cited the case of Jai Bhagwan v. Om Prakash, AIR 1969 Punj and Har 308 to shore up this stand. After examining the two authorities, I have come to the conclusion that the one relied upon by Shri M. K. Dutta is distinguishable and that the facts of the case in hand are more analogous to that of the authority cited by Shri P. K. Sarkar.

8. Section 149 of the Code reads as under:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

The appellant can surely avail of this statutory provision for praying to the Court to make up the deficiency in Court-fee. It is correct that the appellant cannot claim as of right, while moving the Court under this section, the payment of

the additional Court-fee for it is plainly deducible from the language used that the matter rests in the discretion of the Court. In the present case, however, I am inclined to exercise the discretion in favour of the appellant for it appears, as is mentioned in the application made under Section 149, that his counsel did not give him the proper advice. The appeal was headed as a 'Miscellaneous Appeal' by the counsel, although actually it was an appeal against the final decree. The Registrar of this Court also laboured under the impression that it was a Miscellaneous Appeal and adequately stamped as is apparent from his report dated 25-2-1969. It is not in dispute that a Court-fee of Rs. 10/- was sufficient if it were in fact a Miscellaneous Appeal. It would indeed be hard if the appeal were thrown out on a technical point for no apparent fault of the appellant himself, especially when he lost no time in making up the deficiency after the objection was raised by this Court suo motu. Hence, if the matter rested only on the exercise of discretion in favour of the appellant I would do so in context of the circumstances narrated for I feel satisfied that it is a case of bona fide mistake on part of the appellant and that mistake is attributable to wrong advice given by a highly senior counsel engaged by him. However, I find that the appellant can claim as of right the privilege of making up the deficiency in Court-fee in view of clauses (b) and (c) of Order VII Rule 11, read with Section 107 of the Code.

9. Clauses (b) and (c) of O. VII, R. 11, of the Code run as under:—

"The plaint shall be rejected in the following cases:—

(a)

(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(d)"

It appears appropriate that Section 107 of the Code be reproduced here. It is in the following terms:—

"(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

Sub-section (2) of Section 107 gives the appellate Court the same powers and assigns to it the same duties as are conferred and imposed on the Court of original jurisdiction in respect of suits instituted therein. Indisputably, a Court of original jurisdiction has to give time to a plaintiff for correcting the valuation of a suit if the relief claimed is undervalued, and to make up the deficiency in the Court-fee if the plaint is insufficiently stamped, as enjoined by clauses (b) and (c) of O. VII, Rule 11. In the memorandum of appeal submitted to this Court by Hem Chandra, the relief claimed has been undervalued and in consequence it had been also insufficiently stamped. Therefore, in terms of clauses (b) and (c) of O. VII, Rule 11, read with Section 107 of the Code this Court was bound to give time to him for correcting the valuation and making up the deficiency in Court-fee. That was admittedly never done until the deficiency was noted by me on 29-7-1969. Thereafter as well, the Court did not call upon the appellant to correct the valuation and make up the deficiency in Court-fee. Instead, he was asked to satisfy this Court that the memorandum of appeal had been adequately stamped. The appellant then felt, it appears, that the plaint had not been properly stamped and so he voluntarily put in the additional Court-fee stamps to make up the deficiency. Under the circumstances, no fault can be found with the appeal as at present in the matter of its valuation and the Court-fee stamp required for it. Section 149 states unambiguously that when the document has been properly stamped after it had been filed in the Court the document shall have the same force and effect as if such fee had been paid in the first instance.

11. I must state here that there is a sharp conflict of opinion amongst the various High Courts in India on the point whether the provisions of clause (c) of Rule 11 apply to appeals. I am inclined to follow the view that they do apply to the appeals because the phraseology of sub-section (2) of Section 107 leaves no room for doubt on the point. Therefore, the appellate Court is bound to grant time to the appellant for making up the deficiency in the Court-fee if the memorandum of appeal is insufficiently stamped. That Court cannot in the latter circumstance adjudge the fate of appeal merely on the basis of the provisions of Section 149 in exercise of its discretion without comply-

ing with the command given by clauses (b) and (c) of Rule 11 of Order VII and giving time to the appellant to do the needful. If the appellant fails to make up the deficiency in the court-fee within the time allowed to him by the appellate Court, then alone the latter may reject the memorandum of appeal as insufficiently stamped and not otherwise.

12. That an appellant can make up the deficiency in the court-fee in the manner Hem Chandra of this case has done can also be supported on the basis of section 28 of the Court-fees Act. That section enacts, in its first part, that no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. It is mentioned in the second part of the section that if such document is through mistake or inadvertence received, filed or used in any court or office without being properly stamped, the Presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such court, may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance. I have stated above that the Registrar of this Court made a report on 25-2-1969 that the memorandum of appeal had been properly stamped. It is apparent that he had admitted the memorandum of appeal and then acted upon it by sheer inadvertence. He was, I believe, chiefly influenced in acting in that manner by the fact that the memorandum had been described as a Miscellaneous Appeal. Nevertheless, its admission without objection indicates inadvertence and as such I have the statutory authority to call upon the appellant to make the deficiency in court-fee, and once that deficiency is made up in compliance with the order given, the appeal shall be considered as having been properly stamped as in the first instance.

13. In fairness to Shri H. N. Kar a brief reference must be made to the case of Jai Bhagwan, AIR 1969 Punj. & Har. 308 cited by him. In that case the certified copies of judgments of the first appellate and trial courts had been insufficiently stamped when filed along with the memorandum of second appeal. The High Court held that the appeal must be dismissed as barred by time because the deficiency in the court-fee stamp on the two documents had been made good after the period of limitation for the appeal had run out. The High Court evidently refused to exercise the discretion vesting in it under section 149 of the Code in favour of the appellant. The

distinguishing feature between the facts of that case and the case in hand is that in the latter case it was the memorandum of appeal which had not been adequately stamped. Clause (c) of rule 11 of O. VII read with section 107 of the Code applies only to the memorandum of appeal and not to the certified copies of the judgments subjoined to the memorandum of appeal. Hence, the High Court could not have given time to the appellant of the reported case for making up the deficiency of stamp respecting the certified copies under clause (c) of rule 11. The High Court failed to exercise its discretion in favour of the appellant under section 149 on the basis that it had not been proved that the documents could not be fully stamped despite the exercise of due care and attention. The High Court followed the view taken by a single Judge of the Lahore High Court in the case of Shahadat v. Hukam Singh, AIR 1924 Lah 401, in preference to a Full Bench decision of that Court in Jagat Ram v. Misar Kharaiti Ram, AIR 1938 Lah 361 (FB) and a decision of the Delhi High Court in AIR 1968 Delhi 183, Custodian of Evacuee Property v. Rameswar Dayal. It appears that an earlier Division Bench authority of the Punjab High Court in the case of AIR 1966 Punj 332, in which the aforementioned Full Bench decision of the Lahore High Court in the case of Jagat Ram, AIR 1938 Lah 361 (FB) was cited with approval, was not brought to the notice of P. C. Pandit, J., who gave the judgment in the case of Jai Bhagwan, AIR 1969 Punj & Har. 308. It was held by the Lahore High Court in Jagat Ram's case, AIR 1938 Lah 361 (FB) that the discretion conferred on the Court by section 149 is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. The question of bona fides in this connection, it was observed further, should be construed in the sense that word is used in the General Clauses Act and not as used in the Limitation Act. I may point out that the expression "good faith" is defined in the General Clauses Act as : "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not". Following these observations made by the Lahore High Court, and which observations were cited with approval by the Punjab High Court and the Delhi High Court as stated above, I feel satisfied that it would be proper exercise of discretion under section 149 of the Code if Hem Chandra, the appellant in this case, were permitted to make up the deficiency in court-fee.

14. As a result, I allow the application made under section 149 but make

no order as to costs. The appeal shall be considered to have been filed within the period of limitation. The parties' counsel shall now address arguments on the second point raised by me on 29th of July, 1969.

Application allowed.

AIR 1970 TRIPURA 30 (V 57 C 6)

R. S. BINDRA, J. C.

Rabindra Kumar Bhattacharjee, Petitioner v. Smt. Prativa Bhattacharjee, Respondent.

Criminal Revn. No. 5 of 1964, D/- 29-8-1969, against order of S. J., Tripura D/- 18-3-1964.

Penal Code (1860), S. 494 — Hindu Marriage Act (1955), Ss. 7 and 17 — Charge under S. 494 — Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies — Nature of evidence required.

To hold a person guilty of the charge under S. 494 it has to be proved that the second marriage was solemnised in accordance with the customary rites and ceremonies of the party. Under S. 7 (2) of the Hindu Marriage Act where such rites and ceremonies include the sapta-padi (that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. Section 17 of the Hindu Marriage Act is to the effect that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of Ss. 494 and 495 of the Penal Code shall apply accordingly. (Para 6)

The definition of the expression "proved" in S. 3 of the Evidence Act permits the Court to take into consideration all varieties of admissible and relevant pieces of evidence while adjudicating upon whether a particular fact is proved or not. The expression "after considering the matters before it" employed in the definition is of such wide amplitude as to justify the Court taking into consideration, besides the direct and the circumstantial evidence, the opinion evidence made relevant by section 50 of the Evidence Act, the pre-trial admissions of the accused, and the statement made by the accused, during the trial, under section 342, Cr. P. C. (Para 17)

The proviso to S. 50 of the Evidence Act enacts only this much that the opinion evidence of the nature mentioned, which is otherwise made relevant by the

main body of Section 50 of the Act for the purpose of proving existence of relationship, shall not be sufficient to prove a marriage in a prosecution under S. 494 I. P. C. The Proviso does not make the opinion evidence relating to the marriage either irrelevant or inadmissible. Therefore, the only effect of the Proviso is that on the basis of the opinion evidence alone, the Court cannot hold in a prosecution under section 494 I. P. C. that the factum of the marriage has been proved. Hence the contention that the opinion of persons who testify to the marriage, the factum of which is in issue, cannot be taken into consideration at all has to be rejected. Such testimony being relevant can be availed of along with other evidence to reach the conclusion that the factum of marriage had been proved. AIR 1965 SC 1564, Explained.

(Para 6)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 614 (V 53) = | |
| 1966 Cri LJ 472, Kanwal Ram v. | |
| Himachal Pradesh Administra- | 2, 5, 7 |
| tion | |
| (1965) AIR 1965 SC 1564 (V 52) = | |
| 1965 (2) Cri LJ 544, Bhaurao | |
| Shankar v. State of Maharash- | 2, 7 |
| tra | |
| (1965) AIR 1965 J & K 105 (V 52) = | |
| 1965 (2) Cri LJ 640, Phankari v. | |
| State | 2, 8 |
| (1960) AIR 1960 Bom 393 (V 47) = | |
| 1960 Cri LJ 1189, Malan v. State | |
| of Bombay | 4 |

M. C. Chakraborty, for Petitioner; N. L. Choudhury, for Respondent.

ORDER: Shorn of verbiage, the facts relevant to the present revision petition filed by the convict Shri Rabindra Bhattacharjee are that he was married to the complainant Prativa Bhattacharjee, M. A. B.T., in July 1954 at Hoogly, that they could not pull on smoothly as husband and wife despite the fact that they were blessed with a son, Rantu by name, on 23-8-1955 which was soon after the marriage, and that, as alleged by the complainant, her husband entered into second marriage with Anjali Bhattacharjee, a daughter of Gopal Chakraborty of Agartala. On 6-11-1961, Prativa filed a complaint in the Court of Sub-divisional Magistrate at Agartala. Rabindra, the husband of the complainant, was charged in course of time by that Magistrate under section 494 I. P. C., while Anjali and her father Gopal Chakraborty were both charged under Section 494 read with Section 109 I. P. C. By its judgment dated 20th of May, 1963, the trial Court acquitted Anjali and her father but convicted Rabindra under Section 494 I. P. C. and sentenced him to 1½ years' simple imprisonment and a fine of Rs. 500/-, or, in default, 6 months' additional simple

imprisonment. Having felt aggrieved Rabindra went in appeal to the Sessions Court. The learned Sessions Judge upheld the conviction of the accused by his judgment dated 18-3-1964, but reduced the sentence to 6 months' simple imprisonment and a fine of Rs. 500/-, or, in default, 6 months' further simple imprisonment. In the instant revision petition, Rabindra challenges the correctness of his conviction and sentence.

2. Though in the trial court and before the Sessions Judge the accused Rabindra had vehemently asserted that he laboured under bona fide mistake that his first wife Prativa was not living when he married Anjali on 28-10-1959, but in this Court Shri M. C. Chakraborty, appearing for him, did not raise that point. Hence, as at present, that is no longer an issue between the parties. Shri M. C. Chakraborty also did not contest the proposition that his client and Prativa were validly married in July, 1954, and that Prativa bore a male child to Rabindra in August 1955. The only point urged by Shri Chakraborty was that the complainant Prativa had miserably failed in her attempt to establish that Rabindra had been validly married to Anjali on 28-10-1959. In this connection, he invited the Court's attention to section 7 of the Hindu Marriage Act, 1955, and also placed reliance on section 50 of the Indian Evidence Act, besides relying heavily on the evidence led in the case and the propositions of law enunciated in the authorities AIR 1965 SC 1564, Bhaurao Shankar v. State of Maharashtra, AIR 1966 SC 614, Kanwal Ram v. Himachal Pradesh Administration and AIR 1965 J & K 105, Phankari v. State. Shri N. L. Choudhury, representing the complainant, submitted, on the other hand, that the factum and validity of marriage between Anjali and Rabindra were never raised in either of the two courts below and so it is not open to the convict to raise a new issue in revision petition. Shri Choudhury vigorously contended that apart from that legal objection raised by him there is abundant evidence on the record to establish the factum as also the validity of the marriage between Rabindra and Anjali. The rejoinder of Shri Chakraborty was that Rabindra had raised, as a matter of fact, the question of the validity of his marriage with Anjali in the trial court. However, he was unable to take the stand that that point was also emphasised before the Sessions Judge.

3. After going through the judgments of the Sub-divisional Magistrate and the Sessions Judge, as also the statement made by the accused under section 342 Cr. P. C., I have reached the conclusion that neither factum nor validity of the marriage between Rabindra and Anjali

was an issue, active or mute, between the parties in the court of Sessions Judge and that the validity, but not the factum, of that marriage was challenged at the stage of arguments but never before in the trial Court.

4. On page 24 of its judgment the learned trial court happened to observe that the prosecution had proved both the marriages, that the accused had raised no objection respecting those marriages, that he (the accused) had actually admitted those marriages, and that the only defence to the charge, in fact, was that he had married for the second time believing in good faith that his first wife was not amongst the living. Then, on page 25, it is stated that the defence counsel had raised the issue that the prosecution must prove both the marriages to bring the case within the purview of section 494 I. P. C., that he had cited a Privy Council authority in support of that proposition, and that that ruling was unavailing to him as there was no dispute regarding "the facts of the marriage". On the same page the court stated further, while dealing with the argument of the defence counsel based on the authority reported in AIR 1960 Bom 393, Malan v. State of Bombay, that that ruling also did not advance the defence case "as no challenge on the point of marriage, by putting any kind of suggestion, was made by the defence". It was stated further that, in fact, the accused had admitted both the marriages apart from the evidence led by the complainant to establish the factum of those marriages. In the penultimate para on that page, the trial court once again observed that the prosecution had proved both the marriages and that "no challenge was made on the point of marriage".

5. I have gone through the judgment of the learned Sessions Judge twice over but I have not been able to find therefrom any support for the contention that the factum or validity of the second marriage was disputed. In that Court, as in the trial Court, the only point canvassed was that the accused believed honestly at the time of his second marriage that his first wife had died. I think the entire attention of the defence was directed in the two Courts below in proving the bona fide belief of the accused that his first wife Prativa had died on 22nd of September, 1959. This conclusion gathers support from the stand taken by the accused while making statement under section 342 Cr. P. C. One of the questions put to the accused was: "There is evidence that knowing that your married wife Smti. Prativa Bhattacharjee was alive, you have again married accused Smt. Anjali Debi in October 1959.

What is your reply to this?" The reply returned was: "It is not a fact. At the time I married for the 2nd time there were reasons for my belief and I believed that my first wife Smt. Prativa was not alive then." The last but one question put to him by the trial court was if he had anything else to state. The accused came out with the following averment:

"I have not committed any offence. After the receipt of the telegram though I did not venture to go to my father-in-law's place still I wrote a letter to her father—Satish Chakraborty—for performing the "Sradh Ceremony" of Prativa by my son. The first letter was sent under certificate of posting and thereafter I wrote many letters but they did not reply to any."

It would be evident from this averment of the accused that his only defence to the charge on which he stood the trial was that he had learnt from a telegram sent by his father-in-law that his first wife had died. In reply to the other question, as reproduced above, bearing on his marriage with Anjali, the accused had unequivocally admitted the factum of his marriage with Anjali and had not even cared to assert that that marriage was legally invalid. Hence, Shri N. L. Choudhury was justified in urging that an entirely new case is being put up before this Court. However, despite that stand in the Courts below I do not want to rest the present judgment on the foundation that the accused had challenged neither the factum nor the validity of his marriage with Anjali. It is for the reason that the Supreme Court has held in the case of Kanwal Ram, AIR 1966 SC 614 (Supra) that in an adultery or bigamy case an admission of marriage by the accused is not evidence of the fact that the marriage had taken place. It was held further that in such cases, the ceremonies constituting the marriage must be proved.

6. Section 7 (1) of the Hindu Marriage Act states that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto, while sub-section (2) of section 7 enacts that where such rites and ceremonies include the Saptapadi (that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. The parties' counsel were at one on the point that their clients being high caste Brahmins the marriages amongst their class include the ceremony of Saptapadi before the sacred fire. Section 17 of the same Act is to the effect that any marriage between two Hindus solemnized after the commencement of

the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of sections 494 and 495 of the Indian Penal Code shall apply accordingly. The main contention of Shri Chakraborty, based on these two sections of the Hindu Marriage Act, was that it was obligatory for the complainant to prove by convincing evidence that the ceremony of Saptapadi was gone through between Rabindra and Anjali at the time of their wedding before she (the complainant) could legitimately urge that Rabindra was guilty of the charge under section 494 I. P. C. On the authority of the proviso to section 50 of the Indian Evidence Act, it was emphasised by Shri Chakraborty that the opinion evidence, expressed by conduct, is not admissible to prove a marriage in a case under section 494 I. P. C. For the time being, I deem it enough to point out that this proviso enacts only this much that the opinion evidence of the nature mentioned which is otherwise made relevant by the main body of section 50 for the purpose of proving existence of relationship, 'shall not be sufficient to prove a marriage' in a prosecution under section 494 I. P. C. The proviso does not make the opinion evidence relating to the marriage either irrelevant or inadmissible, as is evident from the underlined (here into ' ') words, in such prosecutions. Therefore, the only effect of the proviso is that on the basis of the opinion evidence alone, the Court cannot hold in a prosecution under section 494 I. P. C. that the factum of the marriage has been proved. Hence, I reject the contention of Shri Chakraborty that the opinion of persons who testify to the marriage, the factum of which is in issue, cannot be taken into consideration at all. Such testimony being relevant, as held above, can be availed of along with other evidence to reach the conclusion that the factum of marriage had been proved.

7. On the authority of the Supreme Court decision in the case of Bhaurao Shankar, AIR 1965 SC 1564 (supra) it was urged by Shri Chakraborty that unless it is proved by direct evidence that the ceremony of Saptapadi was gone through between a man and a woman, it cannot be said for the purpose of a case under section 494 I. P. C. that marriage between them had been solemnized. Shri Chakraborty urged further that no evidence except direct evidence bearing on the point of Saptapadi can be looked into, or relied upon, in proof of the marriage. After going through the report with the care it deserves, I have not been able to spell out any support for the propositions canvassed by Shri Chakraborty. The Supreme Court held in Bhaurao's

Constitution of India (contd.)

State — Infringement of fundamental rights of company and share-holders — Distinction pointed out—Tests indicated — See S C 564A (C N 122)

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SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN A.I.R. 1970 APRIL

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- Arts. 19 (1) (f), 31 (2)—AIR 1950 S C 27—**Over**, AIR 1970 SC 564D (C N 122).
- Art. 19 (1) (f)—AIR 1951 S C 270—**Over**, AIR 1970 SC 564D (C N 122)
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- Art. 31 (2)—(1951) S C R 587—**Over**, AIR 1970 S C 564D (C N 122).

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